THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-6830

Martha Smith, Kathleen Post, and William Post,

Appellants,

v.

Town of Sullivan's Island,

Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN RULING THAT THE TOWN OF SULLIVAN'S ISLAND COMPLIED WITH SOUTH CAROLINA LAW IN RESPONDING TO A CITIZEN INITIATED ORDINANCE WHEN THE TOWN FAILED TO PASS THE INITIATED ORDINANCE, FAILED TO CONDUCT A REFERENDUM WITHIN ONE YEAR OF RECEIVING THE INITIATED ORDINANCE, AND FAILED TO OBTAIN A PRE-ELECTION RULING THAT THE INITIATED ORDINANCE WAS FACIALLY DEFECTIVE?

STATEMENT OF THE CASE

This is an appeal from a non-jury trial in which the trial court declared that the Town of Sullivan's Island ("Town") complied with South Carolina law in responding to a citizen initiated ordinance ("Initiated Ordinance") proposed by petition ("Petition").

On February 13, 2012, the Town filed a declaratory judgment action in the Charleston County Court of Common Pleas against the "Islanders for a Smaller School" seeking a court ruling: 1) that the Initiated Ordinance was facially defective and 2) that the Town was not required to submit the Initiated Ordinance to a referendum. (Joint Ex. 8). The Town never served its summons and complaint.

On October 19, 2012, Appellants filed suit against the Town seeking a declaration that the Town failed to comply with South Carolina law in refusing to take appropriate action in response to the Initiated Ordinance.[1] (Complaint). On March 13, 2013, the trial court denied the Town's motion for judgment on the pleadings and allowed the case to proceed. (March 13, 2013 Order). The Town voluntarily dismissed its own complaint on April 23, 2013. (Def. Ex. 1). On September 5, 2013, Appellants amended their

[1] Appellants originally sought injunctive relief but this claim was not pursued at trial and is not the subject of this appeal.

complaint to add a Section 1983 claim for violation of their constitutionally protected rights to vote and procedural due process. (Amended Complaint).

The matter proceeded to a bench trial on May 15-16, 2014 before the Honorable R. Markley Dennis, Jr. After considering the testimony, evidence and argument of counsel, the trial court entered judgment in favor of the Town on June 9, 2014. (June 9, 2014 Order). The trial court ruled that the Initiated Ordinance was facially defective, that the Town complied with South Carolina law in responding to the Initiated Ordinance, and that the Town did not deprive Appellants of their constitutional rights. (June 9, 2014 Order). The trial court denied Appellants' motion to reconsider the order of judgment on September 5, 2014. (September 5, 2014 Order).

Appellants filed a timely Notice of Appeal on October 3, 2014 and appeal the trial court's ruling that the Town complied with South Carolina law in responding to the Initiated Ordinance.

FACTS

Since the 1950s, the Charleston County School District ("CCSD") has operated an elementary school on Sullivan's Island. (Joint Exs. 4 at 6; 10). In or around 2009, CCSD expressed concern for the existing school building's age and structural integrity. CCSD began considering plans to demolish the existing school and to build a new school in the same location. On January 19, 2010, the Town Council ("Council") passed a resolution pledging "its support and commitment to the Charleston County School District in the effort to maintain the school on Sullivan's Island." (Def. Ex. 4). This resolution was reaffirmed by the Town on May 20, 2011. (Def. Ex. 5).

In the late summer and early fall of 2011, the Town and CCSD began privately negotiating a lease for the construction of a new elementary school ("Lease") on Sullivan's Island. (Tr. Tran. 22:12-19; 24:15-23). The Lease provided that the parameters for the design of the new school could include a building of up to 74,000 square feet. (Joint Ex. 4 at 12). The public was provided with no information regarding the plans for the building of the school prior to CCSD's public adoption of the Lease at a regularly scheduled meeting of the Charleston County School Board on August 15, 2011. (Joint Ex. 4; Tr. Tran. 25:3-5; 35:19-36:2). Subsequently, the Town held three readings of a proposed ordinance adopting the Lease during Council meetings on August 16, 2011; September 12, 2011; and September 20, 2011. The particulars of the Lease and school design were first revealed to the residents of Sullivan's Island during the August 16, 2011 meeting. (Tr. Tran. 35:6-13; Joint Ex. 4 at 2).

