IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

CENTER FOR A SUSTAINABLE COAST and JEFF KILGORE,	)	
Plaintiffs,	)	*CIVIL ACTION NO. CE21-01136* JUDGE LANE
v.	)	
GLYNN COUNTY, GEORGIA, a political subdivision of the State of Georgia and COMMISSIONERS, SAMMY TOSTENSEN, CAP FENDIG, WAYNE NEAL, BILL BRUNSON, ALLEN BOOKER, DAVID O'QUINN, WALTER RAFOLKSI, Individually, in their official capacities, and CHURCH WARDENS AND VESTRYMEN OF THE EPISCOPAL CHURCH OF THE TOWN OF FEDERICA, CALLED CHRIST CHURCH.	)	
Defendants.	)	

GLYNN COUNTY'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND RESPONSE TO PLAINTIFFS' REQUEST FOR A TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION

COME NOW, Glynn County, Georgia and Commissioners Sammy Tostensen, Cap Fendig, Wayne Neal, Bill Brunson, Allen Booker, David O'Quinn and Walter Rafolksi, sued in their official capacities (collectively "Glynn County"), and file this Motion to Dismiss Plaintiffs' Second Amended Complaint, pursuant to O.C.G.A. § 9-11-12(b)(6), and this response to Plaintiffs' request for a temporary restraining order and interlocutory injunction, and respectfully show this Court the following:

Introduction

On November 5, 2021, Plaintiffs filed their Second Amended Complaint for Declaratory Judgment, Injunctive Relief, and Writ of Mandamus ("Second Amended Complaint") against Glynn County and Christ Church. Plaintiff Center for a Sustainable Coast ("CSC") is an organization that claims it is dedicated to "ensuring the responsible use, protection, conservation of coastal Georgia's natural, scenic, historic, and economic resources." *Second Amended Complaint*, ¶ 1. Jeff Kilgore ("Kilgore") is the second named plaintiff and claims to be a member of CSC and pleads that he "has an interest in ensuring that the mission of the Plaintiff CSC is carried out." *Id.* The only other allegation in the Second Amended Complaint that relates to standing to bring this action is the claim that Kilgore is a resident and taxpayer of Glynn County "objects to the use of his tax payments to support a religious institution . . ." *Id.* at ¶ 2. Plaintiffs' claims of standing related to Kilgore's alleged enjoyment of the natural beauty and historic values of the road-improvement project area and the surrounding lands for walking around and reflective contemplation are no longer part of Plaintiffs' pleading. *See id.*

Plaintiffs have now filed three separate complaints in this short-lived lawsuit. The third complaint – which was filed after this Court denied Plaintiffs' request for an injunction – asserts a new allegation that Glynn County's road-improvement project violates the U.S. Constitution's Establishment Clause, as well as Georgia's Establishment Clause found in Art. 1, § 2, ¶ VII of the Georgia Constitution. According to Count 1of Plaintiffs' Second Amended Complaint, the property exchange between Christ Church and Glynn County,[1] as well as the road-improvement project

[1]Of course, Georgia law clearly allows county governments to exchange property and use private funds for roadway projects. See O.C.G.A. §§ 32-3-1, 33-3-3, and 32-4-41.

constitutes impermissible financial aid to a religious institution. *Second Amended Complaint*, ¶¶ 7-38.

In Count 2, Plaintiffs re-allege their previously rejected argument that Glynn County's property exchange with Christ Church violated O.C.G.A. § 36-9-3(a). *See Second Amended Complaint*, ¶¶ 39-66; *Amended Complaint*, ¶¶ 48-52.

Finally, Plaintiffs again claim that – pursuant to the Glynn County Tree Ordinance – Glynn County has a non-discretionary obligation to nominate and appoint members to serve on the Tree Board. Count 3 seeks a writ of mandamus requiring "Defendant County Commissioners to nominate and appoint seven members to the Glynn County Tree Board." *Second Amended Complaint*, at 14.

Plaintiffs' suit seeks declaratory relief (Count 1 and Count 2) and a writ of mandamus (Count 3). While not asserted as a separate cause of action, Plaintiffs plead entitlement to "injunctive relief to prevent further work on the Frederica Road Realignment Project during the pendency of this case" and to an "award [of] attorney's fees and litigation expenses to Plaintiffs under 42 U.S.C. § 1988." *Second Amended Complaint*, at 14.

