THE STATE OF SOUTH CAROLINA

In the Original Jurisdiction of the Supreme Court

The State of South Carolina,

The South Carolina Department of Commerce,

and

The South Carolina State Ports Authority, ... Petitioners,

v.

The City of North Charleston, ...Respondent.

PETITION FOR ORIGINAL JURISDICTION

The above-named Petitioners submit this Petition for Original Jurisdiction pursuant to Article V, § 5, of the South Carolina Constitution, Section 14-3-310 of the South Carolina Code, and Rule 245 of the South Carolina Appellate Court Rules (SCACR).

As explained below, the crux of this controversy is that an agreement was reached between a State instrumentality and a municipality, and the municipality now claims that such agreement binds not just the signatory State instrumentality but each and every department, agency, and instrumentality of State government and the State itself. The municipality has threatened federal litigation against the Petitioners. However, in light of the significance and statewide ramifications of the issue created by this controversy, and the involvement of the State and State political subdivisions, Petitioners assert this Court should decide this question in its original jurisdiction.

In support of this Petition the Petitioners would respectfully show as follows:

1. Petitioner State of South Carolina (State) submits this Petition by and through Alan M. Wilson, its Attorney General and the State's chief legal officer, who, pursuant to Section 1-7-40 of the South Carolina Code and common law, appears in this Court for the State.

2. Petitioner South Carolina Department of Commerce (Commerce) is a department and "an administrative agency" of the State of South Carolina. S.C. Code Ann. § 13-1-10. Commerce is comprised of several divisions including, *inter alia*, the Division of Public Railways (Public Railways). *Id.* Pursuant to Section 13-1-20 of the South Carolina Code, Commerce has as one of its principal functions and purposes to "conduct an adequate statewide program for the stimulation of economic activity to develop the potentialities of the State ... [including to] develop the state public railway system for the efficient and economical movement of freight, goods, and other merchandise; and enhance the economic growth and development of the State through strategic planning and coordinating activities." The Director of Public Railways has "the power of a body corporate, including the power to sue and be sued...." S.C. Code Ann. § 13-1-1330.

3. Petitioner South Carolina State Ports Authority (Ports Authority) is an "instrumentality" of the State of South Carolina. S.C. Code Ann. § 54-3-130. The Ports Authority is charged with a duty to "acquire, construct, equip, maintain, develop and improve" the harbors and seaports of the State, including the Port of Charleston, and is authorized "to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and

seaports." *Id.* The Ports Authority has "the powers of a body corporate, including the power to sue and be sued...." S.C. Code Ann. § 54-3-140(1).

4. Respondent City of North Charleston (City) is a municipal corporation of the State of South Carolina existing pursuant to Article VIII, § 9 of the South Carolina Constitution and Sections 5-1-10 *et seq.* of the South Carolina Code and is located partially in Charleston, Dorchester, and Berkeley Counties. The City was granted its municipal charter as a political subdivision of the State on or about June 12, 1972, pursuant to the terms and procedures enacted by the South Carolina General Assembly. *See* S.C. Code Ann. § 47-351 (1962 Code of Laws).

5. In 1993, the federal Base Realignment and Closure Commission decided to close the Charleston Naval Complex (CNC), including the shipyard and naval station. The procedure for closing the CNC includes transferring title of the real property upon which the CNC is situated. The Charleston Naval Complex Redevelopment Authority (RDA) was established to oversee the transfer of title to and the redevelopment of the CNC property, including the transfer of CNC property to the Ports Authority.[1] *See* S.C. Code Ann. §§ 31-12-10 *et seq.*; S.C. Exec. Order 94-22 (Sept. 30, 1994) (establishing the RDA).

6. In the late 1990s, and continuing into the early 2000s, the Ports Authority pursued the construction of marine terminal facilities on Daniel Island, which was commonly referred to as the "Global Gateway" project. Notably, the Global Gateway project proposal included the construction of rail facilities on the Ports Authority's

[1] The transfer of all the CNC property is an ongoing process and has not been fully completed. However, the transfer of future properties has no bearing on the issue in this matter.

terminal site, side-by-side with the marine facilities.[2] Following various concerns expressed by the public about the Global Gateway project, and specifically complaints related to the proposed "on-dock rail," a law was enacted requiring the Ports Authority to "obtain the approval of the General Assembly prior to constructing a terminal or railroad on Daniel Island." *See* S.C. Code Ann. § 54-3-260. The Ports Authority was instructed to investigate the construction of a marine terminal on the west bank of the Cooper River, where the CNC is located. *See* S.C. Code Ann. § 54-3-270.

