THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 01-CP-40-2956

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated,..Appellant,

v.

Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman, ...Respondents.

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

The Plaintiff Edward D. Sloan Jr. ("Sloan") brought this civil action as a citizen, resident and taxpayer of the State of South Carolina for declaratory judgment and injunctive relief against Friends of the Hunley, Inc. ("FOTH") and its chairman, Warren Lasch ("Lasch"), in his official capacity (R. pp. 19-22). He alleged two causes of action: the first under the South Carolina Freedom of Information Act, S.C. Code Ann. 30-4-10, *et seq.* ("FOIA"), and the second under the common law as a taxpayer.

In his first cause of action, Sloan alleged that FOTH received and spent millions of dollars of public money and was a "public body" as defined by FOIA, S.C. Code Ann. § 30-4-20(a) (R. p. 20). He alleged that Respondents' refusal to provide the requested documents violated FOIA (R. p. 20). Sloan's prayer for relief asked for both declaratory relief and injunctive relief under FOIA: a declaration "that Defendants are subject to FOIA and that Defendants have violated FOIA," and an injunction "to approve plaintiff's FOIA request and forthwith to provide him a copy of all requested documents" (R. pp. 21-22).

Respondents' Answer denied that FOTH was a "public body" subject to FOIA (R. p. 24).

In his second cause of action, Sloan sought declaratory judgment that the structure and relationship between FOTH and the Commission rendered FOTH "an alter ego of the Hunley Commission," and therefore "equally subject to the laws of the State of South Carolina that apply to the Commission," including FOIA (R. pp. 20-21). These laws and requirements include not only FOIA, but also the Consolidated Procurement Code (although the Commission has a partial exemption), S.C. Code Ann. § 11-7-20's

requirement that FOTH submit to an annual audit by the State Auditor, and S.C. Code Ann. § 11-9-125's requirements governing the order of the expenditure of funds based on the source of the revenue.

Respondents moved for summary judgment, contending that because FOTH produced the requested documents, Sloan's claims for both injunctive and declaratory relief on the first cause of action were moot and that the second cause of action was merely duplicative of the first and therefore moot (R. pp. 265-266). Sloan countered that FOTH's production of documents did not dispose of Sloan's claim for declaratory judgment that FOTH is a "public body" subject to FOIA, and that FOTH had violated FOIA by its initial refusal to produce the documents relief (Supp. R. pp. 8-23). Furthermore, his second cause of action was a separate claim for declaratory judgment. Sloan also moved for partial summary judgment that FOTH was a "public body" subject to FOIA. Sloan submitted a Memorandum of Law, with exhibits (Supp. R. p. 8-23).

The trial court granted in part and denied in part Respondents' Motion for Summary Judgment and granted Sloan's Motion for Partial Summary Judgment, declaring that FOTH was a "public body" subject to FOIA (R. p. 3).

Thereafter, the Clerk of Court entered a Form 4 Judgment disposing of the entire matter (R. p. 17). Sloan moved to alter or amend the Form 4 Judgment to reflect that the trial court did not dispose of the second cause of action. The trial court heard argument May 7, 2002, and ruled that the Form 4 judgment, which was not signed by the judge, did not dispose of the entire case (R. p. 7).

Respondents also moved for reconsideration or to alter or amend the judgment, alleging that the trial court had not granted them sufficient notice nor held a sufficient

hearing on Sloan's Cross Motion for Partial Summary Judgment (R. p. 171). Based on the lack of notice, the trial court withdrew its previous order (R. p. 7).

Almost two years later, Respondents renewed their Motion for Summary Judgment, arguing that the case was moot (Supp. R. pp. 24-40). Sloan opposed the motion and requested that the case proceed to trial for declaratory judgment on the first cause of action that FOTH is a "public body" and therefore subject to FOIA, and on the second cause of action that FOTH is an alter ego of the Commission and is subject to all the laws to which the Commission is subject (Supp. R. pp. 435-456).

The Circuit Court, the Hon. John C. Hayes III, presiding, granted Respondents' Motion to Dismiss or for Summary Judgment, misread the order entered May 28, 2002, improperly assumed the first cause of action (for declaratory judgment) was moot, and ruled, as to the second cause of action, that "there is no justiciable case or controversy, and Sloan lacks the necessary standing to maintain this action" (R. p. 9). Sloan filed a Notice of Appeal on February 25, 2004 (Supp. R. p. 41).

STATEMENT OF FACTS

The Hunley Commission and FOTH

In 1996, the General Assembly, by S.C. Code Ann. § 54-7-100, created the Hunley Commission ("Commission") to oversee the salvage and curation of the *H.L. Hunley*, a Confederate submarine that sank in 1864. Senator Glenn McConnell was chosen Chairman of the Commission. John P. Hazzard, V, was chosen the Commission's general counsel (Supp. R. p. 459, ll. 3-8). The Commission's role is set out in § 54-7-100. The Commission was granted a limited exemption from the Consolidated Procurement Code, but was not exempted from the State ethics rules or the audits by the State Auditor (*Id.*, p. 460, l. 5-p. 461, l. 11).

The Commission did not have authority to do fundraising, or solicit funds to raise and conserve the *Hunley*, and, (*Id.*, p. 463, ll. 13-17). In 1997, the Commission instructed Hazzard to establish FOTH to raise money for the *Hunley* project (*Id.* p. 463, ll.23-p. 464 l. 3). Hazzard drafted the initial Articles of Incorporation for FOTH and worked to obtain its 501(C) (3) status (*Id.*, p. 462, ll. 5-7, p508). The FOTH Articles of Incorporation list the Commission's chairman and vice chairman, as the incorporators (*Id.*, p. 465, ll. 6-11; Ex. 1, p. 508). The Articles of Incorporation for FOTH designate the mailing same address used by the Commission and McConnell (*Id.*, p. 465, l. 19-p. 467, l. 10; p. 468, ll. 8-11; Ex. 1, p. 508). Hazzard also signed the bylaws for FOTH as Secretary of FOTH (*Id.*, p. 468, l. 20-p. 469, l. 2; Ex. 2). The Articles of Incorporation state that the FOTH directors "shall be appointed by the chairman" (*Id.* Ex. 1, § 4.2, p. 508). The Commission chairman has appointed every member of the FOTH Board of Directors (*Id.*, p. 471, ll. 5-12., p. 486, ll. 3-10).

The purpose of FOTH is to raise money for the care and conservation of the *Hunley* (*Id.*, p. 462 ll. 8-11). The Commission conserves the *Hunley* through FOTH (*Id.*, p. 478, ll. 3-14). FOTH performs the day-to-day operations of the lab related to the care and conservation of the *Hunley* and provides reports to the Commission (*Id.*, p. 479, ll. 6-17).

FOTH managed the day-to-day efforts to raise and restore the *Hunley* and oversaw the up fitting of the Conservation Center (*Id.*, p. 462, ll. 14-17). FOTH also oversees the tours, merchandising, and the daily operation of the scientific work at the lab (*Id.*, p. 462, ll. 19-22). FOTH sells merchandise bearing the insignia of the Commission (*Id.*, p. 473, ll. 8-23). FOTH has obtained trademarks for slogans, logos, and artwork related to the *Hunley*. (*Id.*, p. 474, ll. 9-22). FOTH has also copyrighted the image of the gold coin retrieved from the Hunley (*Id.*, p. 475, ll. 18-21).

Warren Lasch, Chairman of FOTH

In 1995, Lasch was convicted in U.S. District Court in Michigan of a violation of federal laws governing records of his company's pension funds, and as a result, he is prohibited from having any dealings with any company pension funds. Lasch attempted unsuccessfully to expunge his conviction (Supp. R. p. 629).