As Plaintiffs previously alleged, on July 16, 2020, Glynn County and Christ Church entered into a Memorandum of Understanding and Real Property Exchange ("MOU") for the exchange of property allowing for the road-improvement project. *See Amended Complaint*, ¶¶ 9-10; *Complaint*, Ex. B, attached thereto. A certified copy of the July 16, 2020 minutes of the meeting of the Board of Commissioners ("BOC") is attached as *Ex. A.* These minutes show that Glynn County approved the MOU ("Agreement") "pertaining to realignment of a portion of Frederica Road." According to the Agreement, which was executed in 2020, the purpose of the property exchange was "to accomplish the proposed realignment of Frederica Road" for safety and historical preservation

reasons. *Ex. B*. Thus, Glynn County approved the road-improvement project on July 16, 2020 when it authorized the property exchange under the terms of the Agreement. Thereafter, Glynn County approved an award for the realignment of the road to the lowest bidder at its June 3, 2021 meeting. A certified copy of the June 3, 2021 minutes of BOC's meeting reflecting this decision is attached as *Ex. C.* Plaintiffs now plead that "Christ Church and Glynn County exchanged parcels" in furtherance of the project on July 6, 2021. *Second Amended Complaint*, ¶ 16. Thus, the facts and Plaintiffs' allegations make clear that Plaintiffs are complaining about agreements and acts that have occurred long ago.

Notably, Plaintiffs do not plead any entitlement to a temporary restraining order ("TRO") or even request one in their Second Amended Complaint. In fact, Plaintiffs' newest pleading is absolutely silent as to the elements required to be satisfied in order to obtain a TRO or injunctive relief.

In essence, Plaintiffs are seeking to undo Glynn County's 2020 decision to engage in a property exchange with Christ Church and Glynn County's 2020 discretionary decision to approve the road project. This Court has already rejected Plaintiffs' request for injunctive relief as to their challenge to the property exchange and their claims related to the Tree Ordinance. The only new claim asserted in the Second Amended Complaint relates to Plaintiffs' theory that there has been a violation of the Establishment Clause under both the federal and state constitutions. Even if this Court were to consider the merits of this new claim – which it should not given the jurisdictional and immunity defenses discussed below – this recently added cause of action should be rejected by this Court, as Plaintiffs cannot, as a matter of law, prevail on any such claim.

Standard of Review

Under O.C.G.A. § 9-11-12(b)(6), a complaint is due to be dismissed if it "[f]ail[s] to state a claim upon which relief can be granted." O.C.G.A. § 9-11-12(b)(6). Courts grant a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) when the claimant fails to show it is entitled to some form of legal relief under the allegations in the complaint; and the movant establishes that the plaintiff will not be able to introduce evidence within the framework of the complaint sufficient to state a cause of action on which relief can be granted. *See Norman v. Xytex Corp*., 310 Ga. 127, 130-31 (2020); *Collins v. Athens Orthopedic Clinic, P.A.*, 307 Ga. 555, 560 (2019); *cf. Rossville Fed. Sav. & Loan Ass'n v. Ins. Co. of N. Am.*, 121 Ga. App. 435, 438-39 (1970) (A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.).

Argument and Citation of Authority

I. Plaintiffs lack standing to bring this action and, thus, this Court is without jurisdiction to hear this matter.

This issue was extensively briefed and argued to this Court by Defendants and those arguments are adopted as if set forth fully herein. However, there are also additional reasons that Plaintiffs lack standing as to their newly asserted Establishment Clause claims. As this Court knows, the determination of standing is a threshold issue that must be addressed first, prior to consideration of the merits of the claims asserted. *See New Cingular Wireless PCS, LLC v. Ga. Dep't of Rev.*, 303 Ga. 468, 470 (2018) (explaining that standing must be addressed prior to considering the merits of a case); *Sherman v. City of Atlanta*, 293 Ga. 169, 172 (2013) ("[S]tanding is in essence the question

of whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues, and litigants must establish their standing to raise issues before they are entitled to have a court adjudicate those issues."). In addition, "[a] plaintiff must demonstrate standing separately for each form of relief sought." *Center for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App. 762, 765 (2013)(citations and punctuation omitted). This is because "the question of standing is a jurisdictional issue." *New Cingular Wireless PCS, LLC v. Ga. Dept. of Revenue*, 303 Ga. 468, 470 (2018) (citation omitted).

Plaintiffs only allegations related to standing are found in paragraph 1 and 2 of the Second Amended Complaint wherein it is alleged that Kilgore is a member of CSC and is a resident and taxpayer in Glynn County. It is alleged that Kilgore "objects to the use of his tax payments to support a religious institution . . ." *Second Amended Complaint*, ¶ 2. In *Williams v. DeKalb County*, 308 Ga. 265 (2020), the Georgia Supreme Court recently addressed standing in the context of a citizen's complaint regarding the expenditure of his tax dollars. In *Williams* the issue was an objection to an ordinance allowing for pay raises for commissioners. The plaintiff in *Williams* brought an action for mandamus, declaratory and injunctive relief based on the theory that the pay increases violated the state constitution.

