IN THE SUPREME COURT OF THE STATE OF GEORGIA

ANTHONY AVERY and SUSAN M. WILKINS, Appellants, v. STATE OF GEORGIA, PAULDING COUNTY AIRPORT AUTHORITY, and PAULDING COUNTY, GEORGIA, Appellees.	)	Case No. S14A0792

BRIEF OF APPELLANTS

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INTRODUCTION

Appellees Paulding County (the "County") and Paulding County Airport Authority (the "Authority") agreed to finance various airport taxiway construction projects at the urging of Silver Comet, a private business with exclusive rights over the development and control of commercial service at the Paulding Northwest Atlanta Airport. But given the controversy that would surely arise if the County held a referendum on a plan to spend millions of public dollars in the hopes of bringing commercial passenger service to the Airport, the County and the Authority devised a way to bypass the Constitutional requirement of a referendum for any new public debt. Their plan—the Authority's proposed issuance of $3.6 million in revenue bonds, secured by a contract obligating the County to guarantee the Authority's bond payments—is the subject matter of this appeal.

The Debt Clause of the Constitution states that no "county, municipality, or political subdivision shall incur any new debt without the assent of a majority of the qualified voters of such county, municipality, or political subdivision." Art. IX, Sec. VI, Para. I. Given the potential abuse of saddling taxpayers with public debt without their express consent, the Constitution recognizes only a handful of exceptions to the referendum requirement. The Constitution, for example, exempts from the Debt Clause certain contracts between public entities as described in the Intergovernmental Contracts Clause. Art. IX, Sec. III, Para. I(a). Exceptions to

the Debt Clause are narrowly defined and impose their own substantive requirements to protect the interests of taxpayers, citizens, and voters in public financing decisions they did not approve.

In an attempt to sidestep the referendum requirement of the Debt Clause, the Authority proposes to finance the Airport taxiway projects by issuing a $3.6 million revenue bond (the "Series 2013 Bond"), secured by an agreement obligating the County to guarantee bond payments to the Authority. The Series 2013 Bond, however, suffers from fatal constitutional and statutory defects. As even the Paulding County Superior Court—which had earlier validated the Series 2013 Bond under the Revenue Bond Law—recognized, there are "meritorious and non-frivolous arguments in opposition to the validation of the Series 2013 Bond."

As an initial matter, the contract between the County and the Airport Authority that purports to secure the Series 2013 Bond does not qualify as a valid intergovernmental contract under the Intergovernmental Contract Clause. The Intergovernmental Contract Clause permits only contracts "for joint services, for the provision of services, or for the joint or separate use of facilities or equipment" that "deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide." Art. IX, Sec. III, Para. I. Here, the purported intergovernmental contract merely obligates the County to guarantee payments on the Series 2013 Bond for the Authority, which is precisely the type of

agreement this Court previously determined is "not a contract for services or joint services, nor [] a contract for the joint or separate use of facilities or equipment." *Nations, et al. v. Downtown Dev. Auth. of Atlanta*, 255 Ga. 324, 327 (1985) ("*Nations I*").

Separately, the bonds are being issued for the benefit of third party Silver Comet, which deems the taxiway improvements "essential" to its business. In order to secure the benefits of government backed funding, Silver Comet provided the Authority with a contractual "incentive to issue revenue bonds for the purpose of expanding the taxiways"—an agreement to reimburse the Authority for principal and interest payments on the Bond. The commitment of the taxpayers of Paulding County to guarantee bonds issued at the request and for the benefit of Silver Comet, the entity with exclusive control over the Airport, violates the Lending and Gratuities Clauses of the Constitution. *See* Art. IX, Sec. II, Para. VIII; Art. II, Sec. VI, Para. VI.

Further, the requisite notice of the validation hearing for the Series 2013 Bond contained material errors rendering it ineffective and in violation of the Revenue Bond Law. The published notice of the hearing inaccurately identified the issuer of the Series 2013 Bond as the "Paulding Industrial Building Authority," rather than the Airport Authority, and referred to the wrong intergovernmental contract as the security for the Series 2013 Bond. To make matters worse,

consistent with the County's and the Authority's apparent determination to avoid public scrutiny of their plans, it is beyond dispute that the Authority improperly engaged in a number of "Closed Sessions" during which plans for the Airport and the proposed financing of the taxiway improvements were considered, in violation of the Open Meetings Act, O.C.G.A. § 50-14-4.

