

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is executed as of _____, by and among Richland County, South Carolina (Richland County), Central Midlands Regional Transit Authority (CMRTA), and the South Carolina Department of Revenue (Department) (together, the "Parties").

RECITALS:

WHEREAS, the Optional Methods for Financing Transportation Facilities Act (the Transportation Act), codified at Title 4, Chapter 37 of the Code of Laws of South Carolina 1976, as amended, authorizes the governing body of a county to impose a sales and use tax in an amount not to exceed one percent (the Transportation Tax, sometimes commonly referred to as the Penny Tax) within its jurisdiction for a single project or for multiple projects for a specific period of time to collect a limited amount of money, *see* S.C. Code Ann. § 4-37-30(A) (Supp. 2020); and

WHEREAS, Penny Tax revenues must be used in accordance with statutory restrictions imposed by the General Assembly, namely, proceeds must be used for the types of transportation-related projects identified in the Transportation Act; and

WHEREAS, following the enactment of Ordinance No. 039-12HR (Ordinance) and a county-wide referendum, Richland County approved a Transportation Penny Tax Program effective beginning May 1, 2013, to fund construction and improvement of roadways, bicycle and pedestrian pathways, and greenways, which would also fund an expansion of the bus service, and which tax would not exceed 22 years at a maximum cost not to exceed \$1,037,900,000; and

WHEREAS, the South Carolina Supreme Court ruled in *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 304, 811 S.E.2d 758, 764 (2018), that the Department has extensive administrative oversight and enforcement responsibilities in the Transportation Act and throughout Title 12 of the South Carolina Code and that those statutory obligations confer upon the Department the authority to ensure Richland County's expenditures of Penny Tax revenues comply with the State's revenue laws; and

WHEREAS, the Supreme Court determined that a proper expenditure of Transportation Tax funds must be tethered to a specific transportation-related capital project or the administration of a specific transportation project; and

WHEREAS, following the Supreme Court's ruling, the Circuit Court entered a Temporary Injunction adopting guidelines (Guidelines) to be used to determine whether all of Richland County's and CMRTA's use of Penny Tax funds comply with South Carolina law, and authorized the Department to further audit Richland County's Penny Tax Program; and

WHEREAS, in compliance with these Court decisions, and to promote public accountability and transparency in collection and expenditure of Penny Tax revenues, DOR audited County and CMRTA expenditures of Penny Tax funds, in accordance with the Guidelines, from May 1, 2013 through May 31, 2018 (Audit Period); and

WHEREAS, on July 30, 2020, the Department issued its final audit findings for the Audit Period (Final Audit Report) to Richland County and the CMRTA and, in response, Richland County initiated a second proceeding against the Department in the South Carolina Administrative Law Court, in which it challenged the audit findings in the Department's final audit report; and

WHEREAS, the above-described litigation remains pending, both in the Court of Common Pleas captioned *Richland County, et al. vs. South Carolina Department of Revenue*, Docket No. 16-CP-40-3102 (Circuit Court Litigation), and in the South Carolina Administrative Law Court captioned *Richland County v. South Carolina Department of Revenue*, Docket No. 20-ALJ-17-0224-CC (ALC Litigation) (the Circuit Court Litigation and the ALC Litigation are collectively referred to in this Agreement as the Pending Litigation); and

WHEREAS, the Department's purpose in initiating its review and audit of the Penny Tax Program was to promote public accountability and transparency regarding the collection and expenditures of revenue generated by the Penny Tax, not to impose financial hardship on Richland County; and,

WHEREAS, from the inception, the Department's primary concern was the absence of a uniform standard applied by Richland County to determine whether its expenditure of Penny Tax revenues were spent specifically on transportation-related projects in compliance with the Transportation Act; and

WHEREAS, the Department recognizes that although the Penny Tax is paid by both residents and non-residents of Richland County who make purchases subject to sales tax in Richland County, any reimbursement of the Penny Tax Program from the Richland County general fund is made primarily from taxes collected only from Richland County residents, thereby imposing a disproportionate burden on Richland County residents for funding reimbursements of any improper Penny Tax expenditures; and