7. On or about May 28, 2002, the General Assembly, pursuant to Act No. 356 of 2002, instructed the Ports Authority and City to enter into a memorandum of understanding and agreement in order to determine and establish the respective needs and rights of each party with respect to properties to be conveyed by the RDA. Act No. 356 of 2002, § 15.

8. On or about October 25, 2002, pursuant to the directive of the General Assembly, the Ports Authority and City entered into a Memorandum of Understanding and Agreement (MOU). Compl. Exhibit 1, Newsome Aff.¶8, Ex. A (MOU) (affidavit incorporated by reference).[3] The MOU provides that it was entered into "with regard to a division of the real estate on the [CNC]." *Id.* (MOU § 2.0).

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[2] This would be similar to existing marine terminals at the Port of Charleston where rail facilities are co-located on-site with the marine terminal facilities, which is commonly referred to as "on-dock rail," reflecting the circumstance where a shipping container can be taken from a ship and loaded onto rail at the same property location. By contrast, a "near-dock rail" facility is one located off marine terminal property but in close proximity. *See* Compl. Exhibit 1, Newsome Aff.¶5.

[3] An amendment and modification of the MOU was made on February 4, 2005. However, this amendment solely addressed an area of the CNC property which included a former landfill area and the level of restoration conducted by the Navy prior to its conveyance and has no bearing on the issue before the Court. All other portions of the MOU remained unchanged.

9. The only parties and signatories to the MOU are the Ports Authority and the City.

10. In dispute here is the City's interpretation of a clause contained in the MOU between the Ports Authority and the City which it seeks to advance to bind the entire State and all of State government. Specifically, the MOU provides in pertinent part that the Ports Authority "acknowledges that The City does not want The [Ports Authority] to utilize rail access from the north end of the [CNC] Property, and The [Ports Authority] will use rail access exclusively from the south end of the [CNC] Property." Compl. Exhibit 1, Newsome Aff.¶8, Ex. A (MOU § 4.8). In other words, the Ports Authority agreed that any rail it was responsible for, *i.e.*, "on-dock rail," would use southern access to the marine terminal site. Notably, the plans for the Charleston Navy Base Container Terminal (CNBCT) project do not include *any* rail facilities accessing or exiting the marine terminal facility, demonstrating the Ports Authority's compliance with the MOU.

11. Commerce and Public Railways propose to construct an intermodal rail facility on the CNC property. *See* Compl. Exhibit 2, Hitt Aff.¶5 (affidavit incorporated by reference). The intermodal rail facility will move freight and cargo from numerous sources throughout the Charleston region and the State. The City opposes Commerce's proposed intermodal rail facility.[4]

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[4] The City does not appear to oppose *all* rail facilities. By way of a memorandum dated December 18, 2005, the City's Mayor Keith Summey commented to the Corps on a draft environmental impact statement for the Ports Authority's CNBCT project. Compl. Exhibit 1, Newsome Aff.¶9, Ex. B (Mem. of Summey to Corps, dated Dec. 18, 2005). Specifically, Mayor Summey wrote that the "Corps should be instrumental in developing an agreement between the [Public Railways] and the [Ports Authority] for movement of intermodal cargo on the [Public Railway's] rail lines." *Id.*

12. In pursuit of its stated opposition to Commerce's proposed intermodal rail yard, on May 18, 2011, the City served a sixty (60) day notice of its intent to commence a civil action asserting claims under the Clean Water Act, the National Environmental Policy Act, and various provisions of state law in federal court against the above-named Petitioners and the Corps, and also publicized a threatened complaint for filing in the United States District Court for the District of South Carolina (Threatened Complaint). Compl. Exhibit 4 (May 18 Notice Letter) (incorporated by reference); Compl. Exhibit 5 (Threatened Complaint) (incorporated by reference).

13. At the heart of the City's Threatened Complaint is its allegation that the State of South Carolina, and each of its agencies and instrumentalities, are one and the same. Specifically, the Threatened Complaint states:

> At the central core of this lawsuit, [sic] is the meaning, extent, proper interpretation, and validity of a 2002 Memorandum of Understanding and Agreement, formally executed between the City and the Ports Authority....
>
> ....
>
> The 2002 MOU is fully binding and operative on all parts of State Government, including [the State of South Carolina, Commerce, and Public Railways].

Compl. Exhibit 5 (Threatened Compl. ¶¶16, 19). Further, the Threatened Complaint requests that a federal court "[i]ssue a declaration that neither Commerce nor the Ports Authority are 'separate sovereigns' independent of the State of South Carolina. Ports Authority and Commerce 'are the State' and the State 'is Commerce and the Ports Authority.'" Compl. Exhibit 5 (Threatened Compl. ¶92(5)).