TYPE OF CASE AND JURISDICTION

This is an appeal of the Paulding County Superior Court's December 6, 2013 judgment validating the Series 2013 Bond. Appeals of bond validation judgments are governed by "the procedure provided by law in cases of injunction." O.C.G.A. § 36-82-77(a). Cases of injunction fall within the jurisdiction of the Court. O.C.G.A. § 5-6-34(a).

STATEMENT OF CASE

A. The Silver Comet Commercial Lease Agreement

In June 2012, the Gwinnett County Board of Commissioners unanimously rejected a proposal from Propeller Investments ("Propeller"), a private New York-based investment group, to privatize and develop commercial passenger service at the Gwinnett County Airport. As Propeller's efforts in Gwinnett County collapsed, Propeller's principal, Brett Smith, approached the Authority's Executive Director, Blake Swafford, about bringing commercial passenger service to Paulding County.

T-80.[1] Propeller subsequently formed entities called Silver Comet Partners, LLC, and Silver Comet Terminal Partners, LLC (collectively, "Silver Comet"), with the intention of entering into a joint venture with the Authority. T-81.

During discussions between the County, the Authority, and Silver Comet, Swafford—the lead negotiator for the County and the Authority—asked Silver Comet to disclose certain financial information because the County and the Authority needed to know who they were dealing with. T-151. Silver Comet, however, declined to provide any specific financial information. *Id*. In fact, neither Swafford nor anyone else representing the County or the Authority has ever reviewed specific financial documents from Silver Comet or obtained any specific knowledge of Silver Comet's financial assets or capital structure.[2]

Despite lacking basic information about Silver Comet, the Authority entered into an agreement on October 24, 2012, granting Silver Comet the "exclusive right and option" to lease 60 acres of Airport property owned by the Authority. R-823-832. Then, less than a month later, the Authority emerged from an unexplained

[1] Transcript references are to the December 2, 2013, Bond Validation Hearing Transcript.

[2] Without conducting even rudimentary financial due diligence, the Authority entered into multiple contracts with Silver Comet effectively granting Silver Comet exclusive rights to develop commercial service at the Airport. Despite Intervenors' contention that the Authority's relationship with Silver Comet violated the Gratuities Clause, *see* R-309, the trial court repeatedly and erroneously blocked discovery and questioning into Silver Comet's relationship with the Airport. T-96-98, 99-101, 122-123, 151-158, 185; R-279-299, 302-303.

closed session at its November 21, 2012 meeting at which it approved a Commercial Lease Agreement with Silver Comet Terminal Partners, LLC and the Paulding County Industrial Building Authority (the "Industrial Building Authority") (hereinafter, the "Silver Comet Commercial Lease"). *See* R-833-839; 840-852.

The Silver Comet Commercial Lease provides Silver Comet with 700 square feet in the Airport Terminal Building to use "as office space for the marketing and establishment of general aviation and commercial passenger service" for an initial period of 20 years. R-840, 842. It also gives Silver Comet the exclusive option of (1) expanding its lease to cover the entire Airport Terminal Building, and (2) extending the term of the lease for an additional 20 years. R-840-841, 845-846.

The Silver Comet Commercial Lease further grants Silver Comet the right (which Silver Comet has since exercised) to require the Authority to "mak[e] all financially feasible improvements at [the Airport] necessary to obtain" a Part 139 Airport Operating Certification—a certification the Airport would need from the Federal Aviation Administration ("FAA") to permit commercial passenger service. R-845. To comply with Silver Comet's demand that the Airport obtain Part 139 Certification, the Authority has already extended a runway safety over-run area, constructed a perimeter fence, and taken steps to relocate a planned fire station for

the Airport. T-51, 97; R-853-854. These efforts have cost the County and the Authority over $2.1 million thus far. T-97; R-853-854.

B. The Series 2013 Bond Issue

Prompted by Silver Comet's ongoing quest to initiate and manage commercial passenger service at the Airport, the Authority embarked on a project to extend and improve the Airport's taxiways. To fund the project, the Authority's board adopted a resolution (the "Bond Resolution") during its September 18, 2013 meeting—a portion of which was closed for unexplained reasons—authorizing issuance of the Series 2013 Bond. R-462-467.[3] The Bond Resolution provides that the Series 2013 Bond is to be secured by a purported intergovernmental contract between the County and the Authority (the "County-Authority Contract"). R-541, 564-587.