The Town of Sullivan's Island has approximately 2,100 residents and 1,800 registered voters—of whom Appellants are three. (Tr. Tran. 31:1-5). In early September of 2011, Appellants drafted and circulated an initial petition asking the Town to analyze the impact of the new school building before ratifying the Lease. This initial petition simply asked "Town Council to – to stop, to slow down. To listen to this – the voices in this petition, the signees of this petition." (Tr. Tran. 66:4-6). The initial petition was presented to the Town during the September 12, 2011 Council meeting. (Pl. Ex. 1). The Town took no action in response to this initial petition. (Tr. Tran. 38:2-10; 70:16-71:4).

Frustrated by the Town's response at the September 12, 2011 Council meeting, Appellants drafted and circulated a formal petition and proposed ordinance. (Tr. Tran. 71:5-11). The Town's handling of the Initiated Ordinance is at issue in this appeal. The

Initiated Ordinance provided that the Town's existing Design Review Board would evaluate all plans for the new school building and that the school building's size would be limited to the existing school building's smaller footprint. (Joint Ex. 2). On October 10, 2011, Appellants presented the Town Clerk with the Petition and Initiated Ordinance. (Joint Exs. 1&2). The Petition was signed by 261 residents and was certified by the Charleston County Board of Elections and Voter Registration as containing the required signatures of fifteen percent of the registered voters on Sullivan's Island. (Tr. Tran. 102:16-19).

Before the Town ratified the Lease with CCSD, the Town "knew that [it] had received a certified petition for referendum." (Tr. Tran. 38:18-21). During the October 18, 2011 Council meeting, the floor was opened for public commentary and Appellant Kathy Post reminded the Town that the Initiated Ordinance was pending and Appellant Martha Smith expressed that the referendum would give the residents the opportunity to vote for the school they wanted. (Joint Ex. 5). Based on the concerns expressed by the public, Mayor Carl Smith asked Council for a motion to defer ratification of the ordinance of the Lease until a referendum could be held. No member of Council made such a motion and Mayor Pro Tem Mike Perkis signed and ratified the Lease with CCSD on October 18, 2011. (Tr. Tran. 38:23-24; 39:24-40:4; 40:10-23; Joint Exs. 4 and 5). No further action was taken by Council to address the Initiated Ordinance at that time.

On some later date, the Town determined on its own accord that the Initiated Ordinance was invalid and defective and need not be submitted to a referendum vote as required by statute. (Tr. Tran. 42:18-43:5, 43:18-25; 52:7-10; 80:21-81:9). It is unclear when this decision was communicated to the public. During the January 17, 2012

Council meeting, several residents again asked Council about the status of the referendum. (Joint Ex. 6).

After the Town filed a declaratory judgment action on February 13, 2012, the Town failed to commence its action. (Tr. Tran. 84:21-85:19; 87:11-15; 94:12-15; Joint Ex. 8). During the March 5, 2012 Special Meeting of the Council, it was noted that:

> [T]here was no representative for the Islanders for a Smaller School group to accept service. Because there is not a representative and the Town does not want to name one person and put him in a position where he may not want to be, the Town is waiting for someone to step forward.

(Joint Ex. 7).

Several residents who signed the Petition in support of the Initiated Ordinance, including each of the Appellants, came forward after the March 5, 2012 Council meeting and agreed to accept service of the Town's summons and complaint. (Tr. Tran. 88:9-89:1; Pl. Exs. 9-11). However, the Town chose not to serve any of these volunteers or any of the other voters who signed the Petition. The summons and complaint were never served and the Town's action was never properly commenced. (Tr. Tran. 88:1-8).

Because the Town refused to pass the Initiated Ordinance, refused to submit the Initiated Ordinance to a vote by the entire Sullivan's Island electorate, and did not obtain a pre-election ruling as to the validity of the Initiated Ordinance, Appellants filed suit on October 19, 2012—one day and one year after the Town was presented with the certified Petition and Initiated Ordinance. (Complaint).

