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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2022-001469
Case No. 2020-CP-40-2839

South Carolina Public Interest Foundation and John
Crangle, individually, and on behalf of all others
similarly situated,

Respondents,

v.

Richland County and Richland County Council,

Appellants.

INITIAL BRIEF OF APPELLANTS

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Appellants

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59 Am. Jur. 2d *Parliamentary Law*, § 5.

STATEMENT OF ISSUE ON APPEAL

- I. Did the trial court err in finding that the Respondents enjoyed public importance standing to bring their claims for declaratory and injunctive relief?
- II. Did the trial court err in finding that the Respondents presented a justiciable claim?
- III. Did the trial court err in finding that Richland County violated its own rules as well as a common law duty for legislators to cast a vote on every matter before them?

STATEMENT OF THE CASE

This is an action brought by the Respondents South Carolina Public Interest Foundation ("SCPIF") and Joe E. Taylor, Jr.¹ seeking declaratory and injunctive relief related to the interpretation and enforcement of Rule 5.21 of the Richland County Council Rules.² Rule 5.21 states as follows:

5.21 Voting

Each member shall vote on each question put, except that no member shall be permitted to vote on any question in which that member has a direct personal or pecuniary interest, or in which that member perceives that he or she has a direct personal or pecuniary interest, or in which his or her participation might create an appearance of impropriety in that member's estimation. ... *If a member does not declare a vote or an abstention, his/her vote shall be recorded with the prevailing side.* If voting an abstention, a reason for the abstention must be stated and recorded in the minutes. No member shall, under any circumstances be permitted to vote after a decision has been announced by the Chair. After the decision of the question, an absent member may be permitted to record the vote she/he would have given if present, but such vote shall not affect the previous question.

See, Richland County Council Rules, 5.21. (Emphasis added). The Respondents allege that during certain County Council meetings in 2020, there were members of Council who did not declare a vote on certain questions presented to Council for

¹ While the action was pending on appeal, Joe E. Taylor, Jr. died. The Respondent John Crangle was substituted for the Mr. Taylor.

² The caption includes language suggesting that this action is brought as a class action, but the Amended Complaint includes no allegations as required under Rule 23, SCRCF. Additionally, the Respondents have not sought certification of a class action.

votes without stating a reason on the record. The Respondents requested that the trial court "declare that Members of Richland County Council violated their own Rule 5.21" and that Council "failed to enforce the voting requirement of Rule 5.21." The Respondents also sought an injunction directing the members of Richland County Council to follow their own Rule 5.21. The Respondents did not seek to disqualify any votes by County Council or to overturn any legislative enactments.

The parties filed cross motions for summary judgment in late August 2021, together with a Stipulation of Facts, which included County Council minutes from February 2020 through May 2020. Those cross motions were heard by former Circuit Court Judge DeAndrea Gist Benjamin on February 16, 2022. She requested proposed orders from both sides. On June 10, 2022, Judge Benjamin issued an Order Granting Plaintiff's Motion for Summary Judgment in which she issued declaratory and injunctive relief in favor of the Respondents. She also granted the Respondents standing under the public importance exception to general standing requirements. (Order).

The Appellants Richland County and Richland County Council subsequently filed a Rule 59(e) motion to alter or amend order. Judge Benjamin issued a Form Order on September 19, 2022, denying the Rule 59(e) motion. In that Form Order, Judge Benjamin writes: "this Court found that the case concerned the substantive

common law duty of Council members to vote and ordered only that County Council follow their own rules as written and their common law duty to vote.”

(Form Order).

The Appellants subsequently filed a timely appeal to this Court.

STATEMENT OF FACTS

The parties agreed to and filed a Stipulation of Facts which includes as exhibits minutes for certain Richland County Council meetings from February 2020 through May 2020, at which there were non-declared votes being challenged by the Respondents. The Stipulation of Facts are as follows:³

1. Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina.
2. Plaintiff Joe E. Taylor, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County.
3. Defendant Richland County, South Carolina is a County in South Carolina.
4. Defendant Richland County Council is the governing body of Richland County.
5. The Council Rules of Richland County state as follows:

5.21 Voting

Each member shall vote on each question put, except that no member shall be permitted to vote on any question in which that member has a direct personal or pecuniary interest, or in which that member perceives that he or she has a direct personal or pecuniary interest, or in which his or her participation might create an appearance of impropriety in that member's estimation. ... If a member does not declare a vote or an abstention, his/her vote shall be recorded with the prevailing side. If voting an abstention, a reason for the abstention must be stated and recorded in the minutes. No

³ The factual information was current at the time of trial. The membership of County Council has now changed.

member shall, under any circumstances be permitted to vote after a decision has been announced by the Chair. After the decision of the question, an absent member may be permitted to record the vote she/he would have given if present, but such vote shall not affect the previous question.