The County-Authority Contract purports to obligate the County to pay the Authority "an amount sufficient to enable the Authority to pay in full the principal and interest on the Series 2013 Bond," and if necessary, to levy an ad valorem property tax in order to make such payments. *See* R-10, 576-577. Although the County's obligation "to make the payments under the Contract" are "absolute and unconditional general obligations," (R-11, 576) the County-Authority Contract

[3] A Supplemental Bond Resolution was purportedly approved at a subsequent meeting. R-539-540.

permits the Airport Authority to "sell, lease or give away all or a portion of the Project," with or without the County's approval. R-578.

C. Petition for Bond Validation and Public Notice of Hearing

The State of Georgia filed a petition for validation of the Series 2013 Bond on October 9, 2013. R-7-88. The judge issued a Rule Nisi ordering a public hearing on the Series 2013 Bond and the security therefor (including the County-Authority Contract) and directing publication of a notice of the hearing as required by the Revenue Bond Law. R-89-90. That same day, the court clerk issued a notice to the public (the "Notice"), prepared by counsel for the County, stating that the validation hearing for the Series 2013 Bond and the security therefor had been set for October 28, 2013. R-945-946.

But the Notice erroneously identified the "Paulding Industrial Building Authority," rather than the Airport Authority, as the entity issuing the Series 2013 Bond, and erroneously identified as security for the Series 2013 Bond a contract between the County and the Industrial Building Authority. *Id.* The "Paulding Industrial Building Authority" is a separate entity from the Airport Authority and has no connection whatsoever to the Series 2013 Bond. *See* T-122. The Industrial Building Authority was, in fact, seeking validation of its own bond, unrelated to the Series 2013 Bond, the very same day as the hearing in the faulty Notice. *See id.*

D. The October 2013 Silver Comet Agreement

During the pendency of the validation proceedings for the Series 2013 Bond, the Authority and Silver Comet entered into an additional agreement dated October 22, 2013 (hereinafter, the "Silver Comet Bond Agreement"). *See* R-927-934. In the Silver Comet Bond Agreement, Silver Comet represents that: it "wishes to develop its business on the property leased from the Authority"; "it is essential to the development of [Silver Comet]'s business that certain taxiways at the Airport be expanded"; and it "wishes to provide the Authority with an incentive to issue revenue bonds for the purpose of expanding the taxiways at the Airport." R-928. The "incentive" is Silver Comet's agreement to pay the Authority "the principal amount of the Bonded Indebtedness as well as any interest associated with repayment of the Bonded Indebtedness" until it is paid in full. T-147; R-929. Indeed, the Airport director represented to both the County and the Authority at their respective meetings approving the Series 2013 Bond that the Bond would not cost the taxpayers anything because Silver Comet was paying for the Bond. T-138-140, 166; R-926, 966.

The Silver Comet Bond Agreement was not made part of the stated security for the Series 2013 Bond, which referenced only the County-Authority Contract obligating the County to make payments to the Authority as security for the Bond. T-152-153. Nevertheless, Silver Comet is contractually bound to pay principal and

interest on the Series 2013 Bond in the first instance, with the County serving as a guarantor of Silver Comet's agreement. T-147-48.

E. The Proceedings Below

Appellants Avery and Wilkins moved to intervene as parties to the validation proceedings for the Series 2013 Bond and the superior court granted this motion on November 1, 2013. R-200-201. After allowing a mere two weeks for discovery, and quashing Appellants' subpoena on Silver Comet (R-302-303), the superior court held an evidentiary hearing on the Series 2013 Bond on December 2, 2013. On December 6, 2013, the superior court issued findings of fact and law validating the Series 2013 Bond. R-1031-1049. Appellants timely filed notice of this appeal five days later. R-1-4.

On January 17, 2014, the County and the Authority filed a Petition To Require Posting of Bond, requesting that the superior court, pursuant to O.C.G.A. § 50-15-2, require Appellants to post a bond of $1,000,000 or have their appeal dismissed. The superior court held an evidentiary hearing on the petition on February 5, 2014. In an order issued that same day, the court denied the County and the Authority's request to require Appellants to post a bond to pursue this appeal. The superior court, despite having validated the Series 2013 Bond in December, ruled that "[o]n consideration of the record, the evidence, and

arguments of counsel, . . . Intervenors have presented meritorious and non-frivolous arguments in opposition to the validation of the Series 2013 Bond."

The Court docketed this appeal on February 18, 2014.

ENUMERATION OF ERRORS

1. Under this Court's precedent, a public entity's agreement to guarantee bond payments "is not a contract for services or joint services, nor is it a contract for the joint or separate use of facilities or equipment." *Nations I*, 255 Ga. at 327. As a result, the superior court erred in finding that the County-Authority Contract—under which the County agrees to nothing more than guaranteeing payments on the Series 2013 Bond—is a valid intergovernmental agreement under the Intergovernmental Contracts Clause of the Constitution.