14. The underlying basis for the City's legal opposition to Commerce's intermodal facility is its unfounded contention that the MOU binds all state agencies and instrumentalities and prevents any state agency or instrumentality from utilizing rail access

to the north of the CNC property. The City's foundation for this claim is rooted in the fact that the Ports Authority, Public Railways, and Commerce are departments, agencies, and/or instrumentalities of the State, *ergo*, they are one and the same. Therefore, claims the City, Section 4.8 of the MOU, agreed to by the Ports Authority, should have a binding (and in this instance preclusive) effect on *any* other State department, agency, or instrumentality.

15. The underlying premise of every claim asserted by the City in its Threatened Complaint derives from a single legal position. The Petitioners seek this Court's guidance as to this single, pressing question of state law:

> If a State department, agency, or instrumentality enters into a written agreement or contract, is that agreement or contract binding on each and every non-signatory State department, agency, or instrumentality?

Colloquially, the question presented can be further distilled to the following: is the City's allegation that "the State is the State is the State" a valid statement of the law in South Carolina? *See* Compl. Exhibit 6 (Trans. of City's Press Conference on May 18, 2011 at p.6, ll.16-20 (quoting Brady Hair, Esquire as stating: "[W]e ... believe the law is, that the Ports Authority, the Department of Public Rails, and the State of South Carolina are all one and the same.... [The Threatened Complaint] will clearly explain the State is the State is the State.")) (incorporated by reference).

16. The Ports Authority's CNBCT project is currently under construction. The CNBCT project is important to the future economic development of the State. Compl. Exhibit 1, Newsome Aff.¶¶12-13.

17. Improved infrastructure, including Commerce's improved rail infrastructure and intermodal facility, aids the movement of commercial and industrial goods in an efficient and cost-effective manner and are a critical component of successful recruitment of business and industry to the State. Compl. Exhibit 2, Hitt Aff.¶8.

18. This legal issue implicates the very foundation on which State government operates on a daily basis. The relationship of the State's departments, agencies, and instrumentalities to one another, and specifically the ability of the actions of one to bind another, is a question the determination of which has an impact on the core of the legal relationships between independent governmental bodies of the State under the South Carolina Constitution. A timely resolution to this question is critical to the fulfillment of the Attorney General's duty to properly advise State officers and State departments and agencies regarding their legal duties, obligations, and liabilities.

19. The question presented—the validity of the City's "State is the State is the State" theory—presents an issue of urgency and public interest. Such a theory, if established, would result in an unparalleled change in government relationships and create unprecedented obligations upon and liabilities to various State government departments, agencies, and instrumentalities, radically altering the status *quo*.

20. In its Threatened Complaint, the City has acknowledged the importance and urgent need for a resolution of this issue. Specifically, the City stated: "There is a pressing public need to determine the validity, [sic] binding effect of the 2002 MOU." Compl. Exhibit 5 (Threatened Compl. ¶90).

21. The Petitioners respectfully assert that such an important issue, with so many possible ramifications in this and other contexts, should be decided immediately by

this State's highest court. Delay in this Court's adjudication of the issue could be detrimental to existing business and industry, economic development, and recruitment of potential business ventures as well as adversely impact infrastructure investment. *See* Compl. Exhibit 2, Hitt Aff.¶¶9-10.

22. The sole legal issue presented to this Court for consideration—the validity of the "State is the State is the State" theory—implicates Article XII, § 1, of the S.C. Constitution, which provides that the General Assembly "shall provide appropriate agencies to function" in the areas of the citizens' health, welfare, safety, and the conservation of natural resources and "determine the activities, powers, and duties of such agencies." This is because the City's theory allows any State department, agency, or instrumentality to act outside the bounds of any authorized activities, powers, or duties.

23. The sole legal issue presented to this Court for consideration also implicates Article I, § 8, of the S.C. Constitution, which provides that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." This is because the City's theory permits a State department, agency, or instrumentality to assume and exercise *ultra vires* legislative powers.

24. This legal issue also implicates the Commerce and Dormant Commerce Clauses of the U.S. Constitution and federal preemption.[5] This is because the City's

[5] Federal preemption questions arise from the specific statutes governing the construction and operation of rail facilities and the general prohibition of state and local regulation of rail operations. *See, e.g.*, *Norfolk Southern Rwy. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010).

theory would eviscerate the application of these doctrines to both State government and the citizens of South Carolina.