6. The County Council voting system has three options on a touchscreen at each Council member's desk: yes, no, and abstain.
7. In the February 11, 2020 Special Called Meeting, there were fourteen questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on five of the questions. On four other occasions Council Members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
8. In the February 25, 2020 Zoning Public Hearing, there were seven questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on six of the questions without stating a reason. Five other times Council members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
9. In the March 3, 2020 Regular Session Meeting, there were 35 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on 24 of the questions without stating a reason on the record. On four other occasions, Council members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
10. In the March 17, 2020 Regular Session Meeting, there were 14 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on seven of the questions without stating a reason. Other Council members did not declare a vote five times without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
11. In the March 31, 2020 Special Called Meeting, there were 15 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on eleven of the questions without stating a reason. On six other occasions, Council members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.

12. In the April 7, 2020 Regular Session Meeting, there were 33 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on 17 of the questions. Council Member Gwendolyn Kennedy is recorded in the minutes as present, but she did not declare a vote on 32 of the questions without stating a reason. Other Council members did not declare a vote twice without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
13. In the April 21, 2020 Regular Session Meeting, there were 29 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on six of the questions without stating a reason. On nine occasions other Council members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
14. In the May 5, 2020 Regular Session Meeting, there were 31 questions presented to County Council for votes. Councilman Jim Manning did not declare a vote on 20 of the questions without stating a reason. On 22 other occasions various council members did not declare a vote without stating a reason. A true and accurate copy of the minutes for this meeting is attached hereto.
15. At the May 19, 2020 Regular Session Meeting, 12 questions were presented to the County Council members for a vote. On ten of these questions, Councilman Jim Manning did not declare a vote without stating a reason on the record. On seven of the questions Gwendolyn Kennedy did not declare a vote. A true and accurate copy of the minutes for this meeting is attached hereto.
16. The current members of Richland County Council are Paul Livingston (Chair), Bill Malinowski, Derrek Pugh, Yvonne McBride, Allison Terracio, Joe Walker, III, Gretchen Barron, Overture Walker, Jesica Mackey, Cheryl D. English, and Chakisse Newton.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate court “may reverse where the decision is affected by any error of law.” *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are “free to decide matters of law with no particular deference to the fact finder.” *Id.*

ARGUMENTS

I. The trial court erred in finding that the Respondents enjoyed public importance standing to bring their claims for declaratory and injunctive relief.

The trial court erred in finding that the Respondents enjoyed public importance standing to bring their claims for declaratory and injunctive relief. It is well settled that "[s]tanding to sue is a fundamental requirement in instituting an action." *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013). Under South Carolina law, "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008). In this case, where there is no basis for statutory standing, the Respondents were required to show a right to sue through taxpayer standing or by the "public importance" exception to the general standing requirements. The trial court correctly concluded that the Respondents have not demonstrated taxpayer standing. However, the trial court should have also rejected the claim of public importance standing, but it did not do so.

The South Carolina Supreme Court has recognized a "public importance" exception to general standing requirements -- a rule that the Supreme Court has acknowledged "has been the subject of much confusion and misapplication."

Bodman, 742 S.E.2d at 366. The Supreme Court has explained that "standing is not inflexible." *Id.* Thus, "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* The Supreme Court, however, has "tempered the application of the public importance exception somewhat," and in doing so, the Court has "reminded the bench and bar that 'whether an issue of public importance exists necessitates a cautious balancing of the competing interests presented.'" *Bodman*, 742 S.E.2d at 367, citing *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008). In *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014), the Supreme Court addressed the "competing policy concerns" that underlie the application of the public importance exception as follows:

Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

753 S.E.2d at 853.

The Supreme Court has explained that the "key to the public importance analysis is whether a resolution is needed for future guidance." *Id.* This need for future guidance "resists a formulaic approach, as each case must turn" on its own

peculiarities. *Id.* Most recently, in *South Carolina Public Interest Foundation v. Wilson*, 437 S.C. 334, 878 S.E.2d 891 (2022), the Supreme Court reiterated that “[c]ourts must cautiously balance competing interests -- the citizenry’s need to hold public officials accountable for alleged injustices and ‘the concomitant integrity of government action’ -- to determine whether the issue presented is inextricably connected to the public need for court resolution for future guidance.” 878 S.2d at 895. As the Supreme Court noted, “the linchpin of our analysis is whether a need for future guidance exists.” *Id.*