2. The superior court erred in finding that the Series 2013 Bond does not provide an improper benefit to Silver Comet because: (a) under the County-Authority Contract, the County guarantees Silver Comet's obligations to make payments on the Series 2013 Bond in the first instance, in violation of the Lending Clause of the Constitution; and (b) the County-Authority Contract obligates the County to confer exclusive benefits to Silver Comet, without providing any demonstrated "substantial benefit" to the public, in violation of the Gratuities Clause of the Constitution.

3. The superior court erred in finding that the Authority provided the requisite "public notice" of the validation hearing for the Series 2013 Bond because the Notice incorrectly identified the "Paulding Industrial Building Authority," rather than the Airport Authority, as the issuer of the Series 2013 Bond and incorrectly referred to a contract between the County and the Industrial Building Authority as securing the Series 2013 Bond.

4. The superior court erred in finding that the Authority complied with the Open Meetings Law because the Authority entered into "Closed Sessions" during its regular meetings without stating the "specific reasons" for doing so in its meeting minutes, in violation of the Open Meetings Law.

ARGUMENT AND CITATION TO AUTHORITY

I. THE SOLE SECURITY FOR THE SERIES 2013 BOND IS AN INVALID INTERGOVERNMENTAL AGREEMENT

The Debt Clause of the Constitution prohibits counties, municipalities, and other political subdivisions from "incur[ring] any new debt without the assent of a majority" of qualified voters. Art. IX, Sec. V, Para. 1(a). Although the County and Authority could have held a referendum, the Series 2013 Bond was not submitted to the taxpayers for public approval in accordance with the Debt Clause. The County and the Authority contend, however, that the Series 2013 Bond is lawful because the County-Authority Contract securing the Bond is an intergovernmental agreement exempt from the Debt Clause's referendum

requirement. Accordingly, the Series 2013 Bond is valid only if the County-Authority Contract falls within the scope of the Constitution's Intergovernmental Contracts Clause. It does not.

The Intergovernmental Contracts Clause permits counties, municipalities, and other political subdivisions to contract "for joint services, for the provision of services, or for the joint or separate use of facilities or equipment" that "deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide." Art. IX, Sec. III, Para. I. Thus, to qualify as a lawful intergovernmental contract, the contract, as an initial matter, must be for "services," or the "use of facilities or equipment." *Id.*

This Court in *Nations I* invalidated a proposed bond issue because it failed to meet this threshold requirement. 255 Ga. at 327. There, the City of Atlanta's Downtown Development Authority ("DDA") proposed to issue revenue bonds, the proceeds of which were to be used to finance a revitalization project in downtown Atlanta. *Id.* at 324. The security for the DDA's bond was a contract between the City and the DDA, which provided that in consideration for the DDA's issuance of the bonds and construction of the redevelopment project, the City would "pay up to 90 percent of any shortfall due the bondholders should the project proceeds prove to be insufficient." *Id.* at 326. After a careful analysis of the City-DDA contract, this Court invalidated the bonds, holding that the contract violated the

Intergovernmental Contracts Clause. The Court explained that "the City's promise to use its taxing power to pay up to 90% of any shortfall due the bondholders should the project proceeds prove to be insufficient is not a contract for services or joint services, nor is it a contract for the joint or separate use of facilities or equipment." *Id.* at 327.

Importantly, there was no question that the City-DDA contract in *Nations I* involved a facility to be used by the City's residents. Nor was there any question that the contract expressly required the DDA to provide construction and management services in connection with that facility. *Id.* at 324-26. The Court nonetheless properly invalidated the proposed bond because the purported intergovernmental contract was not a contract for services or the use of a facility, as required under the Intergovernmental Contracts Clause. *Id.* at 327-28.

Consistent with *Nations I*, there is no dispute that for the County-Authority Contract to pass constitutional muster, the County and Authority must contractually provide services or facilities to each other that they are authorized to provide. As counsel for the Authority explained to the superior court: "one of the requirements, your honor, of the intergovernmental agreement is that the County has to be providing a service." T-163. Yet the superior court found that the County-Authority Contract was a valid intergovernmental contract without identifying a single "service" the County is providing or "facility" that the County

will "use" under the County-Authority Contract. *See* R-1041-1043. As the Court ruled in *Nations I*, the County's guarantee of bonds issued by another entity is not a valid governmental service. 255 Ga. at 327; *see City of Decatur v. DeKalb Cnty.*, 289 Ga. 612 (2011) (revenue sharing agreement not valid intergovernmental contract); *Mulkey v. Quillian*, 213 Ga. 507, 510 (1957) ("[T]he loaning of money to the political subdivisions of the State or authorities controlled by them is not a permitted purpose for which public funds may be used, and that, therefore it is not a facility or service of the State within the meaning of that term in the Constitution of the State of Georgia [Art. VII, Sec. VI, Par. I] . . .").