Lasch and several others formed Charleston International Ports, Inc. ("CIP"). Lasch was majority owner. Other owners include retired Admiral William Schacte, and Ric Tapp (Supp. R. p. 499). Schacte serves on the Hunley Commission and was employed by Nexen Pruitt in Charleston (*Id.*, p. 470). Tapp is also an attorney at Nexen Pruitt in Charleston. Tapp has performed extensive services for FOTH. In late 1997 or

early 1998, Schacte recommended Lasch to the Chairman, as a "good fit to chair the Friends of the Hunley" (Id., p. 476-477).

In February, 1998, the Chairman appointed Warren Lasch to the FOTH Board and announced to the Commission that Lasch had agreed to "head up [FOTH]. Minutes of the Commission, February 19, 1998, p. 1. Lasch and Hazzard, Treasurer of FOTH, are its only officers (*Id.*, p. 472, ll. 20-25). Lasch oversees the expenditure of millions of dollars in taxpayer funds and private donations to FOTH.

Shortly after Lasch agreed to serve as chairman of FOTH in August, 1998, Senator McConnell wrote a letter to the Charleston Naval Complex Redevelopment Authority ("RDA"), asking that Lasch be given space to do business at the former Charleston Navy base (*Id.*, p. 497, l. 22-p. 498, l. 19, and exhibit 34, p. 529). Lasch's company CIP used terminals at the Navy base for several years (*Id.*, p. 499, ll. 8-14). Lasch paid nothing for use of the terminals (*Id.*, p. 501, ll. 6-8). Admiral Schacte, a member of the Commission, was Executive Vice President of CIP (*Id.*, p. 499, l. 15-p. 500, l. 3). In 2003, the State Ports Authority evicted Lasch and CIP for breach of the agreement.

Public Funding of FOTH

FOTH has received extensive funding and financial support from many State and Federal sources: South Carolina special appropriations, Federal Legacy Funds from the Department of Defense, and appropriations through other State agencies. In 1999 and 2000, FOTH received more than $5,000,000 in State and Federal grants. FOTH's Return of Organization Exempt from Income Tax Form 990 demonstrates this fact (R. p. 119-

135). FOTH's 2000 Return lists "Government contributions (grants)" $3,928,693 (*Id.* at line 1.c.). Likewise on FOTH's 1999 Return lists "Government contributions (grants)" $1,211,318 (R. p. 136). These amounts total more than $5,000,000 in "Government contributions (grants)." These Returns are signed with this affirmation:

> Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

(R. p. 124).

Similarly, FOTH's audited financial statements confirm that FOTH received more than $5,000,000 in grants during 1999 and 2000 (R. pp. 83-118). The 2000 Financial Statement lists "Federal allocation" as $1,889,714, and "State allocation" as $2,038,979 (R. p. 87). The Statement of Cash Flows lists "Cash received from federal and state allocations" as $3,928,693 (*Id.* at 89).

FOTH's 1999 Financial Statement lists the "Federal allocation" as $285,000, and the "State allocation" as $926,318 (R. p. 99). The Statement of Cash Flows shows "Cash received from federal and state allocations" as $1,211,318 (*Id.* at 101).

FOTH's 1998 Audited Financial Statement, "Summary of Significant Accounting Policies," under "Contributions" states the following: "Contributions received, apart from a donated asset (see Note III), *are mainly cash donations from individuals and state entities*" (R. pp. 114-115).

The Independent Auditor's Report on page 1 of all three financial statements, states, "These financial statements are the responsibility of the Organization's management" (R. pp. 85, 96, 109). Accordingly, the management of FOTH stated in their audited financial statements that FOTH received more than $5,000,000 in State and

Federal grants or allocations in 1999 and 2000 (R. pp. 89, 101). In 2003, FOTH received Federal legacy funds of $700,000 (Supp. R. p. 504, ll. 11-16).

In order to secure funds from the Department of Defense, FOTH prepared and presented a budget to the Navy (*Id.*, p. 487, ll. 3-p. 490, l. 15). The Navy approved the request and the schedule of funding (*Id.)*. The Navy sent checks periodically to the Commission (*Id.)*. FOTH then submitted periodic requests to the Commission, as the money arrived from the Navy (*Id.)*.

The Commission diverted blocks of public funds *en masse* to FOTH as shown by a summary of the transfers into and out of the "Federal Account Fund to Save the Hunley" (R. p. 81). Repeatedly, the Commission received a sum of money from the Navy or Department of Defense, and within a short period of time, transferred the same amount *en masse* to FOTH (*Id.*). These sums of money range from a few thousand dollars to more than $651,000 (*Id.*). Thirteen times, the check to FOTH was at least $100,000 (*Id.*). Eleven times there was a zero balance in the account after the Commission wrote the check to FOTH (*Id.*). Once FOTH requested and received $100,000 for "miscellaneous expenses" (Supp. R. p. 510). Another time FOTH requested and received $400,000, based on a 1-page invoice (*Id.* at 523).

FOTH has also received funds from the sale of Hunley memorabilia, which are State assets, under a "Programmatic Agreement" which governs "the management of the wreck of the *H.L. Hunley*" submarine (R. pp. 182-220). The following parties entered into the Programmatic Agreement: the Department of the Navy, the General Services Administration, the Advisory Council on Historic Preservation, the South Carolina Hunley Commission, and the South Carolina State Historical Preservation Officer (R. pp.

211-220.). The Programmatic Agreement provides, "The State of South Carolina will receive all receipts, royalties, and all other revenue generated by the exhibition, display, curation, and all other activities related to the *Hunley* unless otherwise regulated or prohibited by the laws of the United States" (R. p. 218, par. XII). Thus, the State was to receive all funds generated by the *Hunley*. In the case at bar, FOTH has received this revenue, but has not remitted any of it to the State.

Sloan served Requests for Admission upon Respondents related to this issue, and received these responses:

> 1. That pursuant to the Programmatic Agreement Among The Department of the Navy, The General Services Administration, The Advisory Council on Historic Preservation, The South Carolina Hunley Commission, and The South Carolina State Historical Preservation Officer Concerning the Management of the Wreck of the *H.L. Hunley* ("Programmatic Agreement"), Paragraph XII, "The State of South Carolina will receive all receipts, royalties, and all other revenue generated by the exhibition, display, curation, and all other activities related to the *Hunley* unless otherwise regulated or prohibited by the laws of the United States."
>
> RESPONSE: Admitted that the quoted language is in the Programmatic Agreement, but otherwise this request is denied.
>
> 2. That [FOTH] has received receipts, royalties, or revenue generated by the exhibition, display, curation, or other activities related to the *Hunley*.
>
> RESPONSE: Admitted.

(Supp. R. pp. 42-44).

Furthermore, FOTH's Returns and financial statements confirm that FOTH has received revenues related to the *Hunley* (R. pp. 99, 87; 136-150, 119-135). The 2000 Financial Statement reports that FOTH received $248,574 from "Merchandise sales," and the 1999 Financial Statement reports $12,814 from "Merchandise sales" (R. pp. 87, 99). Similarly FOTH's 2000 Return reports "Gross sales of inventory, less returns and allowances" of $282,754, and FOTH's 1999 Return reports "Gross sales of inventory,

less returns and allowances" of $12,814 (R pp. 136-150, 119-135). Thus, in 1999 and 2000, FOTH has received more than $250,000 from the sale of merchandise related to the *Hunley*.

In 2003 FOTH received $1.1 million in income from ticket and souvenir sales, which it deposited into the operating account (Supp. R., p. 505, l. 6 - p. 506, l. 13). Hazzard testified that FOTH has not remitted the proceeds of ticket and souvenir sales to the State, under the Programmatic Agreement, because that money was to be used for the care and conservation of the *Hunley*, and FOTH is fulfilling that function (*Id.*, p. 507, ll. 12-24).