In the case at bar, the trial court did not focus on that “linchpin.” In fact, the trial court disregarded the question. The court never addressed with specificity (or for that matter generally) whether there was a need for *future guidance*. The trial court instead cited a host of pre-*Bodman* cases where public importance standing was allowed, in the trial court’s words, “to address issues of whether public bodies are operating within the bounds of the law in making decisions that affect their constituencies.” (Order, p. 5). The trial court then concluded in a conclusory manner that this case fit that bill because questions arose whether County Council “followed its own rules” and “violated the common law,” the latter of which is a reference to the flawed notion of a common law duty for legislators to cast a vote on every matter before him or her. (Order, p. 6). Critically, however, the trial court never addressed whether there exists a need for *future guidance*.

As the record bears out, the Respondents never made a showing of any need for judicial intervention to provide "future guidance." In fact, the Respondents focused their claims primarily on the voting tendencies of Councilman Jim Manning, who is the only Council member actually identified by name in the Stipulation of Facts. The Amended Complaint mentions only Councilman Manning and Councilwoman Gwen Kennedy by name. However, neither Manning nor Kennedy were still on County Council at the time of trial or the entry of judgment, and hence, "future guidance" is not required as to those Council members. *See*, Stipulation of Facts, ¶ 16 (naming current members of County Council at the time of trial).

Most importantly, the Respondents did not meet their burden of showing that a cautious balancing of the competing interests supports the use of the "public importance" exception in this case. *See, Joseph v. South Carolina Dept. of Labor, Licensing and Regulation*, 417 S.C. 436, 790 S.E.2d 763, 770 (2016) ("[a] party seeking to establish standing carries the burden of demonstrating each element"). As discussed below, the balancing of competing interests in this case weighs heavily against the Respondents having public importance standing. The Respondents are seeking an adjudication of a non-justiciable political question and relief that will violate the separation of powers doctrine. That does not serve the

very limited purposes envisioned by the Supreme Court when it adopted the "public importance" exception. For each of these reasons, the trial court erred in bestowing public importance standing on the Respondents.

II. The trial court erred in finding that the Respondents presented a justiciable claim.

The South Carolina Supreme Court has explained that "it is fundamental that the Declaratory Judgments Act does not eliminate the case-or-controversy requirement." *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371, 374 (2013). "To fall within the intended purpose and scope of the Declaratory Judgment Act, the parties must seek adjudication of a justiciable controversy." 742 S.E.2d at 373-374.

In addition to lacking standing to bring this lawsuit, the Respondents also alleged only a non-justiciable issue -- a political question -- over which the courts lack any authority or jurisdiction to render judgment or grant relief. As the Supreme Court has recognized, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Alexander v. Houston*, 403 S.C. 615, 744 S.E.2d 517, 519 (2013). "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Id.* In *Alexander*, the Supreme Court explained that courts are "duty bound to review the actions of the Legislature

when it is alleged in a properly filed suit that such actions are unconstitutional." 744 S.E.2d at 519-520. Yet, the present case does not raise any constitutional question.

In 1972, Article VIII of the South Carolina Constitution "was completely revised for the purpose of accomplishing home rule, thus granting renewed autonomy to local government." *Williams v. Town of Hilton Head Island*, 311 S.C. 417, 429 S.E.2d 802, 803-804 (1993). Article VIII, § 7 of the Constitution provides:

The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided.

S.C. Const., art VIII, § 7. Moreover, Article VIII, § 17 provides:

The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

S.C. Const., art VIII, § 17. In accordance with the Home Rule Amendments, the General Assembly adopted the Home Rule Act. As part thereof, S.C. Code Ann. § 4-9-25 provides: "[t]he powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties." S.C. Code Ann. § 4-9-25

Importantly, S.C. Code Ann. § 4-9-110 provides that "[t]he Council shall determine its own rules and order of business." S.C. Code Ann. § 4-9-110.