WHEREAS, throughout the audit process, Richland County has worked collaboratively and cooperatively with the Department in an effort to resolve the questions and issues raised by the Department during its review and audit of the Penny Tax Program, including working with the Department to establish the Guidelines and ensure all expenditures are compliant with the Transportation Act retroactively and in the future; and

WHEREAS, the Department's Final Audit Report contained no findings of civil or constructive fraud, self dealing, improper relationships, or civil conspiracy on the part of Richland County; and

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WHEREAS, Richland County has taken a number of significant steps to ensure that its constituents have confidence in the Penny Tax Program, including reimbursing the Penny Tax Fund for certain expenditures following the Supreme Court's decision in 2018, operating the Penny Tax Program in compliance with the Guidelines since those Guidelines were put in place, and bringing the administration of the Penny Tax Program in-house; and

WHEREAS, Richland County has demonstrated a continuing commitment to fostering and maintaining an open government and being transparent to taxpayers regarding the Penny Tax Program; and

WHEREAS, the Parties agree that there exists a genuine factual and legal dispute between the Department, Richland County, and the CMRTA regarding the categories of Penny Tax expenditures that the Department considers ineligible under the Transportation Tax and regarding the amount of money to be repaid to the Penny Tax Program resulting from such expenditures made during the Audit Period, and the Parties further agree that it is in their respective interests to reach a final resolution disposing of all issues and differences pertaining to Richland County's Transportation Penny Tax program for all periods from the inception of the Penny Tax Program through the date of the execution of this agreement (Dispute Period); and

WHEREAS, the Parties agree that this Agreement now is reasonable and desirable to avoid the ongoing cost, expense, and uncertainty of litigation and is a means for final resolution of all disputes regarding Richland County's Transportation Penny Tax program during the Dispute Period, including but not limited to the Audit Period and Pending Litigation; and

WHEREAS, the Parties wish to enter into this Agreement in order to fully and completely resolve each and every aspect of any and all disputes, claims or defenses, asserted or unasserted, known or unknown, by the Department, Richland County, and CMRTA relating to Richland County's Transportation Penny Tax Program during the Dispute Period, thereby forever closing the Dispute Period from further audit, review, determination, findings, or any other actions of any other kind or nature by the Parties;

NOW, THEREFORE, in consideration of these recitals, for the mutual benefits accruing to Richland County, CMRTA, and the Department from the execution of this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and with no admission of liability on the part of any party – each balancing the hope of gaining against the risk of losing with respect to the taxes, interest, and penalties described above, and each preferring compromise and settlement to resolve their claims, disputes and defenses relating to the Pending Litigation – the Department, Richland County, and CMRTA hereby agree as follows:

TERMS

1. RELEASES

- 1.1. Releases by Richland County. Richland County forever releases the Department from any and all past, present, or future rights, claims or demands for the Department to determine, adjust, or re-determine any category, amount, or finding relating to the Transportation Penny Tax Program during the Dispute Period, thereby forever closing this period from further claims or any other actions of any kind or nature by Richland County against the Department relating to the Transportation Penny Tax Program..
- 1.2. Releases by the CMRTA. The CMRTA forever releases the Department from any and all past, present, or future rights, claims or demands for the Department to determine, adjust, or re-determine any category, amount, or finding relating to the Transportation Penny Tax Program during the Dispute Period, thereby forever closing this period from further claims or any other actions of any kind or nature by the CMRTA against the Department relating to the Transportation Penny Tax Program.
- 1.3. Releases by the Department. The Department forever releases Richland County and the CMRTA from any and all past, present, or future rights, claims or demands in connection with the Department's determination, adjustment, or re-determination any category, amount, or finding relating to the Transportation Penny Tax Program during the Dispute Period, thereby forever closing this period from further claims or any other actions of any kind or nature by the Department against Richland County and the CMRTA relating to the Transportation Penny Tax Program.