In analyzing whether the plaintiff's status as a citizen and taxpayer conferred standing to bring a declaratory judgment action, the Supreme Court noted that the plaintiff "does not allege or argue that he faces any uncertainty or insecurity as to his own future conduct." *Id.* at 271. The Court recognized that "without any such uncertainty or insecurity, a declaratory judgment is merely advisory and dismissal of a claim for such relief is required. *Id.* (*citing Walker v. Owens*, 298 Ga. 516, 518-519 (2016) ("[W]here the party seeking declaratory judgment does not show it is in a

position of uncertainty as to an alleged right, dismissal of the declaratory judgment action is proper; otherwise, the trial court will be issuing an advisory opinion, and the Declaratory Judgment Act makes no provision for a judgment that would be advisory")). Because the plaintiff "cited no authority authorizing a declaratory judgment for th[e] type of claim [asserted]," the Supreme Court held that the trial court did not err in dismissing his claims for declaratory relief, because there was no standing to bring such claims. *Id.* The same result should be reached in this case, as Plaintiffs have not alleged any uncertainty or insecurity as to future conduct that would support their declaratory judgment claims.

As to Plaintiffs' claim for injunctive relief – which is not asserted as a separate cause of action but only included as a "throw in" under their prayer for relief – *Williams* further illustrates Plaintiffs' lack of standing to assert this claim. Like in *Williams*, because Kilgore in this case "did not allege in his complaint that he suffered special damages not shared by the general public," in order to survive a motion to dismiss, "he must demonstrate that his status as a citizen or as a taxpayer confers standing to seek an injunction against the members of the governing authority in their individual capacities." *Id.* at 272. Here, Plaintiffs have not sued the commissioners in their individual capacities. In this case, Plaintiffs have sued only Glynn County. By bringing suit against the individual commissioners in their official capacities – but not their individual capacities – Plaintiffs' action is only against Glynn County.[2] Thus, there is no standing to sue Glynn County for injunctive relief.

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[2]"A suit against members of a county board of commissioners in their official capacities – like in the instant action – is tantamount to a suit against the county itself . . . As such, the Board of Commissioners in this case may invoke the protection of sovereign immunity." *Bd. of Comm'rs of Glynn Cty. v. Johnson,* 311 Ga. App. 867, 868–69 (2011).

Even if Plaintiffs had sued the individual commissioners in their individual capacities, *Williams* makes clear that citizen and taxpayer standing would be lacking. Like in *Williams*, in this case, Plaintiffs have argued that standing is conferred by O.C.G.A. § 9-6-24. This statute states: "Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced." *Id*. But this statute is only applicable in situations where a plaintiff seeks to enforce a public duty required by statute, which is not the situation in this case. *See Gaddy v. Georgia Dept. of Revenue*, 301 Ga. 552, 560 (2017) (O.C.G.A. § 9-6-24 is inapplicable because the plaintiff does not seek to enforce any statute, but rather seeks to block enforcement of a statute and O.C.G.A. § 9-6-24 "does not grant standing to challenge the validity of a public duty authorized by statute . . .").

In *Williams*, like in *Gaddy*, the Supreme Court held that O.C.G.A. § 9-6-24 did not confer citizen standing because the plaintiff – in challenging the legality of the salary ordinance – was not seeking to enforce a public duty conferred by statute. *Williams*, 308 Ga. at 272. Again, as to the Establishment Clause issue raised in the Second Amended Complaint, Plaintiffs are not claiming that some public duty required by statute needs to be acted upon. Rather, Plaintiffs are seeking to block completion of a road project, which counties are expressly authorized by statute to perform.[3] O.C.G.A. § 9-6-24 does not confer standing to challenge the validity of a road-improvement project.

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[3]Georgia statutory law provides counties with exclusive jurisdiction over directing and controlling its property, including "the establishing, altering, or abolishing of all roads." *See* O.C.G.A. §§ 36-5-22.1(a)(3), 36-9-2. *See also* O.C.G.A. § 32-4-41(1) ("A county shall plan, designate, improve, manage, control, construct, and maintain an adequate county road system and shall have control of an responsibility for all construction, maintenance, or other work related to the county road system.").

Williams further makes clear that taxpayer standing does not exist to save this action. In order to bring an injunctive relief claim based on taxpayer standing, Plaintiffs would have needed to sue the individual responsible for making the funding decision for the road-improvement project. It is insufficient to simply sue Glynn County for the relief sought. Nor would it be sufficient to sue even the commissioners in their individual capacities. In *Williams*, the plaintiff sued the individual commissioners and claimed taxpayer standing to bring their claims contesting the approved salary increase for the commissioners. The Georgia Supreme Court noted that the plaintiff "must also demonstrate that the injunctive relief he seeks from the parties he has sued is capable of being provided by those parties and would actually prevent the act he seeks to prevent." *Id.* at 273. The Supreme Court cautioned that the plaintiff was "not simply suing the members of the county governing authority in their individual capacities, he [wa]s suing them for specific, allegedly unconstitutional acts done in their official capacities." *Id.* Because the purpose of an injunction pursuant to O.C.G.A. § 9-5-1 is to restrain "a threatened ... act of a private individual ... which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law[,]", the Supreme Court held that the plaintiff was required to show "that *the person* he has sued is the one committing the act at issue, which, in this case, is the allegedly unlawful expenditure of public funds for a salary increase." *Id.* (emphasis supplied)(*citing Peacock v. Georgia Municipal Assn., Inc.*, 247 Ga. 740, 743(1981) ("In a suit to enjoin the expenditure of public funds, the entity or official appropriating the funds is an indispensable party.")).