The Hunley Commission has donated $300,000 per year in rent to FOTH (R. pp. 92, 105). The facility in which FOTH operates the Warren Lasch Conservation Center is owned by the United States Navy, which leases it to the RDA, which in turn leases it to the Commission (R. pp. 188-209). The Commission allows FOTH to use the space for no consideration each year (R. p. 87). The Statement of Activities reflects $309,800 for "Donated rent" (*Id.*). The Notes to Financial Statement explain the donated rent:

> [FOTH] also occupies two facilities and is not required to pay rent. The lessors for both facilities have estimated the fair value of the annual rentals to be $300,000 and $9,800, respectively. These amounts are recognized in the financial statements as Donated Rent revenue and expense.

(R. p. 92). Thus, FOTH receives donation of interest in real estate from the Commission, a public entity.

FOTH has managed or administered the expenditure of public funds (R. pp. 83-106). The Financial Statements contain explanatory statements and notes showing the expenditure of public funds. The "Summary of Significant Accounting Policies" describes the "Nature of Activities" as follows:

> [FOTH] procures, *manages, and expends charitable donations* as needed to advance the raising, restoration, and preservation of the *H.L. Hunley* submarine and its related artifacts. The Hunley Commission, the state agency responsible for overseeing the Hunley Recovery Project, appoints the Board of Directors. *Funding comprises allocations from federal and state agencies* and direct donor contributions.

(R. pp. 91, 103) (emphasis added).

FOTH has utilized the services of persons on the payroll of other government entities. In the Requests for Admission, Appellant asked Respondents to admit the following:

> 8. That [FOTH] has utilized personnel from other state and federal agencies in conjunction with the Hunley Project, as delineated in S.C. Code Ann. 54-7-100.
>
> RESPONSE: [FOTH] denies that it is a state or federal agency. Otherwise this request is admitted.

(Supp. R. pp. 42-44).

Consequences of FOTH's Relationship to the Commission

The attorney who represents FOTH and Lasch in this litigation also represents Hazzard (Supp. R., p. 480, ll. 9-24). In July, 2003, Hazzard testified that the board of FOTH had not held any meetings from 2001 until June or July, 2003 (*Id.*, p. 503, ll. 3-17). The Commission has little detail to substantiate how millions of State and Federal taxpayer dollars have been spent. (R. p. 81; Supp. R. pp. 510-528).

FOTH maintains that as a private organization, it is exempt from any competitive bidding requirements to select contractors or make procurements (Supp. R. p. 482, l. 19-p. 483, l. 1). Lasch selected the contractors for the up fitting of the lab without using any competitive bidding process (*Id.*, p. 481, ll. 19-25). FOTH procured services for fund-raising and public relations without using any competitive process (*Id.*, p. 491, ll. 12-17).

FOTH also procured property and liability insurance without any competitive process (*Id.*, p. 492, ll. 1-15).

FOTH purchased multiple bottles of wine costing $130 and $132 a bottle, threw parties costing $75 per person for food, provided gratuities of $341 and $820 to serving staff, and engaged in additional wasteful activities (*Id.*, pp.493-496; R. p. 330).

Hazzard currently serves as counsel to the President Pro Tempore of the South Carolina Senate (who also serves as Commission Chairman (R. p. 279, ll. 2-3). When he was 30 years old and a staff attorney in the Senate, the Commission appointed Hazzard general counsel, and FOTH appointed him Secretary-Treasurer (R. p. 280, ll. 4-24; p. 36, ll. 14-22). While serving as counsel to the Commission, Hazzard, as Treasurer to FOTH, with Lasch, co-signed FOTH's checks totaling millions of dollars.

For ten months in 2000, Hazzard took a leave of absence from the Senate and served as Executive Director of FOTH (R. p. 281, ll. 1-12). FOTH paid his salary (through the College of Charleston), reimbursed him for his Senate health insurance premiums, and reimbursed him for his preferred Senate garage parking space rental charges, so that he would not lose the space while he was in Charleston (R. p. 301, l. 4 - p. 304, l. 21).

In October, 2000, Hazzard returned to the Senate, and FOTH hired him as a consultant at $2,150 monthly, paid him a $16,000 signing bonus, and paid him $5,000 for "comp time" and vacation (R. p. 283, l. 13 - p. 285, l. 3).

Also in October, 2000, Lasch told Hazzard to go to the Porsche dealer and select a Boxter convertible (R. p. 315, ll. 2-18). For the next two years, Hazzard drove the Porsche courtesy of Lasch (R. p.314, ll. 4-13).

In January 2001, Hazzard's Senate salary almost doubled to approximately $87,000 (R. p. 305, ll. 2-11). In early 2001, he discontinued the consulting contract with FOTH, but later, he took an approximately $10,000 reduction in salary and a year later entered into another consulting contract with FOTH for $24,000 per year, plus expenses, while continuing to hold his offices with the Senate, the Commission, and FOTH (R. p. 310, l. 8-p. 313, l. 18).

Citizen Efforts Under FOIA

From time to time, several citizens requested documents from the Commission under FOIA concerning the details of its finances and expenditures in the raising and conservation of the *Hunley* (Supp. R. pp 533-534, 550-551; 695). The Commission responded with sketchy financial information and directed the citizen that, "Any request of [FOTH] concerning their fundraising and expenditure of funds should be directed to them." (Supp. R. p. 696).

Mr. Webb wrote again to the Chairman,

> Since the Hunley Commission created [FOTH], at State of South Carolina expense, and since the Commission has approved payments to [FOTH] from public monies, the Commission should certainly know and advise me as to how [FOTH] spent public money funneled to [FOTH] through the Hunley Commission.

(*Id.*, 699-701)

Again the Chairman replied, "You have been directed to get the records from [FOTH]" (*Id.*, 705).

On June 29, 2001, Sloan requested copies of documents from FOTH under FOIA (R. p. 54). On July 10, 2001, FOTH responded that it "is not subject to being compelled to respond pursuant to [FOIA]" and refused to produce the documents (R. p. 71). On

July 18, 2001, Sloan filed a complaint for declaratory judgment and injunctive relief (R. p. 18).

Nevertheless, Respondents thereafter produced some requested documents stating,

> The documents are being tendered not due to any concession that [FOTH] is subject to the Freedom of Information Act. Rather, they are being tendered in the spirit of cooperation.

(R. p. 73). Later, Respondents' counsel produced more documents, again stating,

> As with prior tendered documents, the financial statements are being tendered not due to any concession that [FOTH] is subject to the Freedom of Information Act, but rather in the spirit of cooperation . . . . On behalf of [FOTH], we continue to reserve all rights.

(R. p. 75).

FOTH eventually complied with Sloan's initial FOIA request. FOTH represented that it produced all documents Sloan requested (R. pp. 49-50). However, Sloan had also requested declaratory judgment on the issue of whether FOTH was subject to FOIA, and that issue still required decision. Furthermore, as demonstrated above, other persons requested documents from FOTH under FOIA, and like Sloan, were told that FOTH was not subject to FOIA and the documents had not been produced (R. pp. 77-79).

Over the next few months, Sloan requested additional document from FOTH under FOIA. Each time he was told that FOTH was not subject to FOIA. (R. pp. 73, 75).

When another citizen, H.R. "Jock" Stender, requested documents under FOIA, FOTH responded similarly that it was a private charity and was not required to produce documents under FOIA (R. pp. 77-79). FOTH refused to produce documents to Stender. (*Id.*)

Unable to secure documents through FOIA, and being a resourceful citizen, Stender began driving to the offices of FOTH, CIP, and related companies, picking up the trash by the side of the road, and copying and organizing the information and documents (Supp. R. pp. 535-549). This is how South Carolina citizens learned much about how their tax dollars were being spent by FOTH.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO RULE THAT FOTH IS A "PUBLIC BODY" UNDER FOIA.

