UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:	)	Chapter 9
	)	
Connector 2000 Association, Inc.,	)	Case No. 10-04467-dd
	)	
Debtor.	)	

OBJECTION BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION TO THE CHAPTER 9 PETITION AND STATEMENT OF QUALIFICATIONS OF CONNECTOR 2000 ASSOCIATION, INC. AND MOTION TO DISMISS THE PETITION

COMES NOW, the South Carolina Department of Transportation (the "SCDOT"), by and through its undersigned counsel, and pursuant to 11 U.S.C. §§ 109(c) and 921(c) and this Court's Order dated June 25, 2010 (Dkt. #15, as amended) objects (the "Objection") to the voluntary petition (the "Petition") filed with this Court under chapter 9 of the Bankruptcy Code on June 24, 2010, as amended, by Connector 2000 Association, Inc. (the "Association"), the putative debtor, and moves to dismiss the Petition, and in support thereof, respectfully states as follows:

I. INTRODUCTION

The Petition must be dismissed because the Association does not meet the requirements set forth in Section 921(c) of the Bankruptcy Code. In order to be eligible under chapter 9 of the Bankruptcy Code, the Association must demonstrate, *inter alia*, that (i) it is a "municipality", and (ii) it is specifically authorized to be a debtor under chapter 9. 11 U.S.C. §§ 109(c)(1) and (2).

Despite claims to the contrary in its Affidavit Regarding Statement of Qualifications (Dkt. #2) and Memorandum in Support (Dkt. #4), the Association is not a municipality because it does not fit within the definition set forth in Section 101 of the Bankruptcy Code which defines a

municipality as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). The Association further asserts that it is specifically authorized to file the Petition because it is a "governmental unit" authorized under S.C. Code Ann. § 6-1-10. However, because the Association is not a municipality, it likewise is not a governmental unit under such state statute and is not specifically authorized to file a chapter 9 case.

Based on the foregoing and as detailed fully herein, the Court should dismiss the Petition because the Association is not eligible to be a debtor under chapter 9 of the Bankruptcy Code.

II. BACKGROUND

The Association was formed as a South Carolina non-profit corporation for the purpose of constructing and operating a highway in Greenville County, South Carolina. (Dkt. #4, p. 3). The Association and SCDOT are parties to that certain License Agreement dated February 11, 1998 (the "License Agreement") pursuant to which the Association was granted the rights and obligations to acquire, develop and construct, finance, operate, repair and renew, and collect tolls in connection with the approximately 16-mile toll road known as the "Southern Connector". SCDOT owns the Southern Connector itself, and the Association's rights therein flow from the License Agreement. Pursuant to the License Agreement, the Association is responsible for paying to SCDOT a License Fee of $125,000 per month for 25 years. (License Agreement, Sect. 5.1). The Association is also responsible for reimbursing SCDOT for costs and expenses of maintenance activities carried out by SCDOT on the Southern Connector. (License Agreement, Sect. 6.7(a)). The object and ultimate purpose of the Southern Connector project was to drive economic development and growth of the southern portion of Greenville County. Thus, the Southern Connector is an economic development tool.

The construction of the Southern Connector was financed by private funds, with the Association issuing $200,177,680 original principal amount Connector 2000 Association, Inc. Toll Road Revenue Bonds (Southern Connector Project, Greenville, South Carolina) in three series (the "Bonds"). The indebtedness evidenced by the Bonds is secured by, *inter alia*, the toll revenue generated by the operation of the Southern Connector. The State of South Carolina and its agencies, departments and political subdivisions, including SCDOT, are not liable in any way for repayment of the Bonds.[1] Indeed, the Official Statement for each of the Bonds, as on file with the Municipal Securities Rulemaking Board, provides:

> The Bonds do not now and shall never constitute an indebtedness of the State of South Carolina, the South Carolina Department of Transportation or any agency, department or political subdivision of the State of South Carolina (including, without limitation, the County of Greenville, South Carolina or the City of Greenville, South Carolina) within the meaning of any State of South Carolina Constitutional provision or statutory limitation and shall never constitute or give rise to a pecuniary liability (legal, moral or otherwise) of the State of South Carolina, the South Carolina Department of Transportation or any agency, department or political subdivision of the State of South Carolina (including, without limitation, the County of Greenville, South Carolina or the City of Greenville, South Carolina) or a charge against the general credit or taxing power of the State of South Carolina, the South Carolina Department of Transportation or any agency, department or political subdivision of the State of South Carolina (including, without limitation, the County of Greenville, South Carolina or the City of Greenville, South Carolina).