The Supreme Court found that the plaintiff had failed to meet this burden and had failed to adequately allege standing in this regard.

> [The plaintiff's] second amended complaint shows that he seeks to enjoin members

> of the governing authority from performing a specific action, one he describes as the 'unlawful exaction of taxpayer money from the county treasury in regards to the compensation ordinance.' However, [the plaintiff] has not alleged that any of the commissioners are responsible for 'exacting' or expending those funds. He alleges that the commissioners exercised their legislative authority in passing the ordinance increasing their salaries; he has not alleged that, after the passage of the ordinance, the commissioners performed or could forbear any official acts pertaining to the execution of the ordinance or the appropriation or disbursement of public funds they receive as salaries. Consequently, the trial court did not err in dismissing [the plaintiff's] claim for injunctive relief against the commissioners.

In the present case, Plaintiffs have sued only Glynn County and they have certainly not brought any action against any individual allegedly responsible for appropriating or disbursing funds for the road-improvement project. Thus, they lack taxpayer standing to bring the claims asserted.

Another reason there is no taxpayer standing to bring the claims asserted is because Plaintiffs cannot show that Kilgore, as an alleged taxpayer, has or will be damaged by the alleged unconstitutionality of the expenditure of funds on the road project. To reiterate, it is merely alleged that Kilgore is a taxpayer who objects to "the use of his tax payments to support a religious institution . . ." *Second Amended Complaint*, ¶ 2. It is not alleged that any taxpayer funds from the public revenue are being expended to fund the road improvement project. *See generally Second Amended Complaint.* The absence of any such allegation is not surprising because no taxpayer funds from the public revenue are being used to fund the road-realignment portion of the project. *Aff. of D. Deloach*, *Ex. D*, attached hereto. As reflected in the Agreement, the entire project related to the road realignment is being funded by Christ Church. *Id.* The small portion of the road-improvement project being funded by Glynn County involves a separate intersection north of the road-realignment portion of the project and is in no way related to the property exchange or realignment of the road. *Id.* In fact, the work on this separate intersection is being undertaken contemporaneously with the

road realignment project as a matter of cost-savings and efficiency. *Id.* This separate intersection improvement was not requested by Christ Church and in no way benefits Christ Church more than any other pedestrian or motorist using the intersection. No taxpayer money from the public revenue is being used for the realignment work on the road, which is entirely being funded by Christ Church. *Id*.

Gaddy v. Georgia Dept. of Revenue, 301 Ga. 552 (2017), includes a lengthy and insightful discussion of taxpayer standing in the context of an Establishment Clause challenge to the constitutionality of qualified education tax credits. The challenged tax credit program ("Program") allowed individuals and business entities to receive a Georgia income tax credit for donations made to approved not-for-profit student scholarship organizations ("SSOs"). Like in this case, the plaintiffs in *Gaddy* claimed the government action amounted to a violation of our State's Establishment Clause. The plaintiffs alleged that the Program takes money from the state treasury in the form of dollar-for-dollar tax credits that would otherwise be paid to the State in taxes, and since a significant portion of the scholarships awarded by the SSOs goes to religious-based schools, the Program takes funds from the State treasury to aid religious schools in violation of the Establishment Clause. The Georgia Supreme Court ultimately held that the plaintiffs lacked taxpayer (and citizen) standing to bring the action.

First, the Supreme Court rejected the "purely speculative" notion that the plaintiffs would necessarily incur an increased tax burden because of the tax credits that are received by other citizens that are giving to religious-based schools. *Id.* at 555-556. Even if Plaintiffs in this case had alleged something similar – which they have not – any such claim would be too contingent and speculative to support taxpayer standing. Next, the Supreme Court "rejected the assertion that plaintiffs have

standing because these tax credits actually amount to unconstitutional expenditures of tax revenues or public funds." *Id.* at 556. The Supreme Court reasoned that the funds expended on the SSOs were private funds and the Program actually required that only private funds be used. *Id.* Moreover, the Supreme Court recognized that the plaintiffs "do not allege, and cannot demonstrate, that the Program's tax credits represent money appropriated from the state treasury." *Id.* at 557. Here, Plaintiffs do not allege taxpayer standing based on the expenditure of public funds on the road realignment project. Again, the realignment portion of the road project is entirely funded by Christ Church.