In this litigation, the Respondents have requested the judiciary to order a legislative body to "enforce" its own rules based on the court's interpretation of those rules. Such judicial action, however, is clearly violative of the separation of powers doctrine. *See*, S.C. Const., art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other"). In fact, it is well settled that the failure of a legislative body to follow its parliamentary rules is not subject to judicial review. As stated in *American Jurisprudence*:

The courts generally do not concern themselves with violations of parliamentary rules in deliberative proceedings, whether such rules are codified in the form of a manual and formally adopted or whether they consist of a body of unwritten customs or usages, preserved in memory and by tradition. *Since parliamentary rules are merely procedural and not substantive, the courts have no concern with their observance. Hence, they may be waived or disregarded by the legislative body.* The courts will not annul an act of a legislature, or an ordinance of a municipal council, merely because one or the other was enacted in disregard of the rules that the legislature or the municipal council, or either house thereof, had prescribed for its own government, and unless they have proceeded in violation of the law of the land, or of the charter of the municipality, which is their

organic law, the courts have no power to superintend their proceedings or annul their acts.

59 Am. Jur. 2d *Parliamentary Law*, § 5. (Emphasis added).

Our Supreme Court has applied these very principles. In *McSherry v. Spartanburg County Council*, 371 S.C. 586, 641 S.E.2d 431 (2007), the Supreme Court cited Home Rule and concluded that "there is neither a constitutional provision nor a statutory requirement on which this Court could base an invalidation of Council's rules and procedures." 641 S.E.2d at 434. The Supreme Court further noted that "in reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives." 641 S.E.2d at 433. As discussed in more detail below, the South Carolina Attorney General is also in accord.

The trial court concluded that this litigation presented a justiciable claim because "this case is concerned not with discretionary, parliamentary functions of County Council but with the substantive common law duty of Council members to vote." (Order, p. 8). The trial court concluded that South Carolina law recognizes a "common law duty" for legislators to cast a vote. The trial court did correctly recognize that "South Carolina courts have not squarely addressed the question of whether members of a legislative body have a duty to vote on every matter put before them." (Order, p. 9) But the trial court then relies on the 1942 Supreme Court case of *Gaskins v. Jones*, 198 S.C. 508, 18 S.E.2d 454 (1942), to find such a

duty exists under South Carolina common law. However, *Gaskins* simply does not recognize a “common law duty” for a legislator to vote on every matter put before him or her. Otherwise, the court is, in essence, finding that a member of any legislative body, including the General Assembly, can never choose not to cast a vote on a particular matter.

In fairness, the trial court has misread *Gaskins*. In that case, the Supreme Court was addressing the "common law rule to the effect that a majority of a whole body is necessary to constitute a quorum applies, and no valid act can be done in the absence of a quorum." 18 S.E.2d at 456. The Supreme Court explained that "[t]he members who are present at a meeting cannot by mere refusal to vote defeat the action of the majority of those voting." *Id.* Within that context, the Supreme Court stated the language relied on by the trial court in its order: "As long as the members are present in the council chamber and have an opportunity to act and vote with the others, it is their duty to act, and they will be regarded as present for the purpose of making a quorum and rendering legal the action of the council." *Id.*

This excerpt from *Gaskins* does not recognize a council person's “duty to vote,” but rather that once present, the failure to declare a vote will not defeat a quorum. That is the common law principle addressed in *Gaskins* and not some absolute duty for every legislator to cast a vote on every matter before him or her. Inexplicably, the trial court undertook a grammatical analysis of that definitive

sentence to suggest a different meaning. Yet, the first time recognition of a common law duty for legislators to cast a vote on every matter before them – an admittedly novel issue in this State -- should be based on more than a grammatical analysis of a single sentence from a 70-year old opinion that was quoting a legal treatise from that era. In short, the trial court’s reliance on *Gaskins* was misplaced – there is no common law duty imposed on legislators to vote on every matter or bill or resolution before them. Of significance, neither the trial court nor the Respondents cited any other case from this or any other jurisdiction – other than *Gaskins* – to support this idea of a common law duty for legislators to cast a vote on every matter before them.

In sum, how or whether the Richland County Council interprets and enforces its own rules on voting presents a purely political question which is non-justiciable. The Respondents have not alleged nor shown any violation of state statutory law or the South Carolina Constitution. Thus, in deference to the separation of powers doctrine, the judiciary should not undertake to compel a legislative body to implement or enforce its parliamentary rules. Yet, that is precisely what the trial court did. That ruling should be reversed.

III. The trial court erred in finding that Richland County violated its own rules as well as a common law duty for legislators to cast a vote on every matter before them.