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[1] The Supreme Court of South Carolina resolved this issue with respect to the Bonds in *Brashier v. South Carolina Department of Transportation*, 327 S.C. 179 (1997). The Court held:

> …the bonds will state on their face they are payable solely from and secured by toll revenues collected from users of the Southern Connector, and will not be a debt or loan of credit of the State.… Further Association will issue the bonds, not the State. *In no way can the State be legally obligated to pay the bonds.*

Id. at 187 (emphasis added).

Official Statement of the Connector 2000 Association, Inc. Toll Road Revenue Bonds (Southern Connector Project, Greenville, South Carolina) (the "Official Statement").

Further, Section 8.1(b) of the License Agreement provides:

> Except for the obligations of SCDOT to maintain the Southern Connector at the Association's expense as described in Section 6.7 hereof, to use the federal demonstration monies in connection with the Southern Connector and to provide the financing necessary to plan, design, acquire and construct S.C. 153, neither the State of South Carolina nor any of its departments or agencies or political subdivisions shall have any obligation to pay any costs of the Southern Connector or any debt associated therewith. The principal of, redemption premium, if any and interest on the Bonds and all other Project Debt will be limited obligations of the Association payable solely from the sources and special funds pledged for the benefit thereof pursuant to the terms of the Project Debt documents. *Neither the Bonds, any item of Project Debt nor the interest thereof shall ever be a debt or grant or loan of credit of the State of South Carolina or any political subdivision or agency (including, without limitation, SCDOT) thereof and neither the State of South Carolina nor any political subdivision or agency thereof shall be liable thereon.* Neither the Bonds nor any other Project Debt shall constitute a pecuniary obligation of the State of South Carolina or any political subdivision or agency of the State of South Carolina within the meaning of any statutory or constitutional limitation. (Emphasis added).

On June 12, 2009, SCDOT sent the Association a letter detailing an Event of Default under Section 14.1(d) of the License Agreement based on the failure of the Association to pay its debts as the same became due (the "June 2009 Letter"). The June 2009 Letter in essence served as a notice of the event of default and a forbearance agreement between SCDOT and the Association, pursuant to which SCDOT agreed to give the Association 90 days written notice before exercising any right of termination of the License Agreement in exchange for the Association undertaking to restructure its debt. The June 2009 Letter provided, in part, that a "key element of the debt adjustment plan to be proposed by the Association will include the

funding of repairs and replacements to the Southern Connector toll highway." The June 2009 Letter was confirmed pursuant to a letter to SCDOT from counsel to the Association dated October 1, 2009. That letter reaffirmed the goal of funding repairs and replacements to the Southern Connector as a part of any debt adjustment plan.

On June 11, 2010, counsel to the Association circulated a draft Debt Adjustment Plan and Bankruptcy Plan Term Sheet (the "Proposed Plan"), pursuant to which the Association proposed to restructure the Bonds, the License Agreement and the other duties and obligations of the Association. As a part of the Plan, and of significant interest and concern to SCDOT, the Association proposed to eliminate (i) its reimbursement obligations for costs and expenses of maintenance activities undertaken by SCDOT, and (ii) its obligation to pay License Fees to SCDOT. In place of these responsibilities, the Association proposed an amended Renewal and Replacement Fund to be established whereby the new trustee would deposit certain amounts for the benefit of SCDOT based on a priority of payment which was not significantly different than the current License Agreement and which amounts were not tied to costs and expenses actually paid by SCDOT in maintaining the Southern Connector. These revisions were included in the Plan despite the Association's assurances and agreements that a "key element" of the Plan would be funding repairs and replacements on the Southern Connector. The Association, SCDOT and other interested parties did not reach agreement on the Plan, based ostensibly on the disparate treatment accorded the Association's creditors under the Plan as compared with the numerous benefits granted the Association thereunder.

On June 24, 2010, the Association filed the Petition with the Court, along with the Statement of Qualifications, Memorandum in Support and numerous other first day filings.

