STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-10-6830

MARTHA SMITH, KATHLEEN POST, AND WILLIAM POST,

PLAINTIFFS,

TOWN OF SULLIVAN'S ISLAND,

DEFENDANT.

ORDER

This matter comes before me upon Motion for Reconsideration filed by Plaintiffs, MARTHA SMITH, KATHLEEN POST and WILLIAM POST. Based on the pleadings, submissions and memorandums in this matter, the Motion for Reconsideration is denied without oral argument;

AND IT IS SO ORDERED!

R. MARKLEY DENNIS, JR.
Presiding Judge

Moncks Corner, South Carolina

August 26, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO. 2012-CP-10-6830
MARTHA SMITH, KATHLEEN POST, AND WILLIAM POST,	)	
Plaintiffs,	)	FINAL ORDER AND JUDGMENT
v.	)	
TOWN OF SULLIVAN'S ISLAND,	)	
Defendants.	)	

This matter is before the Court for final disposition after a bench trial conducted on May 15 and 16, 2014. After hearing the testimony, examining the exhibits in evidence, considering the arguments of counsel, and applying the applicable law, this Court enters the following findings of fact and conclusions of law and renders judgment in favor of Defendant, the Town of Sullivan's Island ("Defendant" or the "Town").

FINDINGS OF FACT

1. The Town is the owner of land within its municipal boundaries that is the site of the Sullivan's Island Elementary School (the "School"), a public school operated and administered by the Charleston County School District ("CCSD").
2. CCSD operated the original School under a 99-year lease entered into in 1954 between the State of South Carolina and CCSD. That lease was assumed by the Town later, upon its incorporation.
3. Because of concerns about the then existing building's age and structural integrity, especially its vulnerability to an earthquake, CCSD vacated the original school building a

few years ago and moved the students to Mamie P. Whitesides Elementary School in Mount Pleasant.

4. CCSD offered to demolish and rebuild the School on certain conditions. One of CCSD's conditions was that a new facility would have to accommodate at least 500 students. Additionally, the new facility would also have to be in compliance with current building standards and current design criteria for elementary schools.
5. On January 19, 2010, the Town Council for Sullivan's Island unanimously adopted a resolution in favor of the new school.
6. On May 20, 2011 the Town Council for Sullivan's Island unanimously adopted a second resolution supporting the new school under the conditions put forward by CCSD, including rebuilding of the school for an enrollment of up to 500 students if required.
7. In the summer of 2011, prior to beginning any work on the School site, CCSD and the Town negotiated a new 75-year lease for 5.61 acres of the site, ("the Lease").
8. The board of CCSD approved the Lease at its meeting on August 15, 2011.
9. After three readings with favorable votes at duly noticed Town Council meetings on August 16, September12, and September 20, 2011, the Lease was ratified and signed at the meeting of Council on October 18, 2011, by the adoption of Ordinance No. 2011-05.
10. Several provisions of the Lease address design, design review, and construction, including the following:

> 10. IMPROVEMENTS AND ALTERATIONS. *Any new structures to be placed on the Leased Property, or any improvements to the Leased Property should not be made without the prior written consent of Landlord.* Tenant hereby agrees to build the anticipated new school, taking into consideration the compatibility of the existing buildings located nearby and within the Town, with intentions to achieve neighborhood compatibility. In achieving neighborhood compatibility, *the Tenant shall*

consider the standards of neighborhood compatibility as set out in Section 21-111 of the Town of Sullivan's Island Ordinances.

Tenant agrees to design the new school with input from the Town Council, or their duly appointed agents with the understanding and agreement that no construction shall begin until such plans have been approved by the Town Council. The Landlord and Tenant agree to create procedures for the Town and/or its agents or boards, to review the design in phases, and to review the construction pursuant to the design and specifications.

11. DESIGN APPROVAL PROCESS. Tenant shall submit to the Landlord all plans and designs for the new school to be located on the Leased Property. The approval process shall include the following approval steps:

Conceptual Design Parameters.

The parties agree that the conceptual design parameters for the new school building shall include a maximum of 74,000 square feet of conditioned space as defined by the International Building Code, with a maximum of 34 feet for Building A, with maximum of 48 feet height for two-story building (Building B), if required and justified to Council, with a maximum of 42 feet for multi-purpose building (Building C), and with a maximum of 35 feet height for Building D.