Having found that the Respondents enjoyed public importance standing and presented a justiciable claim, the trial court addressed the merits. The trial court ruled that the County Council members “are violating their common law duty to vote by choosing not to vote.” (Order, p. 9). For reasons already addressed above, the trial court erred in recognizing a “common law duty to vote” whereby a legislator is obligated to cast a vote on all matters, bills, or resolutions coming before the legislative body when that legislator is present.

Nonetheless, even if there is a “common law duty to vote,” the trial court erred in failing to recognize that Richland County Council Rule 5.21 *actually satisfies that very common law duty*. Rule 5.21 provides, in pertinent part: “If a member does not declare a vote or an abstention, his/her vote shall be recorded with the prevailing side.” Consequently, Rule 5.21 accounts for the precise scenario that the Respondents are challenging – where a Council member does not declare a vote. In that instance, the vote is recorded with the prevailing side. The Respondents have not shown and the trial court did not rule that provision of Rule 5.21 to be in violation of state law or the state constitution. To the contrary, with its order, the trial court “enjoined” the County Council to follow Rule 5.21.

Moreover, the cases from other jurisdictions cited by the trial court actually support the Appellants' position. As a primary example, in *Prosser v. Village of Fox Lake*, 91 Ill.2d 389, 438 N.E.2d 134, 135-36 (1982), the Illinois court ruled that "a municipal legislator's failure to vote either 'yea' or 'nay' on a proposed ordinance must be interpreted to have the same effect as either a 'yea' or 'nay' vote." 438 N.E.2d at 135-36. Yet, that is precisely what Rule 5.21 does. A non-declared vote is treated as a vote on the prevailing side.

The same is true with the Ohio case of *Babyak v. Allen*, 106 Ohio App. 191, 154 N.E.2d 14 (1958). Immediately after the sentence cited by the trial court in its order, the Ohio Court of Appeals states the actual holding of the case: "We therefore conclude that the rule known as the common-law rule is a proper and efficient rule to adopt, in order that municipal business shall be conducted with a proper regard to the wishes of its citizens. This common-law rule may be stated to be that the legal effect of refusing to vote is an acquiescence in the action taken by the majority of those who do vote." 154 N.E.2d at 19. That exact "common law rule" is embedded in Richland County Council Rule 5.21. Again, a non-declared vote is treated as a vote on the prevailing side. That is the common law rule.

Finally, in *Cromarty v. Leonard*, 13 A.D.2d 275, 216 N.Y.S.2d 619 (1961), another case cited by the trial court, the New York Supreme Court looked at cases from other jurisdictions which "showed the conflict in authority, in other

jurisdictions, on the question before us.” 216 N.Y.S.2d at 626. Ultimately, the New York Supreme Court concluded that the courts should not have gotten involved in this political question: “We see no reason for judicial intervention in this case.” 216 N.Y.S.2d at 631.⁴

The trial court also confused a non-declared vote and an abstention, which are two different concepts; yet the court treated them as the same. (Order, p. 2). In the Order, the trial court states:

The County Council voting system has three options on a touchscreen at each Council member’s desk: yes, not, abstain. When a vote is called, each Council member has a duty to select one of the options, and if they abstain or fail to vote, to state on the record the reasons for the failure to vote and have the reasons recorded in the Council minutes.

(Order, p. 2). As discussed herein, a non-declared vote is not an abstention, which Rule 5.21 makes clear. The critical language from Rule 5.21 states: “If a member does not declare a vote or an abstention, his/her vote shall be recorded with the prevailing side.” Thus, as the use of the disjunctive “or” demonstrates, not declaring a vote, i.e., a non-declared vote, is different from an abstention. Depending on whether there is a non-declared vote or an abstention, the

⁴ The trial court also left off the final part of the sentence quoted from *State v. Yates*, 19 Mont. 239, 47 P. 1004 (1897). The full sentence states: “The courts, as well as law writers and parliamentarians generally, have adopted the more rational rule that if a member of such a body join in making a quorum, and sit, his duty is to vote (unless excused for cause), and he will be counted as present whether or not he refuses to answer to the roll call.” Again, that recognizes the common law rule on how the failure to vote cannot effect the existence of a quorum.

responsibilities of the council member are different and how the vote is tallied is different. A non-declared vote is tallied with the prevailing side, and there is no responsibility to state a reason for the non-declared vote. In contrast, an abstention is not counted as a vote either for the prevailing or non-prevailing side. An abstention is *not* a vote, and as a result, the council member who abstains is required to state a reason for the abstention that is to be recorded in the minutes. In sum, a non-declared vote is a vote; an abstention is not.