The Supreme Court in *Gaddy* also rejected the plaintiffs argument that public funds were illegally expended "indirectly" to administer the Program in that time and resources were used to process the filings for tax credits. *Id.* at 558. This is an argument that Plaintiffs in this case make: "Glynn County provided other financial aid to Christ Church in shifting Frederica Road away from the Church, including time and resources spent by County officials to undertake the Frederica Road Realignment Project." *Second Amended Complaint*, ¶ 26. This argument should be rejected, as it was in *Gaddy*. *Id.* (*citing City of East Point v. Weathers*, 218 Ga. 133, 137 (1962)).

Finally, the Supreme Court in Gaddy rejected the plaintiffs' argument that taxpayer standing was conferred based on the broad language contained in Georgia's Establishment Clause that prohibits the taking of money from the public treasury either "directly or indirectly" for the aid of religious institutions. *See* Ga. Const. of 1983, Art. I, Sec. II, Par. VII. Ultimately, the Supreme Court concluded that:

> Plaintiffs' complaint fails to demonstrate that plaintiffs are injured by the Program by virtue of their status as taxpayers. Consequently, plaintiffs' taxpayer status fails to demonstrate a special injury to their rights so as to create standing to challenge the

Program.

The same result should be reached here, especially since Plaintiffs have not alleged any specific taxpayer injury sustained as a result of Glynn County undertaking the road realignment project.

II. Sovereign immunity bars Plaintiffs' claims for declaratory relief and for injunctive relief.

Plaintiffs allege that sovereign immunity is waived for their declaratory and injunctive relief claims pursuant to Ga. Const. of 1983, Art. I, Sec. II, Par. V. *Second Amended Complaint*, ¶¶ 38, 63. The relevant amendment provides:

> Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment. Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.

Ga. Const. of 1983, Art. I, Sec. 2, Para V (b) (1) (amended by Ga. L. 2020, p. 917, § 1). It is true that as of January 1, 2021, sovereign immunity is waived for actions seeking declaratory relief from acts of the state. "However, the waiver applies only to acts which occur on or after January 1, 2021." *Brantley County Development Partners, LLC v. Brantley County,* 5:19-cv-109, 2021 WL 5034835 (S.D. Ga. Sep. 24, 2021)(*citing Donaldson v. Dep't of Transp.*, 262 Ga. 49, 52 (1992) ("Under Georgia law, a waiver of sovereign immunity occurs at the time that the cause of action arises.")). This action concerns acts/decisions occurring before January 1, 2021, so the waiver does not apply. Specifically, the Agreement to exchange property and undertake the road project occurred in 2020. *See Exs. A & B*. Thus, Glynn County enjoys immunity from any claim by Plaintiffs for declaratory

or injunctive relief. *See Bd. of Commrs. of Glynn County v. Johnson*, 311 Ga. App. 867-68 (2011) (county commissioners are entitled to sovereign immunity in suits against them in their official capacities).

III. Plaintiffs are not entitled to a second application for an injunction after having their previous application denied.

"Generally, where an application for injunction is denied, a second application should not be granted unless based upon grounds which were unknown to the applicant at the time of the first application, and which could not, by the exercise of ordinary diligence, have been discovered." *See Stone Man, Inc. v. Green*, 263 Ga. 470, 472 (1993)(*quoting Cook v. Huckabee Transport Corp.*, 215 Ga. 9, 14 (1959)). Here, Plaintiffs are largely seeking the exact same relief previously denied by this Court, including an injunction based on alleged inequities in the property exchange, wetlands issues, and tree issues. The only new claim asserted by Plaintiffs relates to their Establishment Clause challenges under our federal and state constitutions. However, these challenges could have been brought and heard at the first injunction hearing and could have been included in either Plaintiffs' original complaint or first amended complaint. The facts supposedly supporting this newly added claim were not "unknown" to Plaintiffs. As such, Plaintiffs are not entitled to a second bite at the proverbial apple and their request for injunctive relief must be denied.

IV. Plaintiffs' request for declaratory relief fails as a matter of law because it seeks to adjudge past conduct.

"The State Declaratory Judgment Act gives superior courts the power to declare rights and other legal relations of any interested party in 'cases of actual controversy' under OCGA § 9–4–2(a) and 'in any civil case in which it appears to the court that the ends of justice require that the

declaration should be made.' OCGA § 9–4–2(b)." *Leitch v. Fleming,* 291 Ga. 669, 670 (2012). The Declaratory Judgment Act is designed "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *See* O.C.G.A. § 9–4–1. "The proper scope of declaratory judgment is to adjudge those rights among parties upon which their *future conduct* depends. " *SJN Properties, LLC v. Fulton Cty. Bd. of Assessors*, 296 Ga. 793, 802 (2015) (*emphasis supplied*). Such relief is authorized when there are "circumstances showing [a] necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some *future act or conduct*, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest." *Morgan v. Guaranty National Companies*, 268 Ga. 343-44 (1997) (*emphasis supplied*); *see also Porter v. Houghton*, 273 Ga. 407, 408 (2001). A declaratory judgment action cannot serve as a vehicle to declare the legality of past conduct. *SJN Properties, LLC*, *supra*.