Citing financial difficulties, the Association stated that traffic and toll revenues on the Southern Connector have been "substantially less" than projected. (Dkt. #4, p. 5). Low revenues combined with mounting debt service have created an apparently untenable situation leading to this bankruptcy filing. Collectively with the Petition and other pleadings, the Association filed a List of Creditors Holding 20 Largest Unsecured Claims. SCDOT is the first creditor listed. The Association owes SCDOT approximately $8,275,786. Specifically, the Association owes SCDOT in excess of $775,786 for reimbursement for past maintenance costs and expenses already incurred by SCDOT plus interest accruing thereon pursuant to Section 6.7(a) of the License Agreement. (Dkt. #4, p. 10). The Association owes SCDOT in excess of $7,500,000 for past due License Fees under Section 5.1 of the License Agreement plus interest accruing thereon. *Id.*

On June 25, 2010, the Court entered an Order, *inter alia*, setting the deadline for objections to the Petition as July 30, 2010. (Dkt. # 15, as amended Dkt. # 22).

III. THE ASSOCIATION FAILS TO SATISFY SECTION 921(c) OF THE BANKRUPTCY CODE AND THE PETITION MUST BE DISMISSED

Pursuant to 11 U.S.C. § 921(c), "[a]fter any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of this title." Although Section 921(c) of the Bankruptcy Code is phrased in the permissive, "[c]ourts **must** dismiss the petitions of debtors filing under chapter 9 who fail to satisfy these requirements." *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010) (*citing In re City of Vallejo*, 408 B.R. 280, 289 (9th Cir. B.A.P. 2009) ("Despite the permissive statutory language, courts have construed § 921(c) to require the mandatory dismissal of a petition filed by a debtor who fails to

meet the eligibility requirements under § 109(c).")) (emphasis added); *In re County of Orange*, 183 B.R. 594, 599 (Bankr. C.D. Cal. 1995) ("Although the language of § 921(c) is permissive, the case law indicates that § 921(c) 'must be given a mandatory effect if the defect in the filing is in the debtor's eligibility to file chapter 9.'") (internal citations omitted).

In addition to the good faith requirements, in order to file a chapter 9 petition, the Association must comply with the eligibility requirements as set forth in Section 109(c) of the Bankruptcy Code. Indeed, the putative debtor bears the burden to establish its eligibility to file a chapter 9 petition. *In re New York City Off-Track Betting Corp.*, 427 B.R. at 264; *In re County of Orange*, 183 B.R. at 599.

A. The Association Has Not Satisfied Its Burden of Demonstrating Its Eligibility Under Section 109(c)

Under 11 U.S.C. § 109(c), an entity may be a debtor under chapter 9 of this title if and only if such entity—

> (1) is a municipality;
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> (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
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> (3) is insolvent;
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> (4) desires to effect a plan to adjust such debts; and
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> (5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
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> (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

> (C) is unable to negotiate with creditors because such negotiation is impracticable; or
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> (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

In determining whether the putative debtor has satisfied its burden and demonstrated its eligibility, "[b]ankruptcy courts should review chapter 9 petitions with a jaded eye." *In re New York City Off-Track Betting Corp.*, 427 B.R. at 264. This judicial skepticism arises based on the "court's severely limited control over the debtor once the petition is approved, [and therefore] access to chapter 9 relief has been designed to be an intentionally difficult task." *In re Sullivan County Reg'l Refuse Disposal Dist.*, 165 B.R. 60, 82 (Bankr. D.N.H. 1994) (observing that the jurisdiction of bankruptcy courts "should not be exercised lightly in chapter 9 cases, in light of the interplay between Congress' bankruptcy power and the limitations on federal power under the Tenth Amendment"); *In re Cottonwood Water and Sanitation Dist.*, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (noting that constitutional issues in chapter 9 cases caused Congress "to limit accessibility to the bankruptcy court by municipalities.") (*quoting* H.R. Conference Rep. No. 94-938, at 10 (1976)) (internal punctuation omitted).

While SCDOT accepts that the Association satisfies a portion of the test to be a debtor under Section 109(c) of the Bankruptcy Code, namely Sections 109(c)(3)-(5), the Association has failed to demonstrate that it is a municipality as required by Section 109(c)(1) and that it is specifically authorized as required by Section 109(c)(2). Thus, the Association is ineligible to file the Petition.

1. **The Association's Petition must be dismissed because the Association is not a municipality as required by Section 109(c)(1)**

The first requirement under Section 109(c) of the Bankruptcy Code in order for a putative debtor to be eligible to file a chapter 9 petition is that the putative debtor is a municipality. 11 U.S.C. § 109(c)(1). Section 101 of the Bankruptcy Code defines a municipality as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). In turn, the Bankruptcy Code does not define political subdivision, public agency or instrumentality; however, other courts have interpreted these terms within the context of a chapter 9 filing.