FOTH is a "public body" under FOIA, and FOIA applies to FOTH. When FOTH initially refused to produce the documents in response to Sloan's FOIA request, (R. p. 71) its initial response "constitute[d] the final opinion of the public body as to the public availability of the requested public record." S.C. Code Ann. § 30-4-30.

Sloan's request for declaratory judgment is proper under FOIA.

> (a) Any citizen of the State may apply to the circuit court for either or both a *declaratory judgment* and injunctive relief to enforce the provisions of this chapter in appropriate cases . . . . The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an *irreparable injury* for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100 (emphasis added).

As a citizen of South Carolina, Sloan possesses standing to enforce FOIA.

> (a) *Any citizen of the State may apply* to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases . . . . The court may order equitable relief as it considers appropriate, and *a violation of this chapter must be considered to be an irreparable injury* for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100 (emphasis added).

FOTH is a "public body" under FOIA as demonstrated below. When a "public body" violates FOIA, a plaintiff is entitled to litigate the nature and the fact of the violation and the appropriate relief to be awarded. *Business License Opposition Committee v. Sumter County*, 304 S.C. 232, 403 S.E.2d 638 (1991). A plaintiff who prevails on a request for declaratory relief under FOIA is entitled to receive attorney fees

and costs. *Cockrell by Cockrell v. Trustees of District 20 Constituent School District*, 299 S.C. 155, 382 S.E.2d 923 (1989).

A. The Trial Court Erred in Assuming or Ruling that Sloan's First Cause of Action Was Moot.

1. The Complaint requests declaratory and injunctive relief.

The Complaint requests legal and equitable relief far beyond simple production of documents (R. pp. 21-22). In his first cause of action, Sloan requested an order "Declaring that Defendants are subject to FOIA and that defendants have violated FOIA". *Id.*

2. The trial court erred in failing to act on Sloan's request for declaratory judgment.

Declaratory Judgment for Sloan on this second claim is a proper statutory remedy and is especially appropriate here.

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20. Furthermore the declaratory judgment statute is to be construed broadly to effectuate its remedial purposes.

> This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered.

S.C. Code Ann. § 15-53-130.

Sloan's request for declaratory judgment regarding the applicability of FOIA is justiciable.

> Any citizen of the State may apply to the circuit court for *either or both a declaratory judgment and injunctive relief* to enforce the provisions of this chapter.

S.C. Code Ann. § 30-4-100 (emphasis added). No court has declared whether FOTH is "subject to FOIA" or whether "defendants have violated FOIA." There has been no final ruling on the request for declaratory judgment, and thus, it is not moot.

However should the court consider the first cause of action moot, both declaratory and injunctive relief, the claim falls within both recognized exceptions to the mootness doctrine: capable of repetition but evading review, and the public interest exception.

a. The trial court properly stated the general rule of mootness.

South Carolina courts have recognized the general rule of mootness and several exceptions to the general rule. The general rule is as follows: "The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment." *South Carolina Elec. & Gas Co. v. South Carolina Public Serv. Authority,* 215 S.C. 193, 215, 54 S.E.2d 77, 787 (1949). Before a court may render a declaratory judgment, an actual, justiciable controversy must exist. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Carolina Alliance for Fair Employment v. South Carolina Department of Labor, Licensing and Regulation,* 337 S.C. 476, 488, 523 S.E.2d 795, 801 (citing *Orr v. Clyburn,* 277 S.C. 536, 290 S.E.2d 804 (1982)). When judgment on an issue "can have no practical effect upon an existing controversy, the issue is moot." *State v. Green,* 337 S.C. 67, 71, 522 S.E.2d 602, 605 (Ct. App. 1999) (citing *Dodge v. Dodge,* 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998)); *Byrd v. Irmo High*

School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.").

b. The trial court erred in failing to recognize the mootness exception for matters capable of repetition but evading review.

One exception to the general rule of mootness is "a court may take jurisdiction, despite mootness, if the issue raised is capable of repetition, yet evading review." *Seabrook v. City of Folly Beach,* 337 S.C. 304, 523 S.E.2d 462 (1999). See also, *Evans v. South Carolina Department of Social Services,* 303 S.C. 108, 399 S.E.2d 156 (1990) (although development renders case moot, controversy presents a recurring dilemma which the Court will address to clarify the law); *Steinle v. Lollis,* 279 S.C. 375, 307 S.E.2d 230 (1983) (issues not moot given that the underlying dispute is capable of repetition yet evading review); *Treasured Arts v. Watson,* 319 S.C. 580, 463 S.E.2d 90 (1995); *Byrd v. Irmo High School,* 321 S.C. 426, 468 S.E.2d 861 (1996); *Midland Guardian Co. v. Thacker,* 280 S.C. 563, 314 S.E.2d 26 (Ct. App.) *cert. denied,* (1984); *Guimarin & Doan, Inc. v. Georgetown Textile Mfg.* Co., 249 S.C. 561, 155 S.E.2d 195 (1982); *South Carolina Department of Mental Health v. State,* 301 S.C. 75, 390 S.E.2d 185 (1990).

The Respondents' alleged FOIA violation has evaded review thus far, and future violations could repeatedly evade review. Other citizens have sought to secure documents from FOTH under FOIA, and FOTH has responded that that FOIA does not apply to FOTH and that no documents will be produced (R. pp. 77-79). Thus, the issue is capable of repetition, yet evading review.

c. **The trial court erred in failing to recognize the exception for matters of public importance.**

Another exception to the general rule of mootness is the exception for issues of public importance. Issues of public importance in the current litigation should be decided for future guidance despite their mootness. *Ashmore v. Greater Greenville Sewer District,* 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397 (1947).

> If this were an ordinary case, our opinion might well stop here. . . . But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the Legislature undertook to create by their enactments; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principal, now generally established, that *questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.*

44 S.E.2d 88, 96-97 (emphasis added). See also, *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957); *State ex rel McLeod v. McGinnis*, 278 S. C. 307, 311, 295 S.E.2d 633, 635 (1982); *Charleston County Parents for Public Schools v. Moseley,* 343 S.C. 509, 514, 541 S.E.2d 533, 535 (2001); *Evins v. Richland County Historic Preservation Commission*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000); *Carolina Alliance for Fair Employment v. South Carolina Department of Labor Licensing Regulation*, 337 S.C. 476, 488, 523 S.E.2d 795, 801 (1999); and *Baird v. Charleston County,* 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

The applicability of FOIA to this organization supported by public funds is an issue of great public importance. The General Assembly emphasized the significant purpose of FOIA in its enactment, stating that FOIA not only addresses an "important" public issue, but it addresses an issue "vital in a democratic society."

> The General Assembly finds that *it is vital in a democratic society* that public business be performed in an open and public manner so that citizens shall be

> advised of the performance of public officials and of the decisions that are reached in public activity and the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (emphasis added). The applicability of FOIA is an issue of great public importance in the case at bar, and the trial court's ruling that the issue is moot and should be reversed.

The purpose of FOIA is to protect the public from secret governmental activity. *Wiedman v. Town of Hilton Head Island*, 330 S.C. 532, 500 S.E.2d 783 (1998). Furthermore, a willful violation of FOIA is a criminal offense. S.C. Code Ann. § 30-4-110. As demonstrated above, Respondents have willfully refused to comply with FOIA until after service of a summons and complaint for the enforcement of FOIA. Therefore, Sloan is entitled to declaratory judgment in this case.

B. FOTH Is a "Public Body."

FOTH is supported by public funds, and is not merely a vendor or contractor operating at arm's length. FOTH is a "public body" within the meaning of FOIA. FOTH has received, managed, and expended more than $5,000,000 of public funds in 1999 and 2000. FOTH has spent these funds without the accountability, oversight, and public disclosure required by FOIA.

