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S.C. SUPREME COURT

# EXHIBIT

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF HORRY | ) | FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| | | Civil Action No. 2024-CP-26-02537 |
| Josephine Isom, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | **ORDER** |
| v. | ) | |
| | ) | |
| Town of Atlantic Beach Municipal Election Commission, | ) | |
| | ) | |
| Respondent. | ) | |

Before the Court is Josephine Isom's Appeal of the decision of the Town of Atlantic Beach Municipal Election Commission ("MEC") to invalidate the November 7, 2023, mayoral election.

The Court conducted a hearing on this matter on October 30, 2024. The Court has carefully considered the MEC's Record of Proceedings (the "Record"), including the MEC's written Decision (Record § 6), the law, and arguments of counsel.

For the reasons discussed below, the decision of the MEC is **AFFIRMED**.

## PROCEDURAL BACKGROUND

"The Town of Atlantic Beach employs a council-manager form of government," as provided for in S.C. Code Ann. § 5-13-10, *et seq*. *Cole v. Town of Atl. Beach Election Comm'n*, 393 S.C. 264, 267, 712 S.E.2d 440, 442 (2011). Under this system of government, the mayor is elected. S.C. Code Ann. § 5-13-20. The most recent mayoral election in Atlantic Beach took place on November 7, 2023, and two candidates ran for office—Appellant Josephine Isom and Intervenor John David.[1]

[1]At the beginning of the Court's hearing on October 30, 2024, hearing no objection from Appellant, John David's Motion to Intervene was granted. No counsel filed briefs or appeared on behalf of the Town of Atlantic Beach Municipal Election Commission in this Appeal challenging the MEC's decision.

During the election, several ballots were challenged on the grounds that certain voters did not meet the residency requirements to vote in the Town of Atlantic Beach's municipal election. *See generally* S.C. Const. Art. II, § 5 (a voter in municipal elections "must have resided in the municipality in which he offers to vote for thirty days next preceding the election.").

On November 9, 2023, the MEC held a hearing to resolve these challenges and received testimony and other evidence as required under S.C. Code Ann. § 7-13-830. ("At the [provisional ballot hearing] the [MEC] must hear all objections to these votes [i.e., provisional ballots], and when no person appears or offers evidence before the meeting to sustain an objection made at the polls, the ballot is no longer a provisional ballot. When the challenger appears or produces witnesses or evidence in support of the challenge, the authority in charge must proceed to hear and determine the question. Its decision is final.").

A transcript of the November 9, 2023, is appended to the Record at § 5(f). As the Record and Decision reflect, at the conclusion of the November 9, 2023, hearing, the challenge to most of the provisional ballots "w[ere] decided in favor of the voter[s]" and the provisional ballots were "mingled, and counted and the totals added to the previously counted regular ballot total." S.C. Code Ann. § 7-13-830. According to the count at the end of the November 9, 2023, hearing, John David received 65 votes while Josephine Isom received 64. *See* Decision at 5, ¶ 4; Record § 5(f) at 112:18.[2] Following the count, the MEC recessed, apparently intending to meet the following day to conduct a recount of the votes. *Id.*[3]

[2] The Record also reflects two votes cast for write-in candidates and as such, the MEC contemplated a likely run-off election. *See* Record §5(f) at 117:9-17 ("Neither candidate has the majority because of the two write-ins. So we will probably have a runoff; and we're going to do a recount also."); S.C. Code Ann. § 5-15-62(b) ("[i]f no candidate for a single office receives a majority of the votes cast . . . a runoff election shall be held.").

[3] S.C. Code Ann. § 7-17-280 requires a mandatory recount of votes when the results are less than 1% apart.

Following the MEC's meeting on November 9, 2023, Josephine Isom filed her protest of the MEC's decision later that afternoon. *See* S.C. Code Ann. § 5-15-130 ("Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported . . . by filing a written notice of such contest . . .").