***

13. BUILDING INSPECTION. All building inspections, including the approval of the plans and specifications, shall be the sole responsibility and obligation of the Tenant and of the State of South Carolina, Department of Education, who shall approve all plans and inspect all construction *in accordance with Code Requirements of as set for in the S.C. School Facilities Planning and Construction Guide.* It shall be the sole obligation and responsibility of State Superintendent of Education to approve construction and issue a certificate of occupancy at the completion of construction, prior to the occupation and use of the school building. The Town of Sullivan's Island may, but shall have no obligation to, require further inspections prior to occupancy, all at the expense of the Tenant. Notwithstanding any provisions here, the Town of Sullivan's Island shall not be responsible for the design, construction, maintenance or inspection of the new school and the Town of Sullivan's Island shall not be

responsible for any future design, construction, maintenance or inspection of the new school.

11. The 5.61 acres of the site subject to the Lease between the Town and CCSD is not located in any of the Town's five defined zoning districts. However, the Town and CCSD agreed the Town could use the enforcement powers prescribed in the Town's zoning ordinance with respect to the leased property and the Town retained the "unrestricted right, authority, and power" to zone the leased property in the future in sections 30 and 31 of the Lease, respectively.

12. During September and early October 2011, a group known as "Islanders for a Smaller School" drafted and circulated for signature a document entitled "A Petition to Reconsider the Construction of the Sullivan's Island Elementary School, as Currently Proposed (22 September 2011)" (the "Petition").

13. The Petition was submitted to the Town on October 10, 2011, and presented to Council at its meeting on October 18, 2011, the same meeting where Council ratified and signed the Lease.

14. The Petition purported to be signed by more than 15% of the qualified electors of the Town as of the last regular municipal election.

15. After receiving the Petition, the Town submitted it to the Charleston County Board of Elections and Voter Registration that certified the Petition was signed by more than 15% of the qualified electors of the Town as of the last regular municipal election.

16. The cover page of the Petition states that it purports to act under the provisions of South Carolina's initiative and referendum statute, S.C. Code §5-17-10, and states as follows:

Pursuant to S.C. Code Ann. §5-17-10, we the undersigned as registered voters of Sullivan's Island, do hereby request that no further action be taken by the Town Council on the proposed construction for the Sullivan's Island Elementary School

(SIES), pending serious and heretofore unexecuted, public evaluation of the most recently proposed construction plan. We, the undersigned, emphatically support the rebuilding of a new public school, but hold that this new school must be one of a more appropriate size, scope and type for our historic and environmentally sensitive residential community. Further, all of Sullivan's Island's residents deserve an opportunity to be heard on this issue regarding public monies, education and impacts, with full transparency. Therefore, we hereby request that the Town Council adopt an ordinance (attached) entitled "Reconsideration of the Construction of the Sullivan's Island Elementary School As Currently Proposed " This ordinance seeks full and complete, public evaluation of the currently proposed construction at, in or about the present location of the SIES. (emphasis in original)

17. The ordinance that the Petition sought to have placed on the election ballot as a referendum (the "Initiated Ordinance") was couched as two provisions that were stated in the alternative:

> Section 1-5 (a-b): PROVISIONS
>
> (a) Any school built or rebuilt on Sullivan's Island must comply with established design guidelines for neighborhood compatibility, as stated in the adopted public ordinances of the Town of Sullivan's Island and must specifically be approved by the board or committee that has responsibility for approving design guidelines. (Article XII, Design Review Board, Section 21-111);
>
> (b) If the Town of Sullivan's Island enters into any agreement or makes any commitment to allow for the construction of a school at Sullivan's Island before the board or committee has approved the design of the school, the Town of Sullivan's Island shall take action to revoke such agreement or commitment.
>
> ALTERNATIVE
>
> Section 1-5 (a-b): PROVISIONS
>
> (a) The Town of Sullivan's Island shall not enter into any agreement or make any commitment to allow for the construction of a school at Sullivan's Island with more square footage than the previous school.

(b) If the Town of Sullivan's Island enters into any agreement or makes any commitment to allow for the construction of a school at Sullivan's Island with more square footage than the previous school, the Town of Sullivan's Island shall take action to revoke such agreement or commitment.