1. FOIA's definition of a public body.

FOIA governs "public bodies." "'Public body' means . . . any . . . corporation . . . supported in whole or in part by public funds or expending public funds." S.C. Code Ann. § 30-4-20. The most significant case defining a "public body" under FOIA is *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d. 161 (1991). . In *Weston*, the South Carolina Supreme Court relied on several facts to find that the Carolina Research and Development Foundation was a "public body" under FOIA:

> (1) The Foundation received some of the proceeds of the sale of real property owned by a public entity;
>
> (2) The Foundation received federal grant money and administered its expenditure;
>
> (3) The Foundation used personnel on the payroll of a public entity in conjunction with the Foundation's work;
>
> (4) The Foundation accepted a conveyance of real estate from a local governmental body;
>
> (5) The Foundation accepted cash grants from local governmental bodies, and managed their expenditure, even though the local governmental bodies also received some benefit from the management and development of real estate; and
>
> (6) The Foundation received a percentage of the research and development contracts, allegedly as an administrative fee, which the University could have retained.

The Court ruled,

> Each of the above transactions alone would bring the Foundation within FOIA's definition of "public body.'" Taken together they lead to the unavoidable conclusion that the Foundation is a "public body." This conclusion is mandated by the clear language of the FOIA.

Id. 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991). Likewise in the case at bar, multiple transactions lead to the unavoidable conclusion that FOTH is a "public body" within the meaning of FOIA.

2. FOTH received state and federal grant money.

In 1999 and 2000, FOTH received more than $5,000,000 in State and federal grant money (R. pp. 83-106). State and Federal grant money is considered public funds, and receipt of federal grant money makes the recipient a "public body" within the meaning of FOIA. *Weston,* 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991).

Furthermore, after litigating this issue for two and a half years, Respondents conceded that "[FOTH] has used approximately 4.1 million dollars in state taxpayer funds" (**Defendants' Supplemental Memorandum of Law in Support of Their Motion for Summary Judgment**). But that is only the beginning.

3. FOTH received funds from the sales of state assets.

FOTH has received funds from the sale of State assets, the merchandise and memorabilia related to the *H. L. Hunley* (R. pp. 87, 99). Under the Programmatic Agreement, this money belongs to the State of South Carolina.

4. The Commission donated $300,000 a year in rent to FOTH.

The Commission has donated $300,000 per year in rent to FOTH, the facility in which FOTH operates the Warren Lasch Conservation Center (R. p. 87). If the Supreme Court ruled in *Weston* that receipt of an interest in real estate from a public entity causes the recipient to become a "public body," this further substantiates the conclusion that FOTH is a "public body." *Id.,* 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991).

5. FOTH managed or administered the expenditure of public funds.

As demonstrated above, FOTH has managed or administered the expenditure of millions of dollars of public funds; thus, it has "expend[ed] public funds." S.C. Code Ann. 30-4-20. Like the Foundation in *Weston*, FOTH administers, manages and expends public funds, and is therefore a "public body."

6. FOTH used the services of personnel of other public entities.

FOTH has utilized the services of persons on the payroll of other government entities (**Defendants' Response to Plaintiff's First Requests for Admissions**), and that constitutes public funding. This factor also makes FOTH a "public body." *Id.,* 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991).

C. Respondents' Contentions that FOTH Is Not a Public Body Are Unfounded.

1. FOTH contends it is not a public body.

Despite its receipt, management, and expenditure of public funds, receipt of an interest in real estate from a state agency, receipt of funds from the sale of state assets, and use of employees of other state agencies, Respondents contend that FOTH is not a "public body." FOTH contends:

(1) It is a business enterprise that receives payment from the Hunley Commission in return for supplying goods or services on an arm's length basis;

(2) Access to the Hunley Commission records would show how the money is spent;

(3) Blocks of public funds are not diverted *en masse* from a public body to FOTH; and

(4) FOTH does not undertake the management of the expenditure of public funds.

(R. pp. 171-176). However, FOTH's own records demonstrate these assertions are inaccurate.

2. FOTH did not provide goods and services at arm's length.

FOTH did not provide goods and services at arm's length. FOTH's Returns and Financial Statements consistently refer to the funds as "allocations" or "government contributions (grants)" (R. pp. 83-106). In FOTH's Returns for 1998, 1999, and 2000, the line for "Program service revenue including government fees and contracts" is blank (R. p. 151 at 1.2; 136 at 1.2, 119 at 1.2). Likewise, in the Analysis of Income Producing Activities, under "Fees and contracts from government agencies," no income is listed (R. p. 156 at l. 93g; 141 at 93g; 124 at 93g). FOTH attested to these representations on the Returns under penalties of perjury, (*Id.*).

Furthermore, FOTH lists a variety of "Public Support, Revenues, and Other Support," but does *not* list contractual income from goods or services provided to the Hunley Commission (R. pp. 99, 87). Similarly, under "Cash Flows From Operating Activities," FOTH lists cash received from a wide variety of sources, but does *not* list contractual income from goods or services provided to the Hunley Commission (R. pp. 101, 89).

Other entries on the Returns also demonstrate that the flow of money from State and federal sources was not the result of a purchase of goods and services in an arm's length transaction (R. pp 119-166). In 2000, FOTH's "investments" in "land, buildings and equipment" total $3,932,513 (R. p. 121). At the beginning of the year, the Return shows $558,975 in these assets (*Id.*). At the end of the year the figure is $3,841,421, a substantial increase in assets owned by FOTH (*Id.*). This investment corresponds closely

to the State and federal "Government contributions (grants)" of $3,928,693 (*Id.*, l. 1.c.). FOTH's 2000 Return provides no other likely source for such an "investment" in "land, buildings, and equipment" (*Id.*).

Finally, Hazzard testified to the nature of the money from the Federal legacy funds:

> A. The money that comes in from the Legacy is quasi-appropriated money that is based on a projected budget that Dr. Neyland prepares for the lab. It goes to the Federal government. The Federal government or the Department of Defense approves a certain amount and that money is transferred to the Hunley Commission to the State via that proposed budget, monthly budget, so they can remit the funding periodically, and then the Friends of the Hunley invoices against that amount.
>
> * * *
>
> Q. Is there any requirement that the Hunley Commission justify those periodic payments, or do you even need to make a request?
>
> A. It has just come I believe, the money just based on the appropriations has just been sent.

(Supp. R. pp. 484, l. 22 – p. 486, l. 2). He explained further:

> A. In order to qualify for Legacy funding you had to submit a budget. The budget contained a forecast and the forecast was broken down by month. So some months are higher and lower, but you get to the total that you were requesting.
>
> Q. The budget would be prepared on an annual basis?
>
> A. Yes, sir.
>
> Q. Then the Navy would approve or disapprove what was in the request?
>
> A. The amount, yes, sir.
>
> Q. And then once the Navy approved that, they would also approve a schedule of when the payments would come out?
>
> A. No, sir. They are typically printed regularly, but there is no set in stone date when they would arrive.

Q. And that is why Darlene Russo would have to make a call to the Navy to say, "Has the money been released yet," or something to that effect?

A. Probably, yes.

(Supp. R. p. 489, l. 18 – p. 490, l. 15).

Thus, FOTH's receipt of funds was not a "payment from the Hunley Commission in return for supplying goods or services on an arms length basis," but was a grant of public funds to a "public body."

3. The Commission records do not document how FOTH spent the money.

FOTH attached a large stack of documents to Senator Glenn McConnell's affidavit, attempting to prove that Hunley Commission records document how FOTH spent the money (R. pp. 178-180; Supp. R. pp. 45-434). However, those documents demonstrate that the Hunley Commission transferred large amounts of money to FOTH, with minimal explanation (*Id.*). The Hunley Commission lacks records to show how millions of dollars were spent (*Id.*). If such records exist, FOTH or the Commission possesses them.