Ms. Isom's protest, Record § 1, asserts that several votes were cast by someone "not a resident of the Town of Atlantic Beach" and therefore "improperly changed the outcome of the election." As such, Ms. Isom's protest asserted that she should "be declared the winner of the Election for the Mayor of the Town of Atlantic Beach." *Id.*[4]

S.C. Code Ann. § 5-15-130 required the MEC to "[w]ithin forty-eight hours after the filing of" Isom's protest, "conduct a hearing on the contest, decide the issues raised, file its report together with all recorded and testimony and exhibits . . . notify the parties concerned of the decisions made, and when the decision invalidates the election the [Town] [C]ouncil shall order a new election as the parties concerned."

However, the MEC did not proceed to conduct a hearing on Ms. Isom's protest under § 5-15-130 until April 3, 2024. The decision of the MEC was memorialized in a written ruling on or about May 2, 2024, (i.e. the Decision). The Decision found that several ballots for the November 7, 2023, Mayoral Election were cast by those "not residents in the Town of Atlantic Beach and therefore not qualified to vote in the Election." *See* Decision at 9-10.

Accordingly, the MEC "decline[d] to include these votes in the final count for the Mayoral Election . . . ." Decision at 9. Even so, because "[t]he ballots cast . . . were inextricably commingled with the other remaining and validly cast ballots in the Election" and "[b]ecause the challenged [and later rejected] provisional ballots d[id] not entirely overlap with the voters challenged by

[4] The voters named in Ms. Isom's protest did not completely line up with the provisional ballots considered in the November 9, 2023, MEC hearing. *See, e.g.*, Decision at 5, ¶ 6.

Isom" the MEC concluded "that the prior stated results of the Election are, in the least, significantly doubtful, and are likely to be completely inaccurate." *Id.*

As such, relying on S.C. Code Ann. § 5-15-130, the MEC "declare[d] the [Mayoral] Election invalid and request[ed] that Town Council order a special election, specific to Mayoral Candidates Josephine Isom and John David, as soon as such a special election can be scheduled in accordance with state law." Decision at 10. Thereafter, Isom's Appeal was timely filed.

**STANDARD OF REVIEW**

S.C. Code Ann. §5-15-140 provides that "[w]ithin ten days after notice of the decision of the municipal election commission, any party aggrieved thereby may appeal from such decision to the court of common pleas." "The circuit court, in this situation, is by statute an appellate court." *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997).

In considering an appeal from an election commission, "[t]he circuit court, sitting in an appellate capacity, does not conduct a *de novo* hearing or take testimony. The circuit court must examine the decisions for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence." *Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 14, 609 S.E.2d 500, 503 (2005). "If there is any evidence that supports the commission's finding, [a reviewing court] must uphold the finding." *Odom v. McBee Mun. Election Comm'n*, 440 S.C. 367, 372, 891 S.E.2d 663, 665 (2023) ("*Odom II"*) (citing *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 307, 831 S.E.2d 429, 430 (2019) ("*Odom I*"). "'The Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.'" *Cole v. Town of Atl. Beach Election Comm'n*, 393 S.C. 264, 271–72, 712 S.E.2d 440, 444 (2011) (quoting *George v. Mun. Election Comm'n of the City of Charleston*, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999)).

## ANALYSIS

Isom has explained that her Appeal relies on the MEC's factual finding that "[t]he poll managers initially determined that, excluding the provisional ballots, Isom received sixty-two (62) votes and David received forty-nine (49) votes." *See* MEC Decision at 5, ¶ 3. After additional votes were accepted and counted at the provisional ballot hearing on November 9, 2023, the MEC first concluded David was at 65 votes, while Isom was at 64. Following Isom's logic, when the MEC subsequently rejected 14 votes around six months later, she calculates that would leave her with (at a minimum) 62 votes, while, on the other hand, John David, the other mayoral candidate, could not have received more than 53. *See* Isom Brief at 4.[5]

The Court "must examine the decisions" of the MEC "for errors of law." *Taylor*, 363 S.C. at 14, 609 S.E.2d at 503 (2005). Moreover, "[t]here was no right to contest an election under the common law." *Id.* "In South Carolina, the right to contest an election exists only under our constitutional and statutory provisions, and 'the procedure proscribed by statute must be strictly followed.'" *Odom I*, 427 S.C. at 307-308, 831 S.E.2d at 430 (quoting *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978)); *see also* S.C. Const. art. II, § 10 ("The General Assembly shall . . . establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.")."Statutes which are in derogation of the common law must be strictly construed." *Odom I*, 427 S.C. at 308, 831 S.E.2d at 430 (citing *Doe v. Brown*, 331 S.C. 491, 496, 489 S.E.2d 917, 920 (1997)).