18. On February 13, 2012, the Town filed a Complaint in Charleston County, C.A. No. 2012-CP-10-1060, against the Charleston County School Board and Islanders for a Smaller School that the Town alleged "is an unincorporated association of individuals who, upon information and belief, are organized and existing for the purpose of taking coordinated action in the public domain advancing their common agenda for the construction of a small school on the leased site described below, including conceiving, drafting, and circulating for execution" the Petition.

19. The Town's Complaint sought a declaratory judgment that the Petition was facially defective; that the Town had no legal obligation under the laws of the State of South Carolina to act on the Petition or submit the Initiated Ordinance to a referendum; that the Lease was duly entered and its terms could not be altered by the Initiated Ordinance; and that the only design review of CCSD's building plans for the new school are those set forth in the terms of the Lease.

20. The Town requested that residents who were members of Islanders for a Smaller School come forward and agree to accept service on behalf of the group. The few persons who came forward were willing to be named personally as defendants in the case but not to accept service for the organization. The Town did not amend the Complaint to add those few persons as individual defendants nor did it serve any of the persons who had identified themselves as acting on behalf of the organization in meetings or in the press .

21. Plaintiffs in this case - Martha Smith, Kathleen Post, and William Post, three of the signers of the Petition - filed this separate action on October 19, 2012. Plaintiffs seek a declaratory judgment that the Town failed to comply with South Carolina law by not placing the Initiated Ordinance on the election ballot and for an injunction requiring the Town to either adopt the Initiated Ordinance or hold a public referendum. Additionally, Plaintiffs amended their Complaint to assert a second cause of action that alleges that the Town deprived them of their right to vote and other rights under 42 U.S.C. § 1983.

22. In its defenses in its Answer in this action the Town alleges, among other things, that the Initiated Ordinance is moot and is legally invalid for the several reasons that were alleged in the action the Town initiated in February 2012.

23. On April 23, 2013, six months after this case was filed, the Town voluntarily dismissed its prior lawsuit, C.A. No. 2012-CP-10-1060, without prejudice

24. As a result of comments at the Town's public meetings on the design of the new School, CCSD's architect made numerous revisions to the design.

25. Town Council approved the design of the new School before CCSD was allowed to commence construction, as specified in the Lease.

26. Construction work commenced in early 2013 and has been ongoing. At the time of trial, the $20,000,000+ facility was at least 75% completed and expected to be finished and open in time for the school year beginning in August 2014.

CONCLUSIONS OF LAW

(1) The Initiated Ordinance is facially defective and, thus, not the proper subject of a public referendum.

The Initiated Ordinance was facially defective for the following five independent reasons, each addressed in detail below: (a) it seeks to control the design and size of the new school that

are both inherently within the Town's zoning authority; (b) it involves matters which are subject to a uniform statewide statutory scheme; (c) it involves the entry into a contract, an administrative matter; (d) it is incapable of performance since it is undisputed that CCSD would not have proceeded with the new School if the size were no greater than the original school; and (e) it mandates the Town violate civil law and breach a binding lease.

a. The Initiated Ordinance seeks to control the design and size of the new school, both of which are inherently within the Town's zoning authority.

The petitioners directed their Initiated Ordinance at the design and size of the new School. Both are zoning in nature and, therefore, not proper subjects for initiative and referendum in South Carolina.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code §§ 6-29-310 et seq., enables local governing bodies to adopt zoning ordinances including, but not limited to, ordinances regulating "the size, location, height, bulk, orientation, number of stories, erection, construction, reconstruction, alteration, demolition, or removal in whole or in part of buildings and other structures ." and ordinances regulating "other aspects of the development and use of land or structures necessary to accomplish the purposes set forth throughout this chapter." S.C. Code § 6-29-720 (A)(2) and (7). Under the enabling legislation local governing bodies are also specifically authorized to adopt ordinances providing for a board of architectural review. S.C. Code § 6-29-870.

Zoning matters are outside the category of matters subject to the initiative and referendum process set forth at S.C. Code §§5-17-10 et seq. See I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E. 2d 716 (S C. 2000) (affirming the trail court's ruling that a zoning provision cannot be enacted by referendum). In the I'on case, the Court stated the following:

> The obvious incompatibility between the initiative and referendum process and the comprehensive [statutory zoning] provisions indicates the Legislature did not intend to allow voters to enact more complex zoning measures by initiative and referendum. Furthermore, the [statutory zoning] provisions enacted in 1994 address the matter of zoning in detail. We conclude the Legislature intended for this more specific and more recent enactment to take precedence over the general initiative and referendum process enacted thirty-seven years ago.