2. AMOUNT OF PAYMENT

- 2.1. Payment Amount by Richland County. To settle the Dispute, Richland County agrees to reimburse its Penny Tax Program fund in the amount of **FIFTEEN MILLION FIVE HUNDRED THIRTY EIGHT THOUSAND TWO HUNDRED FIFTY FIVE (\$15,538,255) DOLLARS** in accordance with the terms in Paragraph 2.1.1.
 - 2.1.1. Within thirty (30) days of the date this Agreement is executed, Richland County agrees to reimburse the Penny Tax Program fund the sum of **ONE MILLION FIVE HUNDRED THIRTY-EIGHT THOUSAND TWO HUNDRED FIFTY-FIVE (\$1,538,255) DOLLARS**. Within thirty (30) days of the date this Agreement is executed, Richland County will certify to the Department by way of an affidavit from the Finance Director or County Administrator that this repayment has been made. For each of the next ten fiscal years (ending in fiscal year 2032), Richland County will annually

reimburse the Penny Tax Program fund the sum of **ONE MILLION FOUR HUNDRED THOUSAND (\$ 1,400,000) DOLLARS**. Richland County will certify annually to the Department in writing signed by Richland County's Finance Director or County Administrator that the annual reimbursement payments have been made; this certification must be made no later than thirty (30) days after the close of Richland County's fiscal year. **While Richland County will make every effort to follow the payment schedule prescribed above, both Parties recognize that financial circumstances may arise, when taken in combination with the annual payment of \$1,400,000, would negatively impact Richland County's debt limit and/or credit rating. If such should occur, Richland County may elect to make a lesser payment or no payment in that year, with the understanding that the amount not paid will either be added to a future payment or additional time will be added to the payment schedule to accommodate that payment. However, in no event will any additional time added to the payment schedule extend beyond 2035, which is when the Richland County Transportation Program is scheduled to expire.**

- 2.1.2. For purposes of this settlement and for all future periods in which the Richland County Transportation Program is in existence, the Parties agree that Richland County may, at its discretion, sell mitigation credits from the Mill Creek Mitigation Bank to third parties for projects unrelated to the Richland County Penny Tax Transportation Program. When such a sale of mitigation credits occurs, Richland County agrees to transfer the amount of that sale that equals the cost basis for those credits to the Richland County Penny Tax Transportation Fund. However, with respect to the profit, if any, realized upon the sale of such mitigation credits, that profit may be paid to the General Fund and then utilized at the County's discretion.
- 2.2. Payment Amount by the CMRTA. To settle this dispute, including the Audit Period and Pending Litigation, the CMRTA agrees to reallocate the Penny Tax revenues it received during the Audit Period to those items allowed by the Transportation Act, and to reallocate non-Penny Tax funds to pay for those ineligible expenses that were previously paid with Penny Tax funds during the Audit Period. CMRTA agrees to reallocate a total of **ONE MILLION THREE HUNDRED NINETY FIVE THOUSAND ONE HUNDRED SIXTY THREE (\$1,395,163) DOLLARS**, which represents the full amount of Penny Tax funds that the CMRTA spent on ineligible expenditures during the Audit Period. Within thirty (30) days of the date this Agreement is executed, the CMRTA will certify to the Department in writing that this reimbursement has been made.
- 2.3. The Parties agree that this Agreement does not require Richland County and CMRTA to make payment to the Department or to any other third party. With respect to

Richland County, the Parties agree that the payment of the amounts covered by this Agreement represent a repayment to or reimbursement of the Richland County Penny Tax fund, with those amounts being transferred from Richland County's general fund or other funds to the Penny Tax fund. With respect to CMRTA, the Parties agree that the payment of the amounts covered by this Agreement represents a reallocation of CMRTA funds; in other words, any expenditures identified in the audit as not in compliance with the Guidelines must be paid with non-Penny Tax funds.