4. The Commission diverted large blocks of public funds to FOTH.

Contrary to FOTH's contention, as demonstrated in the Statement of Facts, the Hunley Commission diverted blocks of public funds *en masse* to FOTH (R. p. 81). The "Federal Account Fund to Save the Hunley" was merely a device to pass large blocks of federal money to FOTH.

5. FOTH managed the expenditure of public funds.

FOTH managed the expenditure of public funds. As shown above, the Summary of Significant Accounting Policies, recites, "FOTH of the Hunley, Inc. procures, *manages, and expends charitable donations*" . . . *Funding comprises allocations from federal and state agencies* and direct donor contributions" (R. pp. 91, 103 (emphasis added)).

D. Senator McConnell's Affidavit Does Not Create a Genuine Issue of Material Fact.

FOTH contends that McConnell's affidavit creates a genuine issue of material fact, preventing summary judgment on whether FOTH is a "public body" (R. p. 174). It does not. To prevent summary judgment there must be a *genuine* issue of material fact, not merely a sham issue.

When a party, in an effort to avoid summary judgment, submits an affidavit contradicting prior sworn testimony, it does not create a genuine issue of material fact. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *Barwick v. Celotex Corporation*, 736 F. 2d 946, 960 (4th Cir. 1984); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993); *Gagne v. Northwestern National Insurance Company*, 881 F.2d 309, 315 (6th Cir. 1989); *Perma Research and Development Company v. Singer Company*, 410 F.2d 572, 578 (2d Cir. 1969).

"A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick*, 736 F.2d at 960. FOTH's Returns (submitted under penalty of perjury) and FOTH Financial Statements (which are also public documents) show convincingly that FOTH received more than $5,000,000 in grants from state and federal sources, more than $250,000 in revenue belonging to the State, and $300,000 per year in free rent from the

Hunley Commission (R. pp. 83-166). FOTH also managed and disbursed that money (*Id.*). Finally, these same documents show that FOTH received no income from government contracts or program services (*Id.*).

Like the Foundation in *Weston*, FOTH is supported by public funds, and is not merely operating at arm's length as a vendor or contractor to the Hunley Commission. FOTH is a "public body" within the meaning of FOIA. FOTH has received, managed, and expended more than $5,000,000 of public funds in 1999 and 2000. FOTH spent these funds without the accountability, oversight, and public disclosure required by FOIA.

Accordingly, this Court should rule that FOTH is a "public body" within the meaning of FOIA, and that FOIA applies to FOTH.

II. THE CIRCUIT COURT ERRED IN FINDING THAT SLOAN LACKS STANDING.

Ruling on the Sloan's second cause of action, the Circuit Court ruled, "There is no justiciable case or controversy, and Sloan lacks the necessary standing to maintain this action" (R. pp. 9-16). Sloan contends this ruling was in error.

Sloan is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brought this action individually and on behalf of all others similarly situated. In ruling that Sloan lacked standing, the trial court relied on *Sloan v. Department of Transportation* Opinion No. 2003-UP-416 (cert. granted May 26, 2004), an unpublished opinion, which applied new rules of taxpayer standing, in conflict with the prior decisions of the South Carolina Supreme Court.

A. Sloan Should Have Been Granted Standing as a Citizen.

Appellant possesses standing as a citizen to bring his second cause of action. The trial court should have ruled that Sloan possessed standing under *Baird v. Charleston County*. *Id.* at 333 S.C. 519, 511 S.E.2d 69 (1999). The Supreme Court held in *Baird* that when government commits an *ultra vires* act, the public importance of the issue merits granting standing to the plaintiff so that the issue may be decided for future guidance. *Id.*

> In this case, Doctors have specifically alleged that the County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest--the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. *See* S.C. Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest than this one. Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, by virtue of the immense public interest at

> stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.

Id. at 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999). Most recently, the Supreme Court ruled in *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004)

> Citizens must be afforded access to the judicial process to address alleged injuries. [...] The eligibility of South Carolina's governor to serve in this State's highest elected office is at least as important as the proper funding for a clinical hospital for MUSC.

Id. (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). Sloan submits that the proper expenditure of several million dollars of taxpayer funds by Respondents is as important as the proper funding for a clinical hospital for MUSC.

B. Sloan Should Have Been Granted Public Interest Standing.

In *Evins v. Richland County Historic Preservation District*, the Supreme Court found public interest standing was appropriately granted to the plaintiff. *Id.* at 341 S.C. 15, 532 S.E.2d 876 (2000).

> Appellants attempt to distinguish *Baird* by arguing that its holding applies only to ultra vires acts and then only to those of immense public importance. We disagree. While in *Baird* there was an allegation of an ultra vires act, clearly in several cases, we have held a citizen has standing when ultra vires acts were not alleged. *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (holding that questions of public interest originally encompassed in an action should be decided for future guidance); *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (same). In any event, we hold the actions of RCHPC were ultra vires as discussed above. Thus, the trial court correctly held Evins has standing.

Id. at 341 S.C. 15, 21, 532 S.E.2d 876, 879.

The trial court relied on the unpublished opinion ruling that Sloan does not possess standing under *Baird* because in *Baird* "there were additional factors that would confer standing" (*Sloan v. Department of Transportation* Opinion No. 2003-UP-416 (cert. granted May 26, 2004), at p. 8). The unpublished opinion admitted that the case

was one of public importance but ruled that the case lacked the allegedly necessary "additional factors." In *Baird* and *Evins*, the Supreme Court ruled that standing had been granted because of the public importance of the issues and for future guidance. *Id.* at 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999); 341 S.C. 15, 532 S.E.2d 876 (2000). Just as the Supreme Court granted standing to the plaintiffs in *Baird* and *Evins*, the trial court should have granted standing to Sloan on the basis of the public importance of Respondents' expenditure of several million dollars of public funds, without any effective supervision.

C. Sloan Should Have Been Granted Taxpayer Standing.

Petitioner pursues these actions also as a taxpayer, not merely as a member of the general public. Petitioner respectfully submits that the trial court erred in ruling that he does not possess taxpayer standing.

In reliance on the unpublished opinion, the trial court adopted two new rules limiting taxpayer standing: (1) that taxpayer standing is used only to redress constitutional violations and not mere violations of statutory law; and (2) a taxpayer possesses no standing if his individual interest is *de minimis.* Precedent from the Supreme Court supports neither of these new limitations.

1. The trial court erred in requiring a constitutional challenge.

Again the trial court relied on the unpublished opinion, *Id.* at pp. 5-6, for the proposition that without a constitutional challenge, Sloan did not possess standing. The unpublished opinion interpreted *Shillito v. Spartanburg* to require a taxpayer plaintiff to assert a constitutional violation to possess standing. *Id.* at 214 S.C. 11, 51 S.E.2d 95 (1948). However, like *Myers v. Patterson*, *Shillito's* ruling affirms that "An apparent exception to this rule exists when the act sought to be enjoined is an unlawful diversion

of public funds." *Id.* at 99. *Shillito* holds that if standing should be granted to enjoin these unlawful diversions of public funds, a citizen should also be granted standing "to contest the expenditure of public funds under an alleged unconstitutional statute." *Id.* *Shillito* does not rule that a state taxpayer must challenge "the expenditure on a constitutional basis" or possess an interest separate from contributing taxes to the fund from which an unlawful diversion was made in order to be granted standing. Accordingly, the trial court's holding should be reversed.

"A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School Dist. of Greenville Cty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (citing *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885 (1902)). Sloan challenges the illegal governmental acts of Respondents. "Taxpayers 'have an interest in seeing that city officials disburse funds in a lawful manner." *Id.* (citing *Brown v. Wingard,* 285 S.C. 478, 330 S.E.2d 301). Accordingly, Sloan also possesses standing to ensure that FOIA is followed and that state funded agencies do not evade their statutory limitations by creating alter ego corporations to violate statutes governing the agency.