Id. at 415-16, 526 S.E.2d at 720-21 (agreeing with those courts that "have prohibited such initiatives and referenda, finding that the detailed nature of zoning acts indicates a legislative intent that zoning matters must be decided only in the manner specified in those acts").

The Initiated Ordinance comes within this prohibition. Under the second alternative, no school could be built with more square footage than the previous building. The size of a school building is inherently a zoning issue. See I'on, at 414, 526 S.E.2d at 720 (noting that "[z]oning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare . . . Goals include the prevention of overcrowding of people, buildings, and traffic; the preservation of historic and ecologically sensitive areas; and the adequate provision of services to residents." (citing S.C. CODE § 6-29-710(A) (internal quotation omitted)); see also e.g., S.C. CODE § 6-29-720(A) (2) quoted above.

The first alternative in the Initiated Ordinance likewise concerns a zoning matter. It seeks to impose a method of design review. Included within the Town's Zoning Ordinance are ordinances establishing a Design Review Board ("DRB") to review and approve proposed construction on Sullivan's Island that is located within one of the zoning districts established by Ordinance. See TOSI Ordinances, Sec. 21-108 (DRB's powers limited to properties governed by the Zoning Ordinance); and see TOSI Ordinances Sec. 21-9 ("For the purpose of this Zoning Ordinance, the Town of Sullivan's Island is hereby divided into the following Zoning Districts .

"); and TOSI Ordinances Sec. 21-10 (A) ("The regulations set by this Zoning Ordinance ***within each district*** shall be minimum standards and shall apply uniformly to each class or kind of structure or land, except as hereinafter provided.") (double emphasis added). See also, S.C. CODE §6-29-720 (Providing that a municipality's ". . . zoning ordinance shall create ***zoning districts*** of such number, shape, and size as the governing authority determines to be best suited to carry out the purposes of this chapter [and that] ***[w]ithin each district the governing body may regulate***....") (double emphasis added)

The School site does not fall under the DRB's purview because it is not located within a zoning district. See TOSI Official Zoning Map, and Sec. 21-4 (A) ("The Official Zoning Map is the official map depicting the boundaries of the above zoning districts of Sullivan's Island, South Carolina . . . [t]he Official Zoning Map, together with all explanatory matter thereon, is hereby adopted by reference and declared to be a part of this Zoning Ordinance."). There is no zoning district for schools or public facilities and, as a result, no specific design standards that apply to the schools.

Plaintiffs put into evidence portions of the Town's Comprehensive Plan that concern the School site. However, comprehensive plans have no regulatory effect and do not constitute zoning. In Petersen v. Town of Clemson, 312 S.C. 162, 439 S.E.2d 317 (Ct. App. 1993), the Court of Appeals commented on this distinction:

> The plan does not establish the zoning for the property nor does it mandate the mixing of commercial and residential uses. It merely provides a general direction for considering future rezoning, which is a legislative process.

439 S.E.2d 322.

The Initiated Ordinance would have the impermissible effect of amending the zoning ordinances to grant the DRB authority to evaluate and approve the design of a building that is not

located within any of the five zoning districts. The Initiated Ordinance in essence seeks to zone School site leased to CCSD. The Enabling Act reserves zoning decisions to the local governing body – here, Town Council. Council addressed these design matters in the Lease, including size, that are intrinsically zoning in nature as it was entitled to do.

The Initiated Ordinance is fatally deficient since it seeks to bind Council on zoning matters that are beyond the purview of the statutes governing initiative and referendum. Ion, at 415-16, 526 S.E.2d at 720-21 ("the detailed nature of zoning acts indicates a legislative intent that zoning matters must be decided only in the manner specified in those acts" and are not appropriate for public referendum).

b. The Initiated Ordinance involves matters that are subject to uniform scheme or practice.

Under South Carolina law, "[m]unicipalities have no authority to set aside the structure and administration of any governmental service or function, the responsibility for which rests with the state government or which requires statewide uniformity." Town of Hilton Head, at 456, 415 S.E.2d at 805 (citing S.C. CONST. art. VIII. § 14). Any ordinance seeking to set aside the structure and administration of any governmental service or function requiring statewide uniformity would conflict with state law. See id.