Further, ignoring *Nations I*, the superior court apparently relied on the fact that "Section 5.2. of the Intergovernmental Contract provides that the ***Airport Authority*** 'agrees to provide airport facilities and service for the citizens of the County through the operation of the Project.'" R-1042 (emphasis added). But upholding the validity of the County-Authority Contract on that basis alone would run afoul of *Nations I*. The County-Authority Contract specifies that the Authority, not the County, is providing a "service" and that the "citizens of the County," not the County itself, will purportedly use the facilities. R-578; *see also* R-444. The County is not leasing or obtaining contractual use rights to the Airport improvements. T-129-131, 248-249. Indeed, as the County and the Authority acknowledge, the County-Authority Contract does not affect the County's interests

or operations at the Airport at all—rather, it simply obligates the County to provide "the guarantee for the payment of the bonds." T-131-133. This is exactly the arrangement the Court invalidated in *Nations I*.

Despite the superior court's ruling to the contrary, the Court's subsequent opinions in *Nations v. Downtown Dev. Auth. of the City of Atlanta*, 256 Ga. 158 (1986) ("*Nations II*") and *Clayton Cnty. Airport Authority v. State*, 265 Ga. 24 (1995), do nothing to alter this analysis. In *Nations II*, the Court considered the validity of a "restructured" lease between the City of Atlanta and the DDA, following the invalidation of the City and the DDA's previous bond proposal in *Nations I*. *Nations II*, 256 Ga. at 159. Unlike the County here, the City in *Nations II* did not guarantee the bonds of another governmental entity. *Id*. at 162 ("[T]he City has not pledged or loaned its credit to anyone . . ."). Further, instead of merely acquiring property and guaranteeing bond payments as in *Nations I*, under the new "restructured" lease in *Nations II*, the City "proposed to acquire the project property," "convey [the property] back to the DDA," and then "***lease the property back from the DDA***." *Id*. (emphasis added). Accordingly, there was no question that under the "restructured" lease the City contracted for the direct use of facilities and was therefore a proper intergovernmental contract. *Id*. at 161 ("Under the intergovernmental contracts clause the City may lease facilities.") and 162 ("City has pledged its taxing power to make up any deficit in the rents *it* is obligated to

pay.") (emphasis in original). Similarly, in *Clayton Cnty.*, the Court approved an intergovernmental contract between Clayton County and the Clayton County Airport Authority because Clayton County expressly "contracted 'for the use' of an airport facility which the Authority propose[d] to acquire and expand." 265 Ga. at 25.

By contrast, here, the County is not leasing or obtaining use of any facilities at the Airport under the County-Authority Contract. T-129-131. In fact, Section 5.4 of the County-Authority Contract expressly authorizes the Authority to "sell, lease or give away all or a portion of the Project," which means that the Authority can, without relieving the County of its obligations, sell or even give the financed facilities away without the County's consent. R-578. Accordingly, the County-Authority Contract is not a valid intergovernmental contract and cannot provide adequate security for the Series 2013 Bond. *Nations I*, 255 Ga. at 327.

II. THE SERIES 2013 BOND IMPERMISSIBLY BENEFITS PRIVATE PARTY SILVER COMET

The Series 2013 Bond impermissibly benefits Silver Comet, a private entity, in violation of the Lending Clause, Art. IX, Sec. II, Para. VIII, and Gratuities Clause, Art. II, Sec. VI, Para. VI, of the Constitution.