> … [T]he inquiry under Section 101(40) involves interpretation of three basic sets of characteristics: the extent to which the entity has traditional governmental attributes or engages in traditional governmental functions; the extent to which the State controls the entity's operations with elements that go to control of the State's finances having more weight than elements that may simply be general regulation; and the extent to which the State itself categorizes the entity as a municipality or instrumentality.

In re Las Vegas Monorail Company, 2010 WL 1857241 *22, 49 B.R. 770, 795 (Bankr. D. Nev. 2010).

a. The Association is not a "Political Subdivision" of the State of South Carolina

The phrase "political subdivision" has been interpreted to mean "a public entity bestowed with sovereign powers, such as the power of eminent domain, the police power, or the power to assess and levy taxes". *Id.* at 787 (*citing In re County of Orange*, 183 B.R. 594). As the Association is a private non-profit corporation which does not possess any of these traditional governmental powers or attributes, it cannot be deemed a political subdivision.[2] Specifically,

[2] The Association is a South Carolina nonprofit corporation formed under the South Carolina Nonprofit Corporation Act, S.C. Code Ann. §33-31-101, *et. seq.* which does not purport to create governmental or quasi-governmental entities. The Association was structured as a nonprofit corporation in order to qualify as an exempt entity for taxing purposes under IRS 63-20. The powers of the Association are limited to those enumerated under the South Carolina Nonprofit Corporation Act and include "the same powers of an individual to do all things necessary or convenient to carry out its affairs…" Official Statement of the Connector 2000 Association, Inc. Toll Road Revenue Bonds (Southern Connector Project, Greenville, South Carolina) p. 38. *See* South Carolina Nonprofit Corporation Act, S.C. Code Ann. § 33-31-302.

the Association has no rights to exercise the power of eminent domain in its own name. Rather, the License Agreement provides that SCDOT shall exercise its power of eminent domain. (License Agreement, Sect. 3.13).[3] Further, the Official Statement specifically states that "[t]he Association has no taxing powers." (Official Statement, p.1). Nothing in the License Agreement nor in the South Carolina Code of Laws grants the Association the authority to exercise any taxing power, any sovereign police power or to claim sovereign immunity. Moreover, in its Memorandum in Support of its Statement of Qualifications, the Association advances no argument in support of this point and tacitly admits that it is not a political subdivision.[4] Thus, the Association is not a "political subdivision" within the meaning of the Bankruptcy Code.

b. The Association is not a "Public Agency" or "Instrumentality" of the State of South Carolina

The Association claims that it is either a public agency or instrumentality of the State of South Carolina based on (i) the alleged control exercised over the Association by the SCDOT, (ii) the alleged effect the Association's failure to pay its debts to SCDOT will have on SCDOT's budget, and (iii) the Association's inclusion in the State's financial reports. Each of these claims will be reviewed in turn.

The test advanced by the Association in its Memorandum in Support of its Statement of Qualifications in determining a "public agency" was developed by the District Court in *Ex Parte*

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[3] In addition, the Official Statement provides that "SCDOT's right of eminent domain under South Carolina Law will be used to effect all condemnations of parcels from persons unwilling to sell at a negotiated price, using attorneys selected by SCDOT and approved by the Association." (Official Statement, Appendix B.)

[4] Memorandum in Support of Statement of Qualifications (Dkt. # 4, p. 20) ("Accordingly, the [Association] is a *public agency or instrumentality* of the State of South Carolina and is a municipality within the meaning of Section 109(c)(1).") (emphasis added).

York County Natural Gas Authority, 238 F. Supp. 964, 976 (W.D. S.C. 1965), which held that "the legal test between a private or public authority or agency is whether the authority or agency is subject to control by public authority, state or municipal." In *York*, the court found that a natural gas authority was a public agency under the definition of municipality, and eligible for chapter 9, based largely on the scope of the state legislative grant creating such authority which referred to the authority as a "body corporate and politic". *Id.* at 966. *York* is distinguishable from the instant case and does not support the Association's contention that it is a municipality. There is no such comparable state legislative charter for the Association, nor is there is any comparable chartering language. The Association is a private non-profit corporation formed just like any other private corporation under the laws of the State of South Carolina. Despite this, the Association believes that SCDOT's alleged control over it somehow makes it a public agency or instrumentality of the state.