In Town of Hilton Head, the Court determined that "the initiated ordinance [was] facially defective in its entirety because it set[] aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads." Town of Hilton Head, at 456, 415 S.E.2d at 805. "The planning, construction, and financing of state roads is a governmental service which requires statewide uniformity" as provided for in South Carolina Code § 57-3-10–30. Id. The Court in Town of Hilton Head explained why such an ordinance is

not proper for referendum as follows: "When a municipality enacts an ordinance which conflicts with state law, the ordinance is invalid . . . [and] [a]n electorate has no greater power to legislate than the municipality itself . . . [therefore] [a]n initiated ordinance which is facially defective cannot be cured by adoption by the electorate. Id. (internal citation omitted).

In this case the Initiated Ordinance attempts to set aside the structure and administration of a statewide school scheme for the construction of schools. The South Carolina legislature has mandated that the State Board of Education establish a statewide scheme to govern the building of school facilities and approve all plans for public schools. See, S.C. CODE § 59-23-210.[1] Pursuant to that statutory authority, the Office of School Facilities of the South Carolina Department of Education has promulgated guidelines as minimum standards for the construction and design of public schools and published them in a document entitled "South Carolina School Facilities Planning and Construction Guide." Under S.C. Code § 59-23-210 (A), the School's design and construction was required to conform to the provisions of the South Carolina School Facilities Planning and Construction Guide. Section 13 of the Lease incorporated this requirement in specifying that CCSD and the Department of Education "shall approve all plans and inspect all construction in accordance with Code Requirements of as set for in the S.C. School Facilities Planning and Construction Guide...."

[1] S.C. Code § 59-23-210 (A) and (B) provide, in pertinent part, as follows: "(A) All construction, improvement, and renovation of public school buildings and property on or after the effective date of this section shall comply with the latest applicable standards and specifications set forth in the South Carolina School Facilities Planning and Construction Guide as published by the South Carolina Department of Education.... (B) All construction, improvement, and renovation of public school buildings and property on or after the effective date of this section must have plans and specifications submitted to the State Superintendent of Education or the superintendent's designee. Approval of the plans and specifications by the State Superintendent of Education or the superintendent's designee must be received before public bidding before the construction can begin...."

RMJ 12

The Initiated Ordinance intrudes into design and construction considerations that are exclusively within the authority of the State Board of Education in the exercise of the mandate of the General Assembly to establish, promulgate, and enforce statewide standards. Just as the proposed initiated ordinance in Town of Hilton Head impermissibly sought to set aside the statewide statutory scheme of SCDHPT, the Initiated ordinance in this case seeks to set aside the statewide scheme of the Department of Education. See Town of Hilton Head, at 456, 415 S.E.2d at 805 ("the initiated ordinance [was] facially defective in its entirety because it set[] aside the structure and administration of the statewide highway scheme by attempting to limit the authority granted to the SCDHPT to consider the collection of tolls as a method of financing the construction of state roads."). Therefore, the Initiated Ordinance was facially defective for this additional reason, and the Town was under no obligation to hold a referendum on the Initiated Ordinance. See Town of Hilton Head, at 456, 415 S.E.2d at 805.

The Initiated Ordinance also seeks to override the structure and administration of the countywide school building standards by attempting to limit the authority of CCSD to determine the parameters for the construction of its schools in Charleston County. CCSD applies a written county-wide set of standards titled "Charleston County School District Elementary Education Facilities Specifications 3.0." To accomplish economies of scale, CCSD also has a practice that it will not build any new freestanding elementary school for a capacity of less than 500 students. The Initiated Ordinance seeks to displace these countywide requirements of CCSD for new elementary schools that it pays for, constructs, operates, and maintains.

Although the particular holding in Town of Hilton Head was limited to statewide schemes, the same principles and policy reasons would apply to countywide standards and practices of a local school district with respect to the construction of its new schools. However,

because the Court finds and concludes the Initiated Ordinance was facially invalid for violating a statewide scheme implemented by the General Assembly, the Court need not reach the question of whether the state supreme court's holding in Town of Hilton Head would encompass the countywide practices and policies of CCSD in this case.

c. The Initiated Ordinance involves the entry into a contract, an administrative matter.