A. The Series 2013 Bond Violates The Lending Clause

The Lending Clause of the Constitution prohibits a county, municipality or other political subdivision from "lend[ing] its credit to any person or to any non-

public corporation or association except for purely charitable purposes." Art., IX, Sec. II, Para. VIII. Here, the County and the Authority attempt unlawfully to loan their credit to Silver Comet through the Series 2013 Bond. The Series 2013 Bond—and the County's guaranty of bond payments—came at the request of Silver Comet, which deemed the Series 2013 Bond "essential" to its business pursuits. R-927-934. Indeed, Silver Comet and its counsel reviewed the bond papers before they were even submitted to the County and the Authority for approval. T-110-111; R-943. In exchange for the benefit of public funding through the County's guaranty, Silver Comet agreed (at least aspirationally) to pay the principal and interest on the Series 2013 Bond in the first instance. R-929; T-138-40, 147. The resulting financial arrangement is one in which Silver Comet has agreed to make payments to the Authority sufficient to pay amounts due on the Series 2013 Bond, and the County has agreed to guarantee Silver Comet's payments by paying the full principal and interest on the Series 2013 Bond, if "Silver Comet and the Authority do not do so in the first instance." T-148. But as the Court held in *Nations I*, a government guarantee of a private party's obligation to pay principal and interest on a revenue bond "is a loan of the credit of the City for the benefit of the developers" and thus violates Art. IX, Sec. II, Para. VIII. 255 Ga. at 328. This holding independently mandates the Series 2013 Bond not be validated.

B. The Series 2013 Bond Violates The Gratuities Clause

The Series 2013 Bond also violates the Gratuities Clause of the Constitution, which prevents counties from "grant[ing] any donation or gratuity or forgiv[ing] any debt or obligation owing to the public." Art. III, Sec. VI, Para. VI; *see also Grand Lodge of Ga. v. City of Thomasville*, 226 Ga. 4, 8 (1970). Counties provide an unlawful gratuity when their actions "favor private individuals," without deriving a "substantial benefit" in return. *See Garden Club of Ga., Inc. v. Shackelford*, 266 Ga. 24, 24-25 (1995); R-447-448.

Here, the Series 2013 Bond improperly favors Silver Comet because Silver Comet stands to receive an exclusive and unique benefit from it. *See Garden Club of Ga., Inc.*, 266 Ga. at 24-25 (holding that "the state's tree-trimming regulations favor[ed] private individuals" because the regulations allowed owners of outdoor signage "to obtain permits to trim and remove" foliage on state property). Under the Silver Comet Commercial Lease, Silver Comet is given the exclusive right to coordinate and manage commercial passenger service and other operations at the Airport. *See* R-840-852; T-91-92, 144. The County and the Airport Authority have already spent over $2 million "at the request of Silver Comet" under the Silver Comet Commercial Lease Agreement (T-97; R-853-854), and propose to guarantee and issue an additional $3.6 million in bonds to fund projects essential to Silver Comet's business, without having so much as reviewed a single Silver

Comet financial. *See* T-151. In other words, this is not a bond issue to finance a "public" improvement in the traditional sense, but rather a transaction which provides a disproportionate benefit to a private entity, Silver Comet, which effectively has exclusive control over the Airport. Indeed, the extraordinary, unique benefit the Series 2013 Bond provides Silver Comet is reflected by the issuance of the Bond itself. Silver Comet and the Authority jointly acknowledged that the project funded by the Bond was "essential to the development" of Silver Comet, and Silver Comet expressly provided an incentive to the Authority to issue the Bonds. *See* R-927-934; T-144-147. No other entity or individual, public or private, will receive a comparable benefit in the form of either use of the Airport facilities or public financing of private business interests.

The superior court nonetheless found the Series 2013 Bond did not confer an impermissible gratuity, without ever directly addressing the fact that the Series 2013 Bond confers a unique benefit to Silver Comet. Nowhere does the superior court's validation order acknowledge or even reference Silver Comet or the Silver Comet Bond Agreement. As previously noted, the superior court quashed Appellants' attempt to obtain discovery from Silver Comet. Instead, the validation order merely states that the "***Project*** is available equally to any person or entity that uses the airport" and that the "Intergovernmental Contract does not grant any beneficial interest in the ***Project*** to any third party, except as to what is generally

available to the public." R-1046-1047 (emphases added). But it is unclear what it means for the "Project"—defined as the construction work at the Airport, *see* R-9—to be "available equally" to any person, or what it means for the "Intergovernmental Contract" not to give "any beneficial interest in the Project to any third party." Whatever these findings are intended to convey, there can be no question that given Silver Comet's exclusive control over commercial operations at the Airport, the Series 2013 Bond and the Airport taxiway projects to be financed thereby confers unique, exclusive benefits to Silver Comet.

Ultimately, the superior court appears to have found that the Series 2013 Bond did not constitute an impermissible gratuity because the taxiway projects "would be operated by the Authority for the benefit of the citizens of the County" and would be "owned and operated as a public governmental airport for the benefit of the citizens of the County." R-1046-1047. Leaving aside that the Authority has given Silver Comet exclusive control over the Airport, the superior court's findings fail to identify any such benefit, and the County and Authority, while purporting to identify "specific governmental purposes" served by the Series 2013 Bond, do nothing more than reiterate in broad, conclusory terms that the taxiway projects will provide benefits to "the citizens of the County" and are "available to any person or entity that uses the [A]irport." R-449-450. Indeed, the Gratuities Clause requires that the claimed public benefit "qualify as a ***substantial*** benefit."