Respondents admit that State taxpayer funds were contributed to and spent from the accounts at issue. State taxpayers are a distinct subset of state citizens. In *Myers v. Patterson*, 350 S.C. 248, 433 S.E.2d 841 (1993), state taxpayers sued the State Treasurer, and the Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commission. The Supreme Court acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public

generally, but also noted the exception to the rule: an unlawful diversion of public funds. *Id.*

> In such cases, a taxpayer who may be compelled to pay the assessment, or who has contributed to the sum jeopardized, is considered to have sufficient interest to enjoin the illegal act. [*Shillito v. City of Spartanburg*, 214 S.C. 11, 22, 51 S.E.2d 95, 97 (1948)]. *See also Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that *a taxpayer may maintain an action in equity*, on behalf of himself and all other taxpayers, *to restrain public officers* from paying out public money for purposes unauthorized by law).

350 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added). Therefore, the Supreme Court explicitly recognized that a state taxpayer suing the state possesses standing if he has contributed to the sum at issue. In the cases at bar, the sums at issue exceed $5 million of state and federal tax funds. Accordingly, a state taxpayer such as Sloan possesses standing to enforce FOIA and seek declaratory judgment that FOTH is the alter ego of the Commission.

Myers v. Patterson granted State taxpayer standing to a plaintiff challenging SCDOT expenditures. *Id.* at 315 S.C. 248, 433 S.E.2d 841. The Supreme Court distinguished a State taxpayer with standing from one without standing by whether the taxpayer had "contributed to a sum jeopardized." *Id.* The Supreme Court mentioned "the expenditure of public funds under an alleged unconstitutional statute" as only one type of "unlawful diversion of public funds" which creates "an exception to the rule" that generally requires plaintiffs "to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.*

Shillito affirms that "An apparent exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds." *Id.* at 99. *Shillito* then ruled that if standing should be granted to enjoin these unlawful diversions of public funds, a

citizen should also be granted standing "to contest the expenditure of public funds under an alleged unconstitutional statute." *Id.*

There is no published South Carolina precedent for the trial court's decision that Sloan lacks State taxpayer standing because he did not challenge the constitutionality of a statute. Furthermore, the decision of the trial court creating a new exception to taxpayer standing contravenes precedent from the Supreme Court.

2. The trial court erred in requiring more than a *de minimis* amount in controversy.

The trial court ruled that Sloan does not have State taxpayer standing because only $1.04 of his general taxes ("a '*de minimis*' amount) were contributed to the funds used (R. p. 15). The trial court cites *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941), in support of this proposition. However, the *Crews* opinion never mentions a *de minimis* rule addressing the amount of state taxpayer funds involved. Furthermore, in *Crews*, no state taxpayer funds were involved whatsoever.

> In the instant case, petitioner has no special or peculiar interest to protect. The funds in question *never accrued from taxation*, but from the operation of an electric system by a public corporation created for the sole purpose stated in Section 5 of the Act of 1935 above set out.

Id.

Neither a "*de minimis* rule" nor a distinction between the level of standing required for State and local taxpayers exists anywhere in published South Carolina case law. The Supreme Court ruled that a taxpayer possessed standing to challenge an illegal expenditure even though his taxes contributed only $6.28 to the illegal fund. *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95, 99 (1948). Other cases in a long line of opinions addressing this issue have never applied a *de minimis* rule to taxpayer standing.

Mauldin v. City Council, 33 S.C. 1, 11 S.E. 434 (1890); *Sligh v. Bowers* supra; *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939); *Brown v. Wingard*, supra; *Sloan v. School Dist. of Greenville Cty.*, supra. In *Brown v. Wingard*, although the amount of taxpayer funds was even smaller than that contributed to the funds in the cases at bar, this Court held that taxpayers "have an interest in seeing that city officials disburse funds in a lawful manner." *Sloan v. School District, supra, quoting Brown,* supra. Likewise, Petitioner and the other taxpayers of this state possess an interest in seeing that Respondents spend tax funds lawfully, without wrongfully evading statutory restrictions.

The trial court adopted a *de minimis* test to deny Sloan standing to bring his two declaratory judgment actions, but failed to cite any Supreme Court authority supporting this rule. Furthermore, such a rule is contrary to other opinions of the Supreme Court granting standing to taxpayers to challenge illegal expenditures, such as *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948) in which a mere $6.28 was at issue, and *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), in which a few hundred dollars of travel expenses was at issue. In these cases, the Supreme Court could have, but refrained from, adopting or acknowledging a *de minimis* rule. Sloan respectfully suggests that the *de minimis* rule is not found in South Carolina precedent.

Furthermore, the *de minimis* rule is contrary to the majority of jurisdictions that have considered this issue.

> [I]f a plaintiff is a taxpayer the amount of the damage is immaterial. The money interest of the complaining party, if there is any, is sufficient, although infinitesimal.

18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.13 *Citizens' and Taxpayers' Suits* (3d ed. 1993) (citing *Brockman v. City of Creston*, 79 Iowa 587, 44 N.W. 822 (1890) (a court cannot deny a taxpayer relief because his interest as a taxpayer

is inconsiderable.); *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 106 Am.St.Rep. 931, 99 N.W. 603 (1904) (a court will not stop to inquire respecting plaintiff's standing further than to determine whether he is a taxpayer even if personal loss to him would be infinitesimal.); *Suarez v. Police Jury of Parish of St. Bernard*, 203 La. 680, 14 So.2d 601 (1943) (the fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right); *Aichele v. Borough of Oaklyn*, 1 N.J.Super 621, 64 A.2d 924 (1948) (the standing of one otherwise qualified to question the resolution is not to be determined by the mere matter of dollars and cents involved); *Saenz v. Lackey*, 533 S.W.2d 237, 522 S.W.2d 237 (1975) (when a taxpayer brings an action to restrain the illegal expenditure by the commissioners' court of tax money he sues for himself, and that his interest in the subject matter is sufficient to support the action). This Court should reverse the trial court's adoption of a *de minimis* exception to taxpayer standing.

As a practical matter, in every taxpayer action, the individual taxpayer, by definition, will possess only a minute personal financial interest in the portion of the illegal expenditure by any public body. Accordingly, the new rule that a *de minimis* interest in any expenditure disqualifies a taxpayer from bringing a taxpayer action will eliminate all taxpayer actions except those brought by the wealthiest of our citizens, who pay more than a *de minimis* amount. If not corrected, this rule, taken to its logical conclusion, may effectively end taxpayer standing in South Carolina.

Chief Justice Toal warned against such a result in her dissent in *Newman v. Richland County Historic Preservation Commission*.

> If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A

> moderate balance is achieved by granting citizens standing when they bring actions alleging *ultra vires* acts by a governmental agency, while denying citizens standing to challenge discretionary actions.

Id. at 325 S.C. 79, 480 S.E.2d 72, 75 (1997).

The South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). Petitioner submits that the trial court erred in adopting a *de minimis* test to determine standing.

If the limitations imposed by the trial court on taxpayer standing (the requirement of a constitutional violation and the *de minimis* rule) are allowed to stand, they would substantially alter the law established by the Supreme Court and effectively sound the death knell for taxpayer cases. Furthermore, the significant public interest of these expenditures is a sufficient basis to grant Sloan public interest standing to provide future guidance on these issues.

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO THE *ALTER EGO* CLAIM.

The Complaint's Second Cause of Action prays for an order: "Declaring that FOTH is an *alter ego* of the Hunley Commission and therefore is equally subject to all the laws of the State of South Carolina that apply to the Commission" (R. pp. 21-22).