The Association argues that it is "subject to the control by the State of South Carolina because the SCDOT has the power to approve or disapprove all the members of the Board of Directors of the [Association]." (Dkt. #4, p. 19). As discussed herein, SCDOT and the State do not exercise the control required in the applicable case law interpreting Section 109(c)(1) of the Bankruptcy Code. Assuming *arguendo* that SCDOT's authority to approve or disapprove members of the Association board correlates to some control, this control is for public regulation and oversight of the Southern Connector itself, not the Association, for public safety as required of SCDOT by the State of South Carolina. Indeed, "[a] limited measure of public control, regulation or oversight simply does not, by itself, make an entity a public agency." *In re Las Vegas Monorail Company*, 49 B.R. at 785. As the court in *In re Las Vegas Monorail Company*

astutely continued, "[o]therwise, heavily regulated industries, such as casinos and taxi cabs, would be municipalities." *Id.* SCDOT does not nominate or elect directors of the Association and further, has no authority to directly influence the board's actions. (Association Bylaws, Sect. 3.3). Thus, the Association acts independently of the SCDOT. *See In re Ellicott School Building Auth.*, 150 B.R. 261, 264 (D. Colo. 1992) (applying the *York* control test and finding the requisite governmental control over the putative debtor, which had been structured as a nonprofit corporation to meet the requirements of IRS Revenue Ruling 63-20, was absent, even where it could issue tax-exempt revenue bonds, and the subject chapter 9 petition accordingly was dismissed); *In re Las Vegas Monorail Company*, 49 B.R. at 797 (Governor's ability to appoint directors, among other powers, did not constitute sufficient control to deem the putative debtor an instrumentality of the state).

The Association's argument is further belied by the provision of the License Agreement defining the relationship between the Association and SCDOT, which provides:

> The relationship of the Association to SCDOT shall be one of licensee to licensor, and not of agent, partner, joint venture or employee; and **SCDOT shall have no rights to direct or control the activities of the Association**. Officials, employees and agents of SCDOT, shall in no event be considered employees, agents, partners or representatives of the Association or any Lender.

(License Agreement, Sect.16.1) (emphasis added). The level of control contemplated by courts in finding public agency or instrumentality status is on the order of active, significant management; "the more control over day-to-day activities, the more likely the entity is an instrumentality under Section 101(40)." *In re Las Vegas Monorail Company*, 49 B.R. at 788. Conversely, "if the control, however, is more akin to oversight or regulation, then the entity is not an instrumentality." *Id.* at 789.

The Association's statement that "SCDOT sets the toll rates, which gives SCDOT control of the financial operation of the [Association]", is equally unpersuasive. SCDOT is empowered by statute to set toll rates.[5] This is a function allocated to SCDOT by the State for public interest reasons. Here, the toll rates for the Southern Connector were initially fixed as set forth in the License Agreement, which was agreed upon by the parties. Moreover, adjustments to the toll rates are made in consultation with the Association, based on optimum toll rate estimates provided by an independent traffic consultant retained by the Association and within such range as agreed to by the Association. (License Agreement, Sect. 6.4). In this way, SCDOT does not "control the financial operation of the [Association]", but rather collaborates with the Association to establish the toll rates. Indeed, "[d]uring the term of the License, the Association shall be responsible for all operations on the Southern Connector." (*Id.*, Sect. 6.7(b)). *See In re Las Vegas Monorail Company*, 49 B.R. at 797 (Governor's ability to set monorail's user fares and budget, among other powers, did not constitute sufficient control to deem the putative debtor an instrumentality of the state).

Thus, in practice and by contract as set forth above, SCDOT does not, and in fact cannot, exercise the level of control considered adequate under the case law to deem the Association an instrumentality of the State.

Despite the absence of control, the Association advances a further argument regarding the finances of SCDOT and the State of South Carolina and the effect that the Association ostensibly has on each. First, the Association alleges that the "ability or inability of the Association to

[5] *See* S.C. Code Ann. § 57-5-1340 ("In addition to the powers listed above, the South Carolina Department of Transportation may: … 2. Fix and revise from time to time and charge and collect tolls for transit over each turnpike facility constructed by it…")

provide such payments (reimbursements for maintenance and License Fees) to SCDOT will have a material affect [*sic.*] on SCDOT's budget." (Dkt. #4, p. 20). Even accepting this statement as true does not prove that the Association is a public agency or instrumentality of the State. There are numerous other groups which potentially could affect SCDOT's budget, not the least of which is the federal government, whose reimbursements constitute over half of SCDOT's budget. But the federal government is of course not considered a public agency or instrumentality of the State based on the effect it may have on the State's or SCDOT's budget. Moreover, as set forth above, a showing of control over the Association by SCDOT must be made. The Association has not demonstrated this required control element.