Garden Club of Ga., 266 Ga. at 25 (emphasis added). Unsubstantiated assertions of a generalized public benefit fall well short of establishing the Series 2013 Bond's compliance with the Gratuities Clause, and the Bond fails for this additional reason.

III. TAXPAYERS RECEIVED INSUFFICIENT NOTICE OF THE BOND VALIDATION HEARING

O.C.G.A. § 36-82-76 requires that citizens and residents be given "proper notice of [bond] validation proceedings." *Turpen v. Rabun Cnty. Bd. of Comm'rs*, 251 Ga. App. 505, 508 (2001). This means that notice must inform citizens that "the municipality, county, or political subdivision of which he is a resident is seeking to validate bonds, and the time of the hearing of the proceeding." *Rhodes v. City of Louisville*, 121 Ga. 551, 554 (1904). Although a minor mistake in stating the official, legal name of an issuing entity may not always warrant invalidation of a bond, the notice must at least be "sufficiently descriptive of the [issuing entity's] corporate name so as to be easily and readily applied to the legal name of the corporation." *Id.* at 552-53.

The County and the Airport Authority readily admit that the published notice of the validation hearing misidentified the "political subdivision" issuing the Series 2013 Bond and entering into the contract securing the Bond. *See* T-17-18. Instead of properly identifying the Authority as the bond issuer, the public notice inaccurately stated that the October 28, 2013 validation hearing would concern a

bond to be issued by the "Paulding Industrial Building Authority" that was to be secured by a contract between the "Paulding Industrial Building Authority" and the County. R-945-946. Despite the misinformation in the notice, the superior court found without explanation that "[t]o the extent any error existed in the [public notice], such error did not impair notification to the residents of Paulding County of the time, date and place of the proceeding to hear the case of the State of Georgia v. Paulding County Airport Authority and Paulding County, Georgia." R-1038-1039.

The superior court apparently relied on *Wimberly v. Cnty. of Twiggs*, 116 Ga. 50 (1902), and *Rhodes v. City of Louisville*, 121 Ga. 551 (1904), in concluding that the notice was sufficient, despite the misinformation therein. *See* R-1038. But the only actual deficiency (if there was one at all) with the public notice provided in *Wimberly* was that the notice did not state "the date the bonds are to bear," which the Court deemed an unavoidable omission, because "it would have been impossible to fix such a date" under the circumstances of that case. 116 Ga. at 50-51. This is a far cry from misidentifying the public entity proposing to issue bonds and misidentifying the intergovernmental contract securing them.

The superior court's reliance on *Rhodes* is even more remarkable, given that it directly supports Appellants' position. There, the public notice of a bond validation hearing contained a minor error—it identified the issuer of the proposed

bonds as the "***Town*** of Louisville, Jefferson County," instead of by its official, legal name, the "***City*** of Louisville, Jefferson County." 121 Ga. at 552-53 (emphases added). The Supreme Court explained that to satisfy the public notice requirement, the public notice would have to be "sufficiently descriptive of the corporate name [of the issuing entity] so as to be easily and readily applied to the legal name of the corporation." *Id.* It held that notice was sufficient in *Rhodes* because there was no possibility of confusion about which entity was issuing the bonds—even though Louisville's legal name was the "City of Louisville," the notice reflected the town's name "as used in ordinary speech," and there was no possibility of any confusion because no other entity in Jefferson County could have been known "as the town of Louisville." *Id.*

By contrast, in the present case, there is an overwhelming likelihood of confusion because the public notice incorrectly identified the Paulding Industrial Building Authority as the issuing entity—a public entity that not only actually exists, but was also in the process of issuing bonds of its own at the same time as the Authority was issuing bonds. *See* T-121-22. Applying the rule announced in *Rhodes*, it is inconceivable that the public notice was "sufficiently descriptive" of the Paulding County Airport Authority's "corporate name so as to be easily and readily applied to [its] legal name." Any taxpayer viewing the public notice would be unable to ascertain the Airport Authority's true involvement. Taxpayers could

reasonably have believed the validation hearing involved bonds proposed by the Paulding County Industrial Building Authority, not the Airport Authority, because that is what the notice said. This is enough, under *Rhodes*, to render the public notice in this case insufficient. Because the notice was insufficient, the Series 2013 Bond should not be validated.