3. **GUIDELINES AND STANDARDS**

- 3.1. The Parties agree the Guidelines, as amended contemporaneously with this Agreement, a copy of which is attached hereto as Exhibit A, shall govern the expenditure of Transportation Tax funds by Richland County and the CMRTA for the duration of the current Richland County Penny Tax Program and any future Transportation Tax program, unless or until there is a change in South Carolina law governing such expenditures. A change in South Carolina law refers to legislation by the South Carolina General Assembly or a finally decided South Carolina appellate court decision.
- 3.2. The Department agrees to issue a Revenue Ruling regarding the expenditure of Transportation Tax revenues within twelve (12) months of the execution of this Agreement. The substance of the Revenue Ruling will be consistent with the amended Guidelines attached hereto and will apply to all counties and political subdivisions that receive Transportation Tax revenues. The Department further agrees that Richland County is an "interested party" as described in Revenue Procedure 09-3, Section V(A)(4), and as such, the Department agrees to notify Richland County through its County Attorney of the draft Revenue Ruling such that Richland County can make comments and/or request a conference for the purpose of making its comments known to the Department.
- 3.3. Nothing in this Agreement shall be construed to limit the rights of Richland County or CMRTA to seek judicial or administrative review of any future audit findings for periods beginning after the execution of this document by the Department. Richland County and CMRTA specifically reserve their right to appeal any dispute with the Department regarding the expenditure of Transportation Tax revenues in accordance with the Revenue Procedures Act or as otherwise provided by law.

4. **OPERATING EXPENSES:**

- 4.1. Central Midlands Regional Transit Authority. The Department agrees the CMRTA may be funded by Penny Tax revenues in accordance with Ordinance Number 039-12HR and referendum, and that the use of the Penny Tax revenues for operating the CMRTA system is an eligible cost as provided in the Guidelines, unless or until a court of competent jurisdiction rules otherwise.

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- 4.2. The Department further agrees not to hold Richland County legally liable for any improperly paid expenditures made by the CMRTA, past or future. As part of its annual audit, the CMRTA agrees that its outside independent auditor will findings in its audit certifying whether the CMRTA's expenditures of Penny Tax funds are compliant with all laws, regulations, and Department policy documents governing such. The CMRTA further agrees to furnish its annual audit report and Management Letter to Richland County. Nothing in this Agreement shall be construed to impose a duty on Richland County to ensure correction by the CMRTA of any issue identified in such audit report. Upon receipt of the audit report and Management Letter, Richland County may, in its discretion, forward the audit report to the Department for further action that the Department deems appropriate.
- 4.3. Richland County Transportation Department. The Department agrees that the Guidelines permit Richland County to use Penny Tax revenues to fund the operating expenses of the Richland County Transportation Department, provided those expenditures are tethered to a specific transportation-related capital project or the administration of a specific transportation project as explained in Sections A and B of the Guidelines, as amended herein. The Department also agrees that such eligible operating expenses incurred with respect to multiple transportation projects may be proportionally allocated among those projects based on a reasonable and appropriate allocation method.

5. **DISMISSAL OF PENDING LITIGATION**

- 5.1. The Parties agree the Circuit Court Litigation captioned *Richland County, et al. vs. South Carolina Department of Revenue*, Docket No. 16-CP-40-3102 shall be dismissed with prejudice and forever ended.
- 5.2. The Parties agree the ALC Litigation captioned *Richland County v. South Carolina Department of Revenue*, Docket No. 20-ALJ-17-0224-CC, shall be dismissed with prejudice and forever ended.
- 5.3. Upon execution of this Agreement, the Parties authorize and direct their counsel to execute and file such documents and papers as necessary to dismiss the Pending Litigation with prejudice.

6. **NO ADMISSION OF LIABILITY**

- 6.1. The Parties agree this Agreement and the terms within the Agreement result from a compromise of disputed claims and that payments made in settlement may not be construed as an admission of liability by either Party and that each Party denies liability of any nature or kind.
- 6.2. The Parties understand and agree that this Agreement and its terms shall not be

admissible as evidence in nor used in any manner with respect to any ongoing or future litigation that may ensue between the Parties, with the exception of any action brought to enforce the terms of this Agreement.