STANDARD OF REVIEW

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." Judy v. Martin, 381

S.C. 455, 458, 674 S.E.2d 151, 153 (2009). An issue regarding statutory interpretation is a question of law. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009).

ARGUMENT

This case is about separation of powers and an abuse of limited municipal power. In choosing to disregard the statutory mandate to take affirmative action when presented with a citizen initiated ordinance, the Town exceeded the scope of its power and effectively thwarted Appellants' right to participate in their local government. The trial court's ruling that the Town complied with South Carolina law in response to the Initiated Ordinance constitutes an error of law and should be reversed.

When a municipality is presented with a properly initiated ordinance by a group of its citizens, the municipality has only three options: 1) adopt the ordinance; 2) submit the initiated ordinance to a public referendum; or 3) obtain a judicial declaration that the proposed ordinance is facially defective. See S.C. Code Ann. § 5-17-30 (1975); Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992). Because the Town failed to take any of the three actions permitted under the law, this Court should reverse the trial court's ruling and declare that the Town did not comply with South Carolina law in responding to the Initiated Ordinance.

The General Assembly has provided citizens with the right to petition and propose ordinances to their governing municipalities. Chapter Seventeen of Title Five of the South Carolina Code is specifically and solely dedicated to this procedure and imposes

clear requirements on a municipality in receipt of a properly initiated ordinance. See S.C. Code Ann. §§ 5-17-10 – 5-17-30 (1975).

Section 5-17-10 is entitled "Electors of municipality permitted to propose ordinances" and states:

> The electors of a municipality may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be 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.

S.C. Code Ann. § 5-17-10 (1975).[2]

When the municipality does not pass an initiated ordinance, Section 5-17-30 of the South Carolina Code requires the municipality to conduct a referendum and permit the entire electorate to vote on whether to pass the initiated ordinance:

> If 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 or if the council fail to repeal an ordinance for which a petition has been presented, the adoption or repeal 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. The council may, in its discretion, and if no regular election is to be held within such period, provide for a special election.

S.C. Code Ann. § 5-17-30 (1975).

"The cardinal rule of statutory interpretation is to ascertain the intent of the legislature." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579

[2] It is not disputed that the Petition and Initiated Ordinance complied with the requirements of Section 5-17-10 of the South Carolina Code (1976).

S.E.2d 334, 336 (Ct. App. 2003). The General Assembly's intent should be ascertained primarily from the plain language of the statute in question. See Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); Stephen v. Avins Const. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. See Jones, 364 S.C. at 230, 612 S.E.2d at 723. When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007).

With respect to a citizen's right to initiate an ordinance, it is clear that the General Assembly intended for electors to have a broad ability to "propose any ordinance" subject to very few limitations. The General Assembly did not intend for a municipality's obligation to take responsive action to be triggered by the initiative of one or just a few citizens—which is demonstrated by the requirement that the group of citizens seeking to initiate an ordinance must obtain public support and signatures of at least fifteen percent of the municipality's electorate. See S.C. Code Ann. § 5-17-10 (1975). This is the only burden that the General Assembly chose to place on members of the petitioning electorate.

When the petitioning electorate's burden is satisfied, the General Assembly expressly requires a municipality to take action within one year after receiving an initiated ordinance. See S.C. Code Ann. § 5-17-30 (1975). The Legislature does not permit a municipality to simply declare that an initiated ordinance is invalid or to otherwise take no action. "Under the rules of statutory interpretation, use of words such

as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." Bradley v. Doe, 374 S.C. 622, 634, 649 S.E.2d 153, 160 (Ct. App. 2007) (quoting Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)).

Our Supreme Court carved out a narrowly tailored third option for a municipality in receipt of an initiated ordinance which the municipality does not want to pass or put to the electorate. In Town of Hilton Head Island v. Coalition of Expressway Opponents, the Court held that "a court may undertake a pre-election review of an ordinance initiated by registered voters, and alleged by the municipality to be defective." 307 S.C. 449, 415 S.E.2d 801 (1992). In Expressway Opponents, citizens circulated a petition to initiate an ordinance requiring the municipality to conduct a referendum anytime it sought to collect a toll for the use of roads or bridges located on Hilton Head Island. Id. at 452, 415 S.E.2d at 803.