A. FOTH Was Created by the Commission.

The Commission founded FOTH to oversee the salvage and curation of the *H.L. Hunley*. S.C. Code Ann. § 54-7-100. The Commission chairman appoints the members of the Board of Directors of FOTH (Supp. R. pp. 508-509). As demonstrated above, FOTH has acted as an arm of the Commission, and the Commission has operated as merely a financial conduit for FOTH. The Commission possesses few detailed records to substantiate how millions of State and Federal taxpayer dollars have been spent (R. pp. 178-180; Supp. R. pp. 45-434). FOTH, meanwhile, contends that as a "private" charitable organization, it is beyond the reach of FOIA. FOTH does not comply with the Consolidated Procurement Code (Supp. R. p. 482, l. 19 - p. 483, l. 1). Neither the Commission nor the public is receiving detailed accounting reports. With this lack of accountability and oversight, and with millions of dollars being poured into this politically popular project, the potential for unmonitored misuse, fraud, and irresponsible behavior is enormous.

B. FOTH Possesses No More Authority Than the Commission.

The Commission, as a governmental body, is limited in its powers. It possesses only the powers granted to it by law. The Commission, through its Chairman, vice-chairman, and general counsel, established FOTH to do the business of the Commission. Nonetheless, FOTH takes the implied position that FOTH is free to operate outside the strictures that govern the Commission. This position is fundamentally wrong.

An agent (FOTH) can have no more power or authority than the principal (Commission). This principle is as old as the common law. Almost 200 years ago, the Court asked the rhetorical question: "How then could the defendants convey to their agent a power which they themselves did not possess?" *Moodie and Black v. Penman, Shaw and Co.*, 3 S.C. Eq. 482 (3 Des. 482) (1812). Again 130 years ago, the Supreme Court stated that in "the relation of principal and agent, . . . the agent acts solely as the hand of the principal." *Welsh v. Davis*, 3 S. C. (3 Richardson) 110 (1871). Again, over 100 years ago this Court approved a jury instruction that restated this fundamental principle: "The agent's right and authority to do any act, . . . must be derived from [his] principal." *Stickley v. Mobile Ins. Co.*, 37 S.C. 56, 16 S.E. 280 (1892).

> The potential range of authority, within which power can validly be conferred to act as agent for another as principal, has been broadly and comprehensively summarized by the statement that what one may do himself he may do by another. A somewhat more exact statement is that authority can be vested in an agent to do for his principal any lawful act performable by the principal . . . . Authority cannot be effectively conferred upon an agent to do an unlawful act, which by reason of its illegality, the principal has no right to do personally, or, as otherwise stated, that regardless of the scope of his authority, an agent cannot do what the principal himself could not honestly or lawfully have done.

2A Corpus Juris Secundum, Agency, § 144, p. 765 (footnotes omitted).

The Cobb County Parking Authority was a body created by the Georgia legislature. It consisted of "the commissioner of roads and revenues of Cobb County, who shall be a member ex-officio, and four additional members who shall be appointed by the said commissioner." *Tippins v. Cobb County Parking Authority,* 213 Ga. 685, 100 S.E.2d 893, 895 (Ga. 1957). Under Georgia precedent the County was prohibited from issuing "revenue certificates or bonds for . . . parking facilities." *Id.* The Court ruled,

> [T]he Parking Authority, being an agency of the county, could not be clothed with greater power or authority than its principal. The county cannot do by indirection that which it could not do directly, for there can be conferred upon an agent no greater power than that possessed by the principal.

Id.

A governmental body with limited authority cannot and should not be able to create a private charitable organization, which possesses more authority and freedom, and fewer restrictions on the spending of taxpayer money than the principal. Many organizations across the State are engaging in just such a practice, evading debt limits, evading procurement codes, and evading oversight by the auditing bodies of the State, just as FOTH contends it is free to evade the public oversight of FOIA.

As demonstrated above, a diligent citizen has secured and given to Appellant evidence of lavish and wasteful activities by FOTH (Supp. R. pp. 493-496; R. pp. 330-336). Without this diligence and tenacity, this mismanagement and waste of government resources would likely never have seen the light of day.

C. FOTH Is the *Alter Ego* of the Commission.

FOTH contends that in addition to an identity with the Commission and overreaching relationship with the Commission, the appropriate standard to support a finding of *alter ego* includes an element of "injustice or inequitable consequences"

flowing from the close relationship (R. p. 263). Sloan denies that it is an essential element to create an alter ego, but contends that the foregoing excesses demonstrate such injustice or inequitable consequences.

Appellant submits that without the overreaching control and *alter ego* relationship between the Commission and FOTH, this highly questionable conduct would not have happened. Furthermore, without this *alter ego* relationship the young attorney's conflict of interest would not have arisen. The alter ego relationship allowed the conflicts in Hazzard's multiple offices and compensation, 2) his co-signing FOTH's checks totaling millions of dollars with Lasch; and 3) his serving as hired consultant to FOTH at $2,000 per month, receiving a $16,000 signing bonus, $5,000 "comp time," vacation, and a luxury sports car courtesy of Lasch. The injustice and unfairness arising from and permitted by the *alter ego* relationship demonstrate the error of the trial court's ruling.

Sloan has raised serious issues in his second cause of action, which have received no judicial consideration whatsoever. Therefore, the Circuit Court erred in granting summary judgment to Respondents on this claim.

CONCLUSION

Sloan possesses standing as a citizen and taxpayer. He should also be granted standing because of the public interest of his claims. The claim for declaratory judgment regarding whether FOTH is a public body has never been ruled upon. Furthermore, Sloan's FOIA claim falls within both exceptions to the mootness doctrine.

Sloan has presented extensive evidence to support both his claims: Thus, FOTH is rightly subject to FOIA. Furthermore, FOTH possessed no more authority than the Commission that created it, and should, as the *alter ego* of the Commission, be subject to all the legal restrictions of the Commission.

Sloan therefore prays the Court for an order:

(1) Reversing the grant of Summary Judgment on his First and Second Causes of Action;

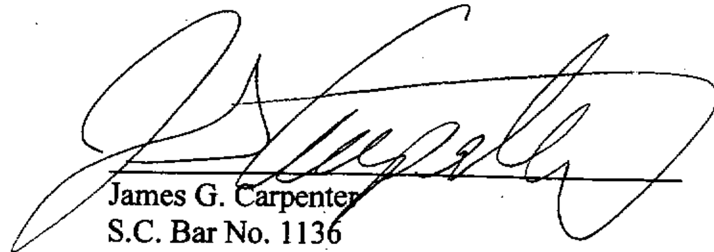
(2) Reversing the Trial Court's finding that Sloan did not possess standing;

(3) Reversing the Trial Court's finding that the case was moot;

(4) Remanding the case for trial; and

(5) Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 01-CP-40-2956

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated, ... Appellant,

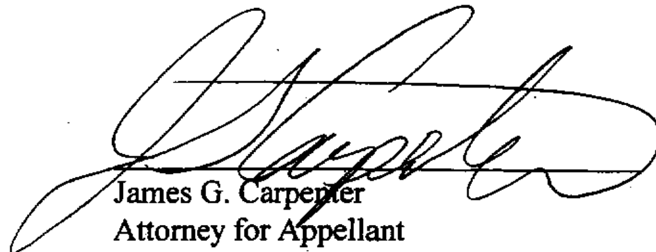
v.

Friends of the Hunley, Inc., and Warren F. Lasch, its Chairman, ... Respondents.

PROOF OF SERVICE

I certify that I have caused to be served Appellant's Brief and Appellant's Reply Brief, by Federal Express, on January 28, 2005, addressed to their attorneys of record, Thornwell F. Sowell, III, SOWELL GRAY STEPP & LAFITTE, LLC, PO Box 11449, Columbia, SC 29211.

January 28, 2005



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