25. This Court has previously accepted original jurisdiction in an analogous situation raising a question of the relationship of public bodies of this State. The matter of *Cooley v. S.C. Tax Commission*, 204 S.C. 10, 28 S.E.2d 445 (1943), was presented to the Court on a petition for original jurisdiction filed by two members of the three-member Tax Commission who disagreed with the settlement compromise reached by the Attorney General and the executor of an estate regarding taxes owed. The two members of the Tax Commission petitioned the Court in its original jurisdiction to disallow the settlement and further find that an agency was not bound by the decision or actions of the Attorney General when the Attorney General was representing that agency. This Court, recognizing the matter as an important question relating to the interaction between separate entities of State government, granted the petition and established a briefing schedule, entertaining the matter under the following narrow issue: whether the Attorney General, associated by an agency in a pending matter, has the ability to enter into a binding agreement with respect to the litigation over the objection of the agency that it represents. The Petitioners respectfully assert that this Court should similarly view the single legal issue presented in this Petition, construing the powers of State departments, agencies, and instrumentalities to bind one another by their actions, as one of acute importance warranting this Court's review and guidance.

26. The Petitioners submit that the within Petition, and the complaint relating thereto submitted contemporaneously pursuant to Rule 245(c), SCACR, raise an issue of

significant public interest which is appropriate for adjudication by this Court in its original jurisdiction for the following reasons:

a. Resolution of this claim in this Court will provide needed guidance not only to the Petitioners and Respondent, but also to all other departments, agencies, or instrumentalities of the State and those doing business with those entities.

b. Economic development in the State, including business recruitment by Commerce, relies upon infrastructure provided by the Ports Authority and Public Railways and is critical to the health and welfare of the State's citizens, and these interests would be best served by a speedy and prompt resolution of this legal issue.

c. This claim raises a purely legal issue. Although facts contributing to the current dispute between these parties may be unsettled, those facts do not in any way contribute to or have an impact upon the resolution of the legal issue presented hereby and in the complaint and will therefore not require the adjudication of any facts by this Court.

d. This claim involves a direct dispute between the State, a State department, a State instrumentality, and a municipal corporation organized and existing under the laws of this State.

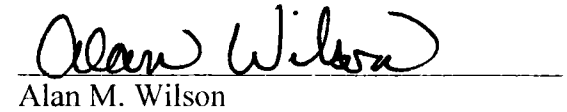
In support of the this Petition, the Petitioners submit herewith a complaint and the notice to Respondent as required by Rule 245(c), SCACR, and incorporate by reference the supporting affidavits of James I. Newsome, III, President and Chief Executive Officer of

the S.C. State Ports Authority and Robert M. Hitt, III, Secretary of the Department of Commerce, attached to the complaint as Exhibits 1 and 2, respectively.

WHEREFORE, having fully set forth their Petition, the Petitioners respectfully request that this Court grant the within Petition.

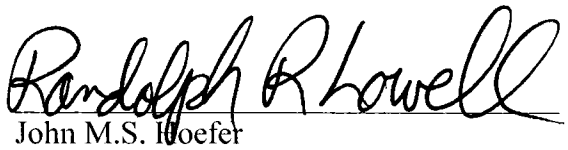
[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Alan M. Wilson
John W. McIntosh
Robert D. Cook
ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA
Rembert Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-3970

Attorneys for Petitioner State of South Carolina

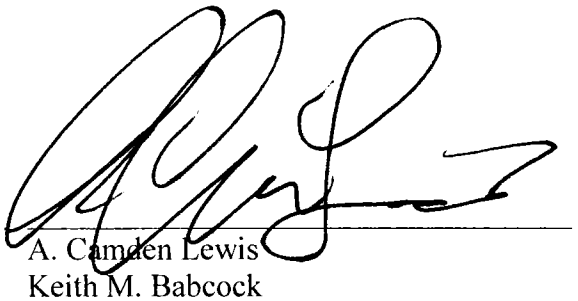


John M.S. Hoefer
Randolph R. Lowell
Chad N. Johnston
WILLOUGHBY & HOEFER, PA
Post Office Box 8416
Columbia, South Carolina 29202 8416
(803) 252-3300

James B. Richardson, Jr.
JAMES B. RICHARDSON, PC
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 799-9412

Philip L. Lawrence
Chief Legal Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
(843) 577-8777

Attorneys for Petitioner South Carolina State Ports Authority



A. Camden Lewis
Keith M. Babcock
Ariail E. King
LEWIS & BABCOCK, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Karen B. Manning
S.C. DEPARTMENT OF COMMERCE
1201 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 737-1603

Joseph P. Griffith, Jr.
JOE GRIFFITH LAW FIRM, LLC
7 State Street
Charleston, South Carolina 29401
(843) 225-5563

Derek F. Dean
SIMONS & DEAN
147 Wappoo Creek Drive, Suite 604
Charleston, South Carolina 29412
(843) 762-9132

John A. Hodge
HAYNSWORTH SINKLER BOYD, PA
Post Office Box 11889
Columbia, South Carolina 29211
(803) 540-7950

Attorneys for Petitioner South Carolina Department of Commerce

Columbia, South Carolina
This 13th day of June, 2011.