The Association next asserts that the State Office of the Comptroller General has made an accounting determination that the Association should be included and reported as a "component unit" of the State in the State's Consolidated Annual Financial Report, and based on this, the Association is a public agency or instrumentality of the State. (Dkt. #4, p. 20). As an initial matter, it is important to note that the Association is not supported by the State fisc; the Association's revenues are derived, and it is supported solely, from the toll revenues generated by the Southern Connector.[6] (*See* License Agreement, Sect. 8.1(b)). The inclusion of the Association in the State financial statements is for accounting purposes only and does not, in and of itself, conclusively prove that the Association is a public agency or instrumentality of the State.

The Government Accounting Standards Board ("GASB") has jurisdiction over accounting and financial reporting standards applicable to government entities. Under the

[6] In addition, as set forth above, the Bonds are non-recourse as to the State, and the State has no liability whatsoever with respect thereto. *See also Brashier*, 327 S.C. 179.

generally accepted accounting principles (GAAP), which GASB has adopted and which are applicable for the State of South Carolina, the Association's inclusion in the state's financial statements is required. GAAP provides that component units which are legally separate entities from the government must be included in the government's financial reporting for purposes of fair presentation and full disclosure. GAAP also provides the guidelines for determining whether a legally separate entity is a "component unit" of a government's financial reporting entity. In sum, because the License Agreement gives SCDOT the ability to modify or approve the tolls affecting the revenues, South Carolina was required under GAAP to include the Association as a component unit. The reference to the Association as a "component unit" was solely for purposes of complying with GAAP and for no other reason. The term "component unit" has a different definition under GAAP than it has under the Bankruptcy Code or under South Carolina law.

Of particular relevance here, the *In re Las Vegas Monorail Company* decision addresses the use of the same word or phrase with differing meanings or applications in separate statutes and acknowledges that facially similar principles in law and accounting may differ in substantive meaning and application.

> The analysis acknowledges two points: that in a perfect world identical words would have identical meanings wherever and whenever used; and that we do not live in a perfect world. For purposes of statutory analysis, *it is not uncommon for the same word or phrase to have different meanings in different codes*; the scope of the word "lease," for example, is particularly slippery in the tax code, and in any event has different nuances than "lease" in the Uniform Commercial Code, or under general accounting principles. See FIN. ACCOUNTING STANDARDS BOARD, Statement of Fin. Accounting Standard No. 13 (1976); INT'L ACCOUNTING STANDARDS BOARD, Int'l Accounting Standard 17 (2009). "Security interest" is another example of the same words having different meanings in different codes. *Compare*

> 26 U.S.C. § 6323(h)(1) with 11 U.S.C. § 101(51) *with* U.C.C. § 1-201(37).

In re Las Vegas Monorail Company, 49 B.R. at 790 (emphasis added). Therefore, the reference to the Association as a "component unit" in the State's financial reports must be viewed as an accounting determination as opposed to a statement on the Association's legal status and relationship with SCDOT and the State.

By way of these arguments, the Association essentially claims that it is an alter-ego of the State. However, in South Carolina, "an alter-ego theory requires a showing of total domination and control of one entity by another..." *Colleton County Taxpayers Assoc. v. School Dist. of Colleton County*, 638 S.E.2d 685, 692 (S.C. 2006). As detailed above, neither the State nor SCDOT exercise this level of control over the Association, and therefore, the Association is not an alter-ego of the State or SCDOT.

c. *In re Las Vegas Monorail Company* is dispositive of this matter

In the case *In re Las Vegas Monorail Company*, the Bankruptcy Court for the District of Nevada reviewed a creditor's motion to dismiss the chapter 11 case of the Las Vegas Monorail Company arguing that the putative debtor qualified as an instrumentality of the state and was therefore required to file a chapter 9 petition. In determining that the debtor was not a municipality, the court expansively reviewed the history of chapter 9 along with case law interpreting the chapter. In the case, the Las Vegas Monorail Company, a private non-profit corporation (the "LVMC"), undertook to design, finance, construct and operate a 3.9 mile monorail system through Las Vegas. The structure of the transaction was such that the State of Nevada, through a department, sponsored the issuance of around $650 million of municipal revenue bonds, which by their terms were non-recourse to the state, and the proceeds of the