Under South Carolina law it is the "Municipal Election Commission" that "shall . . . supervise and conduct all municipal, special and general elections" and the MEC alone is granted the authority to "declare the results" of an election. S.C. Code Ann. § 5-15-100. However, S.C.

[5] The Court notes that neither the Decision nor Isom's calculations in her Appeal refer to the two write-in votes for the mayoral seat.

Code Ann. § 5-15-120 does contemplate a vote counting role for the poll managers—in that they shall, among other things, make a "statement of the . . . number of votes cast for each candidate for mayor . . . and transmit this information to the [MEC]." Even still, the Court is not aware of, and the parties have not suggested any authority specifically discussing the Court's ability to rely on a necessarily "unofficial" count by a manager under S.C. Code Ann. § 5-15-100. And, by virtue of its decision, the MEC elected not to rely on this initial vote total by the managers in directing a new election.

However, even if a manager's count could be used in the way Isom suggests, the Court must also consider whether there is a reliable factual record to support Isom's assertions, which, as noted above, rely on a specific factual finding by the MEC of the results of the poll manager's count under § 5-15-120. "While corruption-free elections are imperative to the very survival of the republic, it is equally essential that, where corruption is charged, *a documented record be established upon which alleged wrongdoing may receive appellate review*." *Fielding v. S.C. Election Comm'n*, 305 S.C. 313, 318, 408 S.E.2d 232, 235 (1991) (emphasis added).

The "evidence" on the record required to support a "finding" by the MEC is very low. But it cannot be said that a "finding" *is* "evidence." This is because, as the Supreme Court has held, a court "must uphold [a] finding" of the MEC "if there is any evidence that supports the commission's finding," *Odom I*, 440 S.C. at 372, 891 S.E.2d at 665, but, on the other hand, a court cannot "accept the factual findings of the commission" that "are wholly unsupported by the evidence." *Taylor*, 363 S.C.at 14, 609 S.E.2d 503.

Here, to be sure, the Record relied on by the MEC in reaching its factual findings is extensive. Totaling over six hundred pages, it includes transcripts of both the November 9, 2023,

and April 2, 2024, MEC hearings, along with extensive documentary evidence introduced by both Isom and David, and significant investigative records obtained directly at the MEC's behest.[6]

But within this extensive Record, Isom does not cite (nor does the Court's review discern) evidence supporting the MEC's specific finding as to what the poll managers "initially determined." In its appellate capacity, the Court cannot go outside the bounds of the Record presented and "may not consider issues which were not raised to the [MEC]." *Armstrong v. Atl. Beach Mun. Election Comm'n*, 380 S.C. 47, 49, 668 S.E.2d 400, 401 (2008) (citing *Taylor*, 363 S.C. 8, 609 S.E.2d 500 (2005).

Indeed, the only count of votes evidenced in the Record occurred on November 9, 2023, when at the conclusion of the provisional ballot hearing, after *all* the ballots cast in the election were "inextricably commingled," John David was determined to have received 65 votes and Josephine Isom 64 votes, Record § 5(f) at 112:15-19, along with two apparent votes for write-in candidates. Record § 5(f) at 117:9-17. Such close results would have required a recount and assuming the count remained the same, a runoff election. *See* S.C. Code Ann. §§ 7-17-280; 5-15-62(b).

Naturally, had there been no manager's count on election night, when later, on April 2, 2024, fourteen of the votes counted on November 9, 2023, were determined to be invalid, "there was no way to tell for whom the disputed votes were cast; consequently, the only conceivable conclusion was that the results of the election were in doubt, and **the only remedy. . . was a new election**." *Odom I*, 427 S.C. at 314, 831 S.E.2d at 434 (citing *Gecy v. Bagwell*, 372 S.C. 237, 642

[6] According to the MEC's Decision, on February 28, 2024, it "authorized its legal counsel to issue subpoenas to challenged voters . . . and . . . obtain information that would assist in reaching a determination during a forthcoming protest hearing." The material obtained during this process included property, tax, and voter registration information, along with the Facebook page of a student at American University and the on-line biography and several images of a football player at Brown University. *See* generally Record at §5(a) "Agency Exhibit."