"Only legislative questions may be referred to a vote of the people." Town of Hilton Head Island, at 457, 415 S.E.2d at 806 (citing State ex rel. Boynton v. Charles, 136 Kan. 875, 18 P 2d 149 (1933)). "An administrative measure is an enactment which puts into execution previously declared policies or previously enacted laws." Id. The Initiated Ordinance plainly intruded on the Town's administrative decisions. It sought to dictate certain terms of the Lease and instructed Town Council to breach the Lease if the new building was larger than the original one.

Whether a Town should enter a contract and the terms of that contract is an administrative decision, rather than the enactment of permanent legislation. Courts considering this question have reached this same conclusion. In particular, the Supreme Court of Colorado held that the adoption of an amendment of a lease of municipal property is an administrative function that it is *not* the proper subject of a public referendum. See Witcher v. Canon City, 716 P.2d 445, 450 (Colo. 1986). As the court succinctly stated in Witcher:

> ***The question of approval of the specific terms and conditions of the lease is not a matter of public policy. The negotiation of the leases and the amendments thereto are administrative acts. . . .***
>
> Witcher, 716 P.2d at 450 (double emphasis added).

See, also, City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (Colo. 1987) (the choice of location and structure for a new city hall is administrative).

Because the Initiated Ordinance sought to curtail and overrule administrative actions of Council, the Petition was facially defective for this additional, alternative reasons, and the Town was not required to adopt the Initiated Ordinance or put it on an election ballot.

d The Initiated Ordinance is incapable of performance

The Initiated Ordinance is incapable of performance seeking to do something that is neither possible nor feasible

It is undisputed that CCSD was not going to proceed with the new School facility if its size were no greater than the original school In the numerous "whereas" clauses of the Initiated Ordinance, the signers of the Petition profess to emphatically support the rebuilding of an elementary school on Sullivan's Island Yet, the Initiated Ordinance's second alternative provision seeks to prohibit the construction of a new building with more square footage than the first one

The Court finds and concludes that a new elementary school that meets the statewide and countywide standards previously discussed must necessarily be larger than the elementary school built in 1954 that had already outgrown its building at the time it was closed and vacated CCSD was not going to proceed with the new facility unless it was designed and constructed for at least 500 students Council unanimously passed a resolution in favor of a new school building for up to 500 students in May 2011

Petitioners possess no right to obtain a vote to enact invalid legislation; a court "should not compel the doing of a vain thing and the useless spending of money " Town of Hilton Head, 415 S.E 2d 806 The Initiated Ordinance sought a vain and impossible act and was facially defective for this additional reason as well

e The Initiated Ordinance mandates the Town violate civil law and breach a binding lease.

The Initiated Ordinance mandates the Town violate civil law by breaching a binding contract—the Lease duly entered into by the Town and CCSD The Lease's terms are specific and contemplate a school of a particular size and provide for an extensive design review process Lease, ¶¶ 10-16 Either of the two of the alternative provisions of the Initiated Ordinance would have required the Town to breach the terms of Lease related to size and the design review process, in violation of civil contract law Therefore, the Initiated Ordinance was facially defective for this additional reason, and the Town had no obligation to adopt the Initiated Ordinance of place it on an election ballot

(2) The Court, not Council, renders the ultimate determination of whether a proposed initiated ordinance is facially defective.

In Town of Hilton Head our state supreme court ruled that the final determination of the legal validity of an initiated ordinance rests with the courts "We emphasize that these are findings [of facial invalidity] which can be made pursuant to judicial inquiry only, and that a municipality has no power to pass on the validity of an initiated ordinance, a declaratory judgment action is the appropriate method by which a municipality may seek pre-election review of an initiated ordinance " 415 S E 2d 806

Here, the Town received the Petition, the Town sent the Petition to Charleston County Board of Elections and Voter Registration, and the Charleston County Board of Elections and Voter Registration certified the Petition as being signed by more than 15% of the qualified electors of the Town as of the last regular municipal election Members of Town Council came to their own conclusions whether the Initiated Ordinance was facial invalid Council then had the Town file the first declaratory judgment action, C A, No 2012-CP-10-1060, seeking a judicial

declaration that the Initiated Ordinance was legally invalid and that Council was not required to adopt it nor to conduct a referendum