bonds were in turn loaned to the debtor through a Financing Agreement. The debtor owned and operated the monorail system and planned to repay the loan, and thereby the bonds, from revenues generated by user fares. Following disappointing ridership and an inability to service its debt, the debtor filed a chapter 11 petition. One of its creditors, Ambac Assurance Corp., an insurer of a series of the bonds, moved to dismiss the petition, arguing that the debtor was not eligible for chapter 11 and rather, should have filed a chapter 9 petition. As noted, the court proceeded to conduct a thorough examination of whether the debtor was indeed a municipality of the state. Although *In re Las Vegas Monorail Company* presents the inverse situation from the Association's case, in that a creditor argued the debtor's eligibility under chapter 9 rather than chapter 11 and here the putative debtor asserts its eligibility under chapter 9, the court's analysis and its conclusion are dispositive of the instant case.

In reviewing Ambac's motion to dismiss, the court reviewed whether LVMC was a municipality under the Bankruptcy Code, namely Section 101(40). The court initially found that LVMC was neither a political subdivision nor agency of the State of Nevada because it did not carry out traditional governmental functions, as it had no power to tax, no power of eminent domain and no sovereign immunity. *In re Las Vegas Monorail Company*, 49 B.R. at 795. The court found that "LVMC is a creature of general nonprofit corporation laws rather than of a specific legislative enactment." *Id.* at 796. Next, the court reviewed whether LVMC was an instrumentality of the state. The court found that "[w]hile the Governor has the power to approve LVMC's fares, approve its budget and appoint its directors, LVMC operates it day-to-day business in significant isolation from the State." *Id.* at 797. In addition, the court found that LVMC's "creditors are not and do not expect to be creditors of the State." *Id.* The court found

that the State's control, "while extensive", was more in the realm of regulation and not the type generally found to give rise to instrumentality status. *Id.* at 798. Thus, the court held that LVMC was not an instrumentality, as "it is best seen as an entity engaged in a public purpose, not an instrumentality carrying out a public function." *Id.* The court also reviewed how the state labeled LVMC with specific regard to its state statutes, ultimately finding that LVMC was not an instrumentality thereunder. *Id.* at 798-801. Through this review, the court determined that LVMC was not a municipality of the state and therefore not eligible to file a chapter 9 petition. Ambac's motion to dismiss the chapter 11 petition was accordingly denied.

Based on the foregoing, the Association is likewise foreclosed from seeking chapter 9 relief. Like LVMC, the Association has no power to tax, no power of eminent domain and no sovereign immunity. The Association was formed as a private nonprofit corporation under the laws of South Carolina, and the Association, like LVMC, "bears the consequences of its operation in a manner similar to a private entity" as its revenues derive solely from the tolls paid by the users of the Southern Connector; and like Nevada in LVMC's case, South Carolina is not liable for the Association's operating losses. *Id.* at 798 *citing* H.R. Rep. No. 2246, 79th Cong., 2d Sess.2-3 (1946); S.Rep.No. 1633, 79th Cong., 2d Sess.2 (1946). Moreover, like LVMC, the Association is not an instrumentality of the State of South Carolina because the state does not exercise the requisite level of control. The court in LVMC's case found that control by the state, to the extent of approving fares and appointing directors, did not constitute control sufficient to establish an instrumentality. Finally, the court dismissed Ambac's argument regarding the labels used by the State of Nevada with regard to LVMC. *Id.* at 798-801. Thus, under *In re Las Vegas*

Monorail Company, the Association is not a municipality and is accordingly ineligible to file a chapter 9 petition.

2. Alternatively, the Association's Petition must be dismissed because the Association was not specifically authorized to be a chapter 9 debtor

A further requirement, Section 109(c)(2) of the Bankruptcy Code mandates that a chapter 9 debtor be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter." 11 U.S.C. § 109(c)(2). The authorization contemplated hereby must be "exact, plain, and direct with well-defined limits so that nothing is left to inference or implication." *In re County of Orange*, 183 B.R. at 604 (determining that a county investment fund was not specifically authorized by California statute, as required by Section 109(c)(2), to file a petition under chapter 9); *In re Slocum Lake Drainage Dist. of Lake County*, 336 B.R. 387, 390 (Bankr. N.D. Ill. 2006) (observing that "specific authorization by a state is necessary in order for a municipality to be eligible to file for bankruptcy" and dismissing the subject chapter 9 petition because the putative debtor's filing was neither specifically authorized by state statute nor was it authorized by any government officer or other authority under state law); *In re Alleghany-Highlands Econ. Dev. Auth.*, 270 B.R. 647, 648-49 (Bankr. W.D. Va. 2001).