In this case, Plaintiffs seek to invalidate a property exchange that has already occurred and the 2020 approval of a road project, which will soon be completed. In other words, Plaintiffs seek to have this Court invalidate past action. This is precisely the type of past conduct that cannot serve as a basis for a declaratory judgment action. *See SJN Properties, LLC*, *supra*. Thus, even in the absence of the many other legal defenses to this action, Plaintiffs' claim for declaratory relief would be subject to dismissal.

V. Even if this Court were to reach the merits of Plaintiffs' Establishment Clause claims, they would fail as a matter of law.

A. Federal Establishment Clause Claim

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In so stating, "the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). Incorporated through the Due Process Clause of the Fourteenth Amendment, the First Amendment "applies to state and municipal governments, state-created entities, and state and municipal employees." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268 (11th Cir. 2004) (citations omitted). "[T]he Establishment Clause was intended to afford protection" against "the three main evils" of "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (quotation and citation omitted). Still, "[i]n every Establishment Clause case, [the court] must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the [Supreme] Court has so often noted, total separation of the two is not possible." *Lynch v. Donnelly*, 465 U.S. 668, 672, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *see also Van Orden v. Perry*, 545 U.S. 677, 690, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion) (explaining in a case where a Ten Commandments monument had been in place for forty years on government property with other monuments and historic markers that "[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause") (citations omitted).

"The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application." *Van Orden,* at 678, 125 S.Ct. 2854. Thus, "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003); *see also Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320, 1323 (11th Cir. 2006) ("Knowledge of the particular facts and specific circumstances is essential to a determination of whether the governmental acts in question are religiously neutral.").

In *Lemon*, the Supreme Court enunciated the three part test which is the controlling standard for Establishment Clause jurisprudence: "First, the [government activity] must have a secular ... purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;" and third, "the [government activity] must not foster an excessive government entanglement with religion." 403 U.S. at 612–13, 91 S.Ct. 2105 (quotation and citations omitted). The factors used to assess the effect of government action are similar to those used to assess whether entanglement is excessive. *Agostini v. Felton*, 521 U.S. 203, 232–33, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Nonetheless, "while the Court has folded its traditional 'excessive entanglement' inquiry into its 'primary effect' analysis, the substance of its Establishment Clause jurisprudence remains fundamentally unaltered." *Holloman*, 370 F.3d at 1285; *see also McCreary County v. ACLU*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (reaffirming validity of *Lemon* test and not citing *Agostini*).

Lemon's purpose prong is viewed objectively, taking into account "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862, 125 S.Ct. 2722 (quotations and citations omitted). This

consideration should include "the implementation of government action," knowledge about "the specific sequence of events" leading to the action, and "the history and context of the community and forum in which" the action occurs. *Id.* at 866, 125 S.Ct. 2722 (reviewing cases). Where a predominantly religious purpose is found, it is often because "the government action itself bespoke the purpose," leaving the court to draw the "commonsense conclusion" from the "openly available data" that the purpose was religious. *Id.* at 862–63, 125 S.Ct. 2722 (citations omitted). Thus, although a government official's "stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864, 125 S.Ct. 2722.

Application of the *Lemon* test's purpose prong in this case reveals that Glynn County's decision to exchange property with Christ Church to realign and improve a dangerous road serves a secular purpose. Plaintiffs focus on Christ Church's perspective about the property exchange and road improvement, but ignore Glynn County's motivation for the project. *See Second Amended Complaint*, ¶¶ 9-15. It is the government's stated reasons for the challenged conduct that is afforded great deference so long as the reasons appear genuine, not a sham or secondary to some religious objective. Here, Glynn County's legitimate, secular motivation for the road improvements are plainly stated in the Agreement, which was entered into "in order to improve safety and historic preservation for the citizens of Glynn County . . ." *Ex. B*, at 1-2. The realignment of 1,700 feet of road was necessary because the current road is "narrow with a series of misaligned intersections, including the entrance to Fort Frederica National Monument." *Id.* at 2. The overall project involved making the nearby Stevens Road intersection safer by turning it into a 90-degree intersection and creating a multi-use path that will "link into existing sidewalks at the entrance to Fort Frederica National

Monument." *Id.* The realignment portion of the project will also allow "new, organized parking and bus loading areas," thus "eliminating pedestrian crossing hazards." *Id.* The property exchange between Christ Church and Glynn County was necessary to effectuate the road project and was deemed by Glynn County "to serve the best interest of the public." *Id.* Indeed, the project improves a "public right-of-way." *Id.* After all, Kilgore testified under oath that, in his opinion, the road project will improve safety for the public. There is no credible argument to be made that these stated reasons and motivations for the road project are simply a sham and that the real reason Glynn County is undertaking the road improvement projects is to promote some religious purpose.