Plaintiffs argue that somehow their rights were violated when the Town did not proceed to serve and prosecute its declaratory judgment action until conclusion Putting aside that Plaintiffs, as individual petitioners, have no "right" to force council to adopt a facially invalid initiated ordinance or to force it to conduct a referendum on it, their separate suit now before the Court seeks a declaratory judgment and other relief that requires judicial findings of the facial validity of the Initiated Ordinance The Town violated no rights in not proceeding to judgment in its case and in dismissing its action eight months after this case was filed This second action joins the same issues and results in a judicial determination of the validity of the proposed ordinance, in keeping with the process espoused by our state supreme court in Town of Hilton Head

A town council necessarily must review and assess an initiated ordinance to decide what action to take, including whether to initiate litigation to seek a final, binding judicial determination of its validity, as it did in this instance The Town is not contending that any determinations by its members are binding on this Court nor entitled to judicial deference Our state supreme court in Town of Hilton Head did not prohibit such initial consideration of validity by a town council when it reposed in the courts the authority to make the ultimate findings on validity

The Town's actions were in keeping with the various holdings of our state supreme court in Town of Hilton Head

Rule 17

(3) Plaintiffs have no right under South Carolina law to have Town Council adopt or hold a referendum on their Initiated Ordinance that is facially invalid.

The statutes providing for initiative and referendum, as applied by our state supreme court, do not create a right in a petitioner to have a municipality proceed to adopt or conduct a referendum on a facially invalid initiated ordinance

South Carolina Code section 5-17-10 provides that "[t]he electors of a municipality may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes [provided that any] initiated ordinance [is] submitted to the council by a petition signed by qualified electors of the municipality equal in number to at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election commission as being in accordance with the provisions of this section "

South Carolina Code section 5-17-30 provides that "[i]f the council shall fail to pass an ordinance proposed by initiative petition or shall pass it in a form substantially different from that set forth in the petition therefor , the adoption of the ordinance concerned shall be submitted to the electors not less than thirty days nor more than one year from the date the council takes its final vote thereon "

Even though these statutes contain no express exclusions, our supreme court has determined that a municipality is under no obligation to adopt or place a facially defective ordinance on a ballot. Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S C 449, 456, 415 S E 2d 801, 806 (S.C. 1992) ("Because the initiated ordinance is facially defective in its entirety, we find that the Town has no obligation to place the initiated ordinance on the ballot") This is because citizens "possess no right to obtain a vote to enact invalid legislation " Id. (citing Utz v. City of Newport, 252 S W.2d 434 (Ky 1952))

Since Plaintiffs possessed no right to obtain a vote to enact invalid legislation, the Town did not violate any of their alleged rights under the South Carolina's initiative and referendum statutes

(4) The right to vote is not implicated, and Plaintiffs have not proven that the Town violated any of their State or Federal Constitutional rights.

In addition to their claim that the Initiated Ordinance should have been submitted to referendum and that their rights were violated when the Town failed to do so, Plaintiffs brought a cause of action under 42 U S Code § 1983 asserting that the Town deprived them of their right to vote and their right to due process under the South Carolina and United States Constitutions

The Fourth Circuit Court of Appeals has squarely decided this issue against Plaintiffs and ruled that state law authorizing voters to initiate legislation does not implicate the fundamental right to vote In Kendall v Balcerzak, 650 F.3d 515, 522 (4th Cir 2011), the Fourth Circuit addressed whether a group of citizens' right to initiate a petition for referendum can implicate the right to vote such that a plaintiff can maintain and action pursuant to section 1983 for an alleged failure of the government to hold a referendum on an initiated ordinance In that case, a unanimous panel of the Fourth Circuit Court of Appeals affirmed the lower court's determination that the right to vote is not implicated when a group of citizens seeks to have a particular issue submitted to referendum Id ("We agree with the district court's conclusion that there is no fundamental right to initiate legislation as there is a fundamental right to vote.") The court went on to explain as follows·