Here, the Association claims that S.C. Code Ann. § 6-1-10 satisfies Section 109(c)(2) and allows it to file the Petition. Specifically, this South Carolina statute regards the "[p]ower of **political subdivisions** to proceed under legislation dealing with bankruptcy or composition of indebtedness" and provides:

> The consent of the State is hereby granted to, and all appropriate powers are hereby conferred upon, any **county, municipal corporation, township, school district, drainage district or other taxing or governmental unit** organized under the laws of the State to institute any appropriate action and in any other respect to proceed under and take advantage of and avail itself of the benefits and privileges conferred, and to accept the burdens and obligations created, by any existing act of the Congress of the United States and any future enactment of the Congress of the United States relating to bankruptcy or the composition of indebtedness on the part of the counties, municipal corporations, townships, school districts, drainage districts and other taxing or governmental units or any of them.

S.C. Code Ann. § 6-1-10 (emphasis added). The Association asserts that it is a "governmental unit" as set forth in the foregoing statute because such term is defined in the Bankruptcy Code to include a "municipality" or "instrumentality" of a State. 11 U.S.C. § 101(27). Accordingly, the Association contends that because it is a municipality and therefore a governmental unit authorized under S.C. Code Ann. § 6-1-10, it may file the Petition.

As an initial matter, S.C. Code Ann. § 6-1-10 does not allow the Association to file its Petition because this statute is reserved for political subdivisions.[7] As set forth above, the

[7] S.C. Code Ann. §§ 6-1-130 and 6-1-170 each provides: "For purposes of this section, "political subdivision" includes, but is not limited to, a municipality, county, school district, special purpose district, or public service district." S.C. Code Ann. § 1-9-20 defines a "Political subdivision" to include "counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law." Likewise, S.C. Code Ann. § 3-7-110 defines a "Political subdivision" to mean "any agency or unit of this State, corporate or otherwise, which is authorized to levy taxes or empowered to cause taxes to be levied." S.C. Code Ann. § 4-10-720 defines such term to mean "a county, or a school district located wholly or partly within a county area, or both the county and a school district so located." In S.C. Code Ann. § 11-35-310, "Political subdivision means all counties, municipalities, school districts, public service or special purpose districts." S.C. Code Ann. § 11-42-30: "Political subdivision means any municipality, county, public service district, or special purpose district."

Association is not a political subdivision and in fact, does not even argue the point. Moreover, as described in detail above and directly to the Association's argument on this point, the Association is not an instrumentality or a municipality. As such, the Association is not a governmental unit as included in the list in S.C. Code Ann. § 6-1-10. *In re Ellicott* 150 B.R. at 265 (a non-profit corporation "is no more a governmental entity than is any other corporation, therefore general authorization [to file under chapter 9] given to a governmental entity ... does not apply to a non-profit corporation.") In addition, the resolutions dated January 10, 2010 passed by the Association Board are insufficient to meet the statutory requirement of an authorization by a "governmental officer or organization empowered by State law". The Association asserts no other reasons why it is specifically authorized to file its Petition, and as such, it fails the requirement under Section 109(c)(2) because it is not a political subdivision or a governmental unit and because the resolutions of the Board of the Association do not satisfy the statute.

IV. CONCLUSION

Based on the foregoing, the Association is not an eligible debtor under 11 U.S.C. § 109(c). Thus, the Association cannot seek relief under chapter 9 of the Bankruptcy Code, and its Petition must be dismissed pursuant to 11 U.S.C. § 921(c).

WHEREFORE, SCDOT respectfully requests that the Court (i) decline to enter an order for relief, (ii) dismiss the Association's Petition, (iii) dismiss this case, and (iv) grant such other and further relief as the Court deems just and proper.

SCDOT hereby reserves its rights to supplement and amend this Objection, seek discovery with respect to the same, and introduce evidence at any hearing relating to this Objection, without in any way limiting any other rights that SCDOT may now have or acquire in the future.

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Dated: July 30, 2010
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2010, a true and correct copy of the foregoing **OBJECTION BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION TO THE CHAPTER 9 PETITION AND STATEMENT OF QUALIFICATIONS OF CONNECTOR 2000 ASSOCIATION, INC. AND MOTION TO DISMISS THE PETITION** was filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing though the Court's electronic filing system. A true and correct copy was also sent via U.S. Mail to Counsel for the Putative Debtor at the address set forth below:

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