S.E.2d 569 (2007); *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 537 S.E.2d 543 (2000); *Easler v. Blackwell*, 195 S.C. 15, 10 S.E.2d 160, 162-64 (1940) (emphasis added)).

To be sure, a "Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." *Cole*, 393 S.C. at 271–72, 712 S.E.2d at 444 (2011) (citations omitted); *see also Trapp v. South Carolina Bd. of State Canvassers*, 273 S.C. 163, 169, 255 S.E.2d 670, 673 (1979) (holding that where evidence presented in an election challenge hearing allows for two reasonable inferences, one of which would invalidate the election, and the second of which would sustain the election, "the choice between the two inferences must be made in favor of the validity of the contested election.").

But it is unclear how "employ[ing] every reasonable presumption to sustain a contested election" applies in this case. In *Cole*, the Town of Atlantic Beach election commission initially certified an election, but then "de-certified the election results and ordered a new election." *Cole*, 393 S.C. at 271, 712 S.E.2d at 444. After unacceptable delays in the MEC's handling of the election, the Supreme Court ultimately "vacate[d] the MEC's decision to de-certify, and order[ed] the original certification . . . restored." *Id.* at 275, 712 S.E.2d at 446. But here, there is not an "original certification" contained in the record at all. In other words, it can hardly be said that this election should continue to be "sustained" when nearly a year after votes were cast, no winner or reliable vote total has yet been declared by the MEC.

Still, even though the votes declared valid could not be segregated from the "invalid" votes, here, in calling for a new election, the MEC correctly relied on the Supreme Court's holding in *Broadhurst*, that "[i]n determining whether an irregularity in the conduct of an election is sufficient to render the result doubtful, the rule deducible from the decisions is that all illegally cast ballots

shall be deducted from the total number counted for the declared winning candidate . . .” Decision at 9 (citing *Broadhurst*, 342 S.C. at 382, 537 S.E.2d at 547).

While it is true that the Supreme Court’s “longstanding method of determining whether an irregularity has affected the outcome of an election” and “the best method to safeguard the purity of election is to add the irregular votes to the losing side,” *Broadhurst*, 342 S.C. at 382, 537 S.E.2d at 547, this is not the same as actually awarding these votes to the other side and directing, as Isom requests here, that a candidate be declared the winner of an election on an uncertain vote total.

“Section 5–15–130 requires the municipal election commission to take a number of actions within forty-eight hours of the candidates filing protests—conduct a hearing, decide the issues, file a report that includes the transcribed testimony and exhibits with the county clerk, notify the parties of the decision, and order a new election, if necessary.” *Cole*, 393 S.C. at 274, 712 S.E.2d at 446. Now, nearly a year later, it is disappointing that the “main purpose” of the laws impacted by this protest—“realizing the voters’ will and seamlessly transitioning governmental offices”—continue to be frustrated by no clear winner of the November 7, 2023, mayoral election. *Id.* But, unlike in *Cole*, here, despite substantial delay in the electoral protest process, there still is not an “initial certification” that can be “restored.” *Cole*, 393 S.C. at 272, 712 S.E.2d at 444. Accordingly, it is with great hope that the Court issues this Order today so that the Town of Atlantic Beach can “order a new election as to the parties concerned” in the mayoral election, Josephine Isom and John David, without delay. S.C. Code Ann. § 5-15-130.

In sum, the Court having determined that sufficient factual evidence exists justifying the MEC’s Decision to invalidate the mayoral election and finding no error of law that would justify disturbance of the MEC’s ruling, the Decision of the Atlantic Beach Municipal Election Commission is **AFFIRMED**.

**AND IT IS SO ORDERED.**

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William H. Seals, Jr.
Circuit Court Judge

November ___, 2024

Horry Common Pleas

**Case Caption:** Josephine Isom VS Town of Atlantic Beach Election Commission

**Case Number:** 2024CP2602537

**Type:** Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157