The trial court did not draw that distinction, and that resulted in an erroneous ruling. The trial court used the term “non-vote” in the order, and that was intended to encompass both non-declared votes and abstentions, and the trial court in error concluded that all “non-votes” required the council member to state a reason therefor, which is not the law and is not required by the Council’s own rules including specifically Rule 5.21. Importantly, neither the trial court nor the Respondents have cited any authority holding that a council member who chooses not to vote and hence the vote is tallied as a non-declared vote must state a reason on the record comparable to the requirement for an abstention.

Furthermore, the trial court overlooked or disregarded well settled law that a county governing body is free to make or change its rules of procedure. As recognized in this State, a legislative body may abolish, suspend, modify, or waive

its own rules. This also may be done by implication, when action is had not in accordance therewith.

For decades, the South Carolina Attorney General has acknowledged that legislative bodies have wide discretion in their adoption of and enforcement of their parliamentary rules. In 1980, the Attorney General, citing to S.C. Code Ann. § 4-9-110, wrote: "Rules of order are not ordinances, but are merely the forms of procedure for enacting ordinances, and hence are not subject to stringent requirements of reasonableness." S.C. Op. Atty. Gen., March 10, 1980, 1980 WL 121084. Later, in 1985, the Attorney General opined that "there is no state statute which dictates operating procedures of county councils, including the structure of standing committees. The power of a county council is plenary in this regard. The law generally states that a municipal or county government is free to make or change its rules of procedure." S.C. Op. Atty. Gen., February 27, 1985, 1985 WL 259134. The Attorney General further explained that "[t]he council may abolish, suspend, modify or waive its own rules. This also may be done by implication, when action is had not in accordance therewith." *Id.*

In sum, the voting by Council members being challenged in this litigation is in compliance with Rule 5.21. That rule actually allows for a non-declared vote. Such a vote is recorded with the prevailing side. Nonetheless, to the extent that individual Council members may not have complied with this rule or the Council

has not enforced this rule or there may be a clerical error made in recording a vote in the minutes from time to time, that is entirely within the Council's legislative prerogative and cannot be challenged by the Respondents or be subject to review by the judiciary without infringing on the separation of powers doctrine.⁵

In its order, the trial court “agrees with the Defendants that the judiciary should not undertake to compel a legislative body to implement or enforce its own discretionary, parliamentary rules absent a clear violation of constitutional or statutory law.” (Order, p. 8). Yet, that is precisely what the trial court did. The trial court did not find that the Appellants have violated any statutory or constitutional provision. In fact, S.C. Code Ann. § 4-9-110 grants the Richland County Council the authority to “determine its own rules and order of business.” S.C. Code Ann. § 4-9-110. Neither a statute nor the State Constitution requires County Council to adopt or enforce a rule requiring each member to actually cast a vote on each question asked. To the contrary, as the Attorney General acknowledges and the trial court disregarded, a council may abolish, suspend,

⁵ The record includes minutes from several Richland County Council meetings in early 2020. To provide some context, using the March 3, 2020 meeting as an example, the minutes show there were 35 votes taken. Former Councilman Manning did not declare a vote on 22 of those votes. With respect to 14 of those votes, the vote was recorded as unanimous despite Councilman Manning not declaring a vote, which demonstrates that the non-declared votes were counted with the prevailing side. Even on the non-unanimous votes, the non-declared votes were counted with the prevailing side. Using the March 17, 2020 meeting as an additional example, the minutes show that there were 14 votes taken. Former Councilman Manning did not declare a vote on seven of those votes. With respect to two of those votes, the votes were recorded as unanimous despite Councilman Manning not declaring a vote, which demonstrates that the non-declared votes were counted with the prevailing side. Even on the non-unanimous votes, the minutes reflect that the non-declared votes were counted with the prevailing side.

modify, or waive its own rules.

In sum, the Appellants submit that the voting by Council members being challenged in this litigation are in compliance with Rule 5.21. That rule allows for a non-declared vote, where no abstention is made on record, to be recorded with the prevailing side. Nonetheless, to the extent that individual Council members may not have complied with Rule 5.21 or the Council has not strictly enforced this rule, that is entirely within the Council's legislative prerogative and cannot be challenged by the Respondents or be subject to review by the judiciary.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Richland County and Richland County Council respectfully request that the Court reverse the declaratory judgment and injunctive relief ordered by former Circuit Court Judge DeAndrea Gist Benjamin and remand for the entry of judgment in favor of the Appellants.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

*Counsel for Appellants Richland County and
Richland County Council*

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