7. **OTHER MATTERS**

- 7.1. Terms Understood. Each of the Parties declares that the terms of this Agreement have been read, understood, and voluntarily accepted by them; that they have had ample opportunity to review the terms with their respective legal, financial, and tax advisors; that they have been provided the opportunity to review as they deem necessary; and that they, with their advisors, have signed this Agreement in reliance upon their own (or their advisors') review, independent investigation, and inquiry.
- 7.2. Jointly Drafted. The Parties have participated jointly in the negotiation and drafting of this Agreement and should any ambiguity or question of intent or interpretation arise, no presumption or burden of proof shall arise favoring or disfavoring any Party by the authorship of any portion of this Agreement.
- 7.3. Conciliatory Further Acts. The Parties shall sign and deliver to the other Parties such further instruments, contracts, forms and other documents and shall perform such further acts as may be necessary or desirable to carry out, complete, and perform all the Parties' covenants and obligations under this Settlement Agreement.
- 7.4. Recitals Incorporated. The recitals set forth initially are incorporated into this Agreement and this Agreement shall be interpreted and construed with reference to the recitals.
- 7.5. Cost Distribution. The Parties agree that each Party is to bear its own fees and costs, including attorneys' fees and costs, incurred in the negotiation of this Agreement.
- 7.6. Complete Document. This Agreement supersedes all prior agreements and understandings between the Parties relating to the subject and is intended by the Parties as a complete and exclusive statement thereof.
- 7.7. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the Parties, and their respective heirs, legal representatives, successors, and assigns. For this paragraph, a successor to the Department shall include any successor agency or agencies or successor governmental entity or entities authorized by the South Carolina General Assembly to administer, assess, and collect taxes and revenues.
- 7.8. Complete Defense. This Agreement may be pleaded as a full and complete defense to any action, demand, claim, suit or other proceeding which may be instituted, prosecuted or attempted for, upon, or regarding, the claims released by this Agreement.
- 7.9. Severable. Each provision of this Agreement is severable such that if any court of

competent jurisdiction determines that any provision of this Agreement is illegal, invalid, or unenforceable, the remainder of this Agreement will remain in force.

- 7.10. No Modification. This Agreement may not be changed, modified, altered, or amended except by an agreement in writing signed by the Party against whom enforcement of such change, modification, alteration or amendment is sought.
- 7.11. Choice of Law. The validity, construction, interpretation, and enforceability of this Agreement are governed by the laws of the State of South Carolina.
- 7.12. Counterparts; Facsimile. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute the same instrument. Fax or PDF signatures are to be treated as original signatures for this Agreement. This Agreement shall not be effective unless it is executed by each of the Parties.
- 7.13. Warranties. Each party represents and warrants that it has the full and complete legal authority to enter into this Agreement, that the individuals executing this Agreement have the legal authority to do so, and that this Agreement shall be binding and enforceable in accordance with its terms when duly executed by both Parties.
- 7.14. Revenue Procedures Act. In accordance with S.C. Code Ann. § 12-60-40, this Agreement represents both Richland County's and the CMRTA's written waiver of any rights it may have under the South Carolina Revenue Procedures Act in connection with the Final Audit Report or the Dispute Period, including but not limited to the right to obtain a written Department Determination (as required under S.C. Code Ann. § 12-60-450(E)) relating to any claims or defenses raised by the Parties in connection with the Final Audit Report or the Dispute Period.
- 7.15. Failure to Comply. Should any Party violate the terms of this Agreement, a compliant Party may seek resolution by filing a complaint in the South Carolina Circuit Court in Richland County, South Carolina.

8. NOTICES

- 8.1. All notices or other communications required or permitted to be given under this Settlement Agreement shall be in writing and shall be sent by United States Postal Service first class mail:
- 8.1.1. As to Richland County:

Richland County Administrator
Richland County Administration Building
2020 Hampton Street, Suite 4069
P.O. Box 192

Columbia, South Carolina 29204

8.1.2. As to the CMRTA:

Executive Director
Central Midlands Regional Transit Authority (COMET)
3613 Lucius Road
Columbia, South Carolina 29201

8.1.3. As to the Department:

Chief Legal Officer
Office of General Counsel
South Carolina Department of Revenue
P.O. Box 125
Columbia, South Carolina 29214
803-898-5130

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the ____ day of _____, 2021.

RICHLAND COUNTY

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Leonardo Brown
SIGNATURE

By: W. Hartley Powell
SIGNATURE

Leonardo Brown
PRINT NAME

W. Hartley Powell
PRINT NAME

County Administrator
TITLE

Director
TITLE

7/20/2021
DATE

7/20/21
DATE

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**CENTRAL MIDLANDS REGIONAL
TRANSIT AUTHORITY**

By: _____
SIGNATURE

PRINT NAME

TITLE

DATE

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