This Court must next consider whether the "principal or primary effect" of the road improvements is "one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 613, 91 S.Ct. 2105. "The effect prong asks whether the practice under review in fact would convey a message of endorsement or disapproval [of religion] to an informed, reasonable observer." *Glassroth*, 335 F.3d at 1297 (quotation, citation, and alteration omitted). The effect is analyzed without regard to the government's actual purpose. *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (*quoting Lynch*, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring)). Glynn County concedes that Christ Church deems some benefit to consolidating its property and having a safer road that abuts its property. However, the primary benefit of the road-improvement project will be to the public and the thousands of non-Church members who use the road and Stevens Road intersection on a daily basis, as well as the many tourists and visitors who visit the Fort Frederica National Monument. *Compare*, *e.g.*, *Holloman*, 370 F.3d at 1286 (finding teacher's conduct failed Lemon's "effect" prong because the effect of her call for students to pray promoted the "quintessential religious practice" of praying, "endors[ed] religious activity, [and] encourag[ed] or

facilitat[ed] its practice") (quotation and citation omitted); *Hewett v. City of King*, 29 F.Supp.3d 584, 635 (M.D.N.C. 2014) (finding mayor's delivery in his official capacity of religious messages at privately sponsored annual public commemorative events which featured Christian prayer practices had effect of City endorsement of Christianity); *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 528–29 (7th Cir. 2009) (finding sheriff's invitation to religious group to speak at mandatory employee meetings gave appearance of state endorsement of religion in violation of Establishment Clause).

The last prong of the *Lemon* test asks whether the government activity "foster[ed] an excessive government entanglement with religion." 403 U.S. at 613, 91 S.Ct. 2105 (quotation and citations omitted). "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Ed.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948). "Entanglement is a question of kind and degree," *Lynch*, 465 U.S. at 684, 104 S.Ct. 1355 (finding no excessive entanglement). Of course, "[t]otal separation between church and state is not possible in an absolute sense."*Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1261 (10th Cir. 2005). Contacts between the government and religion are only impermissible, therefore, if they are so extensive that they have "the effect of advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. at 233. Therein, the court "'must examine the character and purposes of the institutions that are benefited, the nature of the aid that the [government] provides, and the resulting relationship between the government and the religious authority.'" *Utah Gospel Mission*, 425 F.3d at 1261 (*quoting Lemon*, 403 U.S. at 615).

There is no entanglement caused by an arms-length transaction that results in each party exchanging separate parcels of land. As to the road project itself, even though it is funded by Christ Church, it is Glynn County that is fully responsible for the "oversi[ght], supervision, and construction of the public roadway" and it is Glynn County that bears "all liabilities for the construction of the public roadway. . ." *Ex. B*, at 3. The delineation of roles/responsibilities between Christ Church and Glynn County is unambiguous and defined, with no overlapping or intertwined duties. Thus, this prong of the *Lemon* test is not at issue in this case.

Plaintiffs fail to cite a single analogous case where a court has held there to be a violation of the Establishment Clause. *Utah Gospel Mission*, *supra*, is analogous. In *Utah Gospel Mission*, a group of plaintiffs, including a gospel mission, church, and a national organization for women, brought suit against a city and church seeking to invalidate the city's sale of pedestrian plaza easement to the church, which had previously purchased city property subject to the easement. The district court denied the plaintiffs' motion for a preliminary injunction and granted defendant's motion to dismiss, and an appeal was taken. The Tenth Circuit applied the *Lemon* test and rejected the plaintiffs' claim that the transaction violated the Establishment Clause. Specifically, the Tenth Circuit held that (1) the city's sale of the plaza easement to the church did not violate the purpose prong of the *Lemon* test, (2) the city's sale of the plaza easement to the church did not have as its principal or primary effect to endorse or inhibit religion; (3) the sale of the plaza easement to the church did not create excessive entanglement with religion; and (4) the city's stated reasons for selling the plaza easement to the church were not pretextual for viewpoint discrimination. *Id.* at 1259-1263. If the merits of Plaintiffs' claims are reviewed by this Court, the same result should be reached as to Plaintiffs' federal Establishment Clause claim.

B. State Establishment Clause Claim

Plaintiffs also allege that the realignment project and property exchange violate Georgia's Establishment Clause which provides: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Ga. Const. of 1983, Art. I, § 2, ¶ VII. Under this provision, neither the State nor any of its political subdivisions can own or control, or give monetary aid, to a church or religious institution. *Mayor &c. of Savannah v. Richter*, 160 Ga. 177 (1925); *Bennett v. City of LaGrange*, 153 Ga. 428 (1922); *see Collum v. State*, 109 Ga. 531, 532 (1900). Thus, a municipality cannot appropriate money for a sectarian hospital to care for city patients. *Richter v. Mayor &c. of Savannah*, 160 Ga. 178, 127 S.E. 739 (1925). And, in the same vein, a municipality cannot pay money to a religious organization to enable that organization to assume the city's charity work. *Bennett v. City of LaGrange, supra*. That is because a political subdivision of this state cannot give money to a religious institution in such a way as to promote the sectarian handiwork of the institution.