> ***This case is not a right to vote case.*** We find the case of Taxpayers United v Austin, 994 F 2d 291, 296 (6th Cir 1993), to be instructive on this issue As summarized above, in Taxpayers United, the Sixth Circuit Court of Appeals held that Michigan's procedures for checking signatures on initiative petitions did not deny voters' right to vote, as signing a petition to initiate legislation was not entitled to the same protection as exercising the right to vote As in Taxpayers United, in this case, Kendall ***does not cite to us nor does our research identify any decision of the Supreme Court holding that signing a petition to initiate legislation is entitled to the same protection as exercising the right to vote.***
>
> The basis for distinguishing the right to vote in a representative election, on the one hand, from the right to petition for referendum and initiative, on the other, is a sound one The referendum is a form of direct democracy and is not compelled by the Federal Constitution See Doe v Reed, 561 U S 186, 130 S Ct 2811, 2817, 177 L Ed 2d 493 (2010) (Sotomayor, J , concurring), Kelly v Macon–Bibb Cnty Bd of Elections, 608 F Supp 1036, 1038 (M D. Ga 1985)

Kendall, at 523 (4th Cir 2011) (double emphasis added)

Furthermore, as just discussed, with respect to the right to petition for referendum and initiative, there is no right under South Carolina law to compel a municipality to adopt or conduct a referendum on an initiated ordinance that is legally invalid on its face

With respect to the other rights Plaintiffs allege were violated in their Amended Complaint, the Court finds that those claims fail as well. The Town did not violate any state law (as discussed in detail above), no fundamental federal right is implicated in the right to initiate legislation, the legislation they sought to initiate was facially invalid; Plaintiffs were not deprived of a property or liberty interest that would sustain a claim for violation of substantive due process, and Plaintiffs were not deprived of procedural due process because this lawsuit has afforded them all the procedural rights afforded to any party to litigate the issues before the Court.

The Court has fully considered all the claims, arguments, and positions of Plaintiffs contained in their filings, including their Pretrial Brief, including those stated on the record during trial. Any particular argument advanced by Plaintiffs not specifically addressed herein

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has been considered and rejected. No motion to alter or amend shall be necessary to protect and preserve any grounds of Plaintiff previously presented to the Court

Therefore, based upon the forgoing findings of facts and conclusions of law the Court renders the following Judgment

(1) The Plaintiffs' request for a declaration that the Town failed to comply with the law of the State of South Carolina is **DENIED** and it is **DECLARED** that the Initiated Ordinance was facially invalid for the multiple reasons discussed, that the Town had no obligation to adopt the Initiated Ordinance or to conduct a referendum, that Town did not violate any rights of Plaintiffs, and that the Town is entitled to judgment in its favor on Plaintiffs' first cause of action,

(2) It is further **DECLARED** that the Town did not deprive the Plaintiffs of any state or federal constitutional right, including the right to vote, right to participate in local government, right to procedural due process, or the right to substantive due process, and that the Town is entitled to judgment in its favor on Plaintiffs' second cause of action under 42 U S C §1983,

(3) The Plaintiffs' request for an Order of the Court or writ of Mandamus directing the Town to adopt the Initiated Ordinance or hold a public referendum is **DENIED**

(4) The Plaintiffs request for an award of cost and attorneys' fees pursuant to 42 U S C § 1988, S C CODE § 15-53-100, or other statute or legal precedent is **DENIED**

AND IT IS SO ORDERED

June 6, 2014
Charleston, S C

R Markley Dennis, Jr
Circuit Court Judge

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ATTORNEYS AT LAW

October 14, 2014

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

RE Martha Smith, et al. v. Town of Sullivan's Island
Civil Action No.: 2012-CP-10-6830
Appellate Case No.: 2014-002128

Dear Ms. Kitchings:

I am in receipt of and thank you for your letter dated October 10, 2014 in the above-referenced appeal. Please find enclosed a copy of the two Orders being challenged on appeal in the above-referenced matter.

Thank you for bringing this deficiency to our attention.

Please do not hesitate to contact me with any questions or concerns.

Respectfully,

Liane Marcotulli
Legal Assistant

Enclosures
cc: G. Trenholm Walker, Esq.
John P. Linton, Jr., Esq.
Lawrence A. Dodds, Esq.

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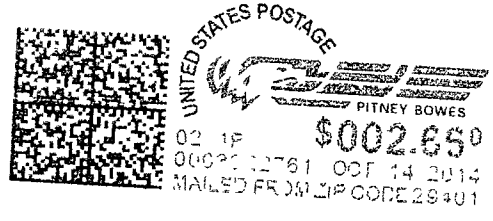

The Honorable **Jenny Abbott Kitchings**
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201