IV. THE AIRPORT AUTHORITY VIOLATED THE OPEN MEETINGS ACT IN CONSIDERING AND APPROVING THE SERIES 2013 BOND

"[T]he Open Meetings Act seeks to eliminate closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name." *Moon v. Terrell Cnty.*, 249 Ga. App. 567, 568 (2001) (quoting *Atlanta Journal, et al. v. Babush*, 257 Ga. 790, 792 (1988)). Given the importance of maintaining the public trust, "[a]ny exception to the requirement that meetings shall be open must be strictly construed." *Id.* at 569 (quoting *Steele v. Honea*, 261 Ga. 644, 645 (1991). Among other things, the Open Meetings Act requires that:

> When any meeting of an agency is closed to the public pursuant to any provision of this chapter, the ***specific reasons for such closure shall be entered upon the official minutes***, the meeting shall not be closed to the public except by a majority vote of a quorum present for the meeting, the minutes shall reflect the names of the members present and the names of those voting for closure, and that part of the minutes shall be made available to the public as any other minutes.

O.C.G.A. § 50-14-4 (emphasis added).

The Authority has repeatedly disregarded the requirement that "the specific reasons" for closing a public agency meeting "be entered upon the official minutes."[4] The Authority's pattern of omitting the requisite "specific reasons" for the "Closed Sessions" is exemplified in the Authority's dealings with the Silver Comet and the Series 2013 Bond. On November 21, 2012, the Authority entered into a "Closed Session" immediately prior to considering the Silver Comet Commercial Lease. R-833-839. Following the "Closed Session," the Authority voted to approve the Silver Comet Commercial Lease. *See id.* Yet the meeting minutes do not state any of the reasons—let alone the required "specific reasons"—for the "Closed Session." *See id.*; T-184. Nor do the minutes reflect the "names of those voting for closure." *See Moon*, 249 Ga. App. at 569 (finding violation where minutes indicated "the names of the commissioners moving and seconding the motion" but not the specific "names of those voting for closure").

A year later, the Authority approved the Series 2013 Bond Resolution on September 18, 2013. R-462-467. The Authority's minutes from the September 18 meeting indicate that the Authority's board entered into a "Closed Session" during the meeting. *See id*. But yet again, the meeting minutes do not state "the specific

[4] Perhaps even more alarming, on June 18-19, 2013, the Airport Authority invited Silver Comet to attend a two-day meeting outside of Paulding County to discuss official Airport matters, without any members of the public present. According to an email sent by Swafford, the two-day meeting was necessary because it was "not practical to meet in smaller groups (sunshine law) to cover such a large amount of detail." R-995-1000; T-105-07.

reasons for [the] closure" of the Authority's meeting or the "names of those voting for closure," as required by the law. *See* O.C.G.A. § 50-14-4.

The Authority has indisputably violated the Open Meeting Act by failing to provide required information regarding the closure of their meetings. T-184-85. While even they cannot deny these violations, the County and Authority attempt to diminish the gravity of their non-compliance with the law by characterizing their conduct as amounting to "a technical violation of the Open Meetings Law." T-229. But what they fail to acknowledge is that when it comes to matters of public trust, the Authority is not entitled to determine which laws warrant compliance and which ones may be disregarded as "technical." When the Authority chooses to issue revenue bonds, Open Meetings laws the Authority would rather disregard serve an important purpose and must be carefully observed. *See Moon*, 249 Ga. App. at 569 (explaining that Georgia courts must "strictly construe the exceptions to the Open Meeting Act").

Regardless of whether the County and the Authority subjectively view their violations as inconsequential, the Authority's failure to comply with the Open Meetings Act renders the Authority's approval of the Bond Resolution invalid. *See* O.C.G.A. § 50-14-1(b)(2) ("Any resolution, rule, regulation, ordinance, or other official action of an agency adopted, taken, or made at a meeting which is not open to the public as required by this chapter shall not be binding."); *see Moon*, 249 Ga.

App. at 569 ("Because the board violated the Open Meetings Act in conducting the closed sessions, the actions taken during that meeting are void."). Accordingly, the Court should reverse the superior court's validation of the Series 2013 Bond.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court vacate the judgment of the superior court validating the Series 2013 Bond.

This 10th day of March, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF GEORGIA

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 10, 2014, a true and correct copy of the foregoing **BRIEF OF APPELLANTS** was served by mail and electronic service to the following:

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