However, as recognized by the Georgia Supreme Court in *Taetle v. Atlanta Independent School System*, 280 Ga. 137, 138 (2006), "that is not to say that a political subdivision of the state cannot enter into an arms-length, commercial agreement with a sectarian institution to accomplish a non-sectarian purpose." In *Taetle*, a plaintiff brought an action to enjoin a public school system from leasing space at a church to create a kindergarten annex. The Georgia Supreme Court held that this transaction did not violate Georgia's Establishment Clause in that the city "did not give money to the church to foster the education of its children in a sectarian school" but rather "merely leased classroom space from the church so it could establish and run a public kindergarten in a

non-sectarian environment." *Id.* The Supreme Court held that the payments made by the city under that lease did not constitute the giving of monetary aid to the church and did not, therefore, violate the Establishment Clause of the Georgia Constitution. *Id.* This case is the most analogous Georgia case to the facts presented in this action. Here, Plaintiffs challenge an arms-length property exchange and road improvement project that clearly has a non-sectarian purpose. Glynn County can think of nothing less sectarian than a public road that predominately serves non-Church members and provides access to a national monument.

VI. Plaintiffs' causes of action related to the property exchange fail as a matter of law because the BOC did not clearly and manifestly abuse its discretion in precisely following the appraisal requirement of O.C.G.A. § 36-9-3(a)(3)(D).

Where an act is within the power of the county commissioners, the manner of doing it must be largely left to their discretion, and that discretion must be a broad one. There should be no interference had unless it is clear and manifest that they are abusing the discretion vested in them by law. *Moore v. Maudlin*, 199 Ga. 780, 782 (1945); *Commissioners v. Porter Mfg. Co.*, 103 Ga. 613 (1898); *Dyer v. Martin*, 132 Ga. 445 (1909); *Dunn v. Beck*, 144 Ga. 148 (1915); *Terry v. Wade*, 149 Ga. 580 (1919); *Thomas v. Ragsdale*, 188 Ga. 238 (1939). It is true that a county may exercise only those powers authorized by statute. *DeKalb County v. Atlanta Gas Light Co.*, 228 Ga. 512, 513 (1972). But, when authorized, the governing body of a county has broad discretion in the exercise of these powers. *Lindsey v. Guhl*, 237 Ga. 567, 570 (1976). It is not a clear and manifest abuse of discretion to do what the law requires. That is, it is not an abuse of discretion to obtain appraisals that demonstrate the value of the property to be acquired by Glynn County is of equal or greater value than the property being exchanged. *See* O.C.G.A. § 36-9-3(a)(3)(D).

Moreover, "[a] substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law." O.C.G.A. § 1–3–1(c). *See also DeKalb County v. Buckler*, 288 Ga.App. 346 (2007). This can be so even if the statutory requirement is expressed with the word "shall." *See, e.g.*, *Thebaut v. Ga. Bd. of Dentistry*, 235 Ga.App. 194 (1998). Again, the statute in question here merely requires that, in order to be exempted from the bid requirement of O.C.G.A. § 36-9-3(a)(1), a county obtain appraisals showing that the value of the property to be acquired is of equal or greater value than the property being exchanged. *See* O.C.G.A. § 36-9-3(a)(3)(D). The statute does not require that multiple appraisals be obtained from various appraisers or that the appraisals meet the satisfaction of individuals like Kilgore. Indeed, the statute vests the authority to approve the value of the appraisals on "the proper authorities of said county," which in this instance is the BOC. Not only did Glynn County substantially comply with this statutory provision, there was absolutely no deviation from its mandate. Notably, Plaintiffs plead sufficient facts to show that Glynn County obtained appraisals that indicated that the property exchanged between the parties was of equal value. *Second Amended Complaint*, ¶¶ 46-62. Those appraisals were entered into evidence at the last hearing on Plaintiffs' request for an injunction. Plaintiffs simply subjectively claim that there are errors in the appraisals. Plaintiffs are asking this Court to substitute the judgment of their after-the-fact appraisals for the discretionary decision-making authority of the BOC. There is no legal support for this proposition and nothing to suggest that the BOC manifestly abused its discretion in accepting the value set forth on the appraisals presented to it. In addition, this Court has previously considered this precise argument, and rejected the same at the last injunction hearing.

Conclusion

For the above reasons, all relief requested by Plaintiffs should be denied and their Second Amended Complaint should be dismissed with prejudice.

Respectfully submitted, this 16nd day of December, 2021.

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UNIFORM SUPERIOR COURT RULE 6.1 STATEMENT

The undersigned certifies that in filing this motion or response, the opposing parties and the assigned judge or the judge's designee will be notified by e-mail of the motion or response contemporaneously with the e-filing or no later than 24 hours after e-filing.

This the 16th day of December, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing pleading by addressing same to:

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and depositing same in the United States Mail with sufficient postage affixed to assure delivery.

This the 16th day of December, 2021.

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