Upon receipt of the initiated ordinance, the Town of Hilton Head Island believed that the ordinance was facially invalid and chose not to adopt the ordinance or submit it to the electorate. Id. at 453, 415 S.E.2d at 803. Instead, the Town filed a declaratory judgment action seeking pre-election review of the validity of the proposed ordinance. Id. In ruling that the lower court had jurisdiction to determine whether the initiated ordinance was facially defective, the Court was clear:

> [Whether an] . . . initiated ordinance is facially defective in its entirety. . . [is a] finding[] 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.

Id. at 457-58, 415 S.E.2d at 806 (emphasis added).

The Court did not remove or abrogate any statutory duty placed on a municipality pursuant to Section 5-17-30. Significantly, the Court expressly placed the burden of obtaining a judicial declaration on the municipality before the municipality can properly refuse to conduct a referendum. This is in keeping with the General Assembly's clear directive that once the petitioning electorate complies with Section 5-17-10 the municipality has the burden of taking action.

The trial court's ruling in the present case suggests that a municipality can choose to take no action in response to an initiated ordinance and still comply with the requirements of Section 5-17-30 and Expressway Opponents. The Town never commenced an action to seek a pre-election ruling. See Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are . . . served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing"). As a practical matter, choosing not to serve a summons and complaint makes the proposed lawsuit a legal nullity. Simply filing suit does not satisfy the burden of a municipality to obtain a pre-election ruling on the validity of a proposed ordinance.

The Town argued that it could not effectuate service of process because no member of the "Islanders for a Smaller School" group would step forward and agree to be served. The South Carolina Rules of Civil Procedure do not require a member of an unincorporated association—or any defendant—to step forward and agree to be sued. Rather, Rule 4(d)(3) provides plain rules for serving an unincorporated association with a summons and complaint:

> Upon a[n] . . . unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and

> complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 4(d)(3), SCRCP.

The Town has also maintained that service was "impossible." This argument has no merit. Several individuals, including each of the Appellants, came forward and agreed to voluntarily accept service. The Town chose not to serve any of these individuals and chose not to amend its complaint to individually name any of the 261 residents who signed the Petition as defendants. The Town's failure to commence the action filed is fatal to its argument that it sought to obtain pre-election review pursuant to narrow exception to Section 5-17-30 carved out in Expressway Opponents.

The trial court reasoned that, in effect, the Town's failure to serve its suit was harmless error and determined that the issues raised in the action the Town failed to commence merged into Appellants' lawsuit. The trial court's ruling is neither countenanced by the plain language of Section 5-17-30 nor supported by the limited exception to the statute's requirements detailed in Expressway Opponents. The trial court's ruling rewrites the law and unfairly shifts the burden to citizens to not only satisfy the requirements of Section 5-17-10 but to also obtain judicial review and pre-approval of an initiated ordinance when a municipality refuses to take action. Permitting a municipality to pocket veto a citizen initiated ordinance and avoid the mandate imposed by the General Assembly renders the requirements of Section 5-17-30 meaningless. The trial court should be reversed.

CONCLUSION

Appellants respectfully request that this Court reverse the judgment of the trial court and declare that the Town of Sullivan's Island failed to comply with South Carolina law in responding to the Initiated Ordinance. Appellants further request that the matter be remanded to the trial court for a determination of an award of costs recoverable under Section 15-53-100 of the South Carolina Code (2005).

Respectfully submitted,

Rutledge Young 12/30/2014

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December 30, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-6830

Martha Smith, Kathleen Post, and William Post,

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v.

Town of Sullivan's Island,

Respondent.

PROOF OF SERVICE

I, Liane Marcotulli, of Duffy & Young, LLC, certify that I have served the **INITIAL BRIEF OF APPELLANTS** on Respondent by e-mail and by U.S. mail on December 30, 2014 by depositing a copy of it to its attorneys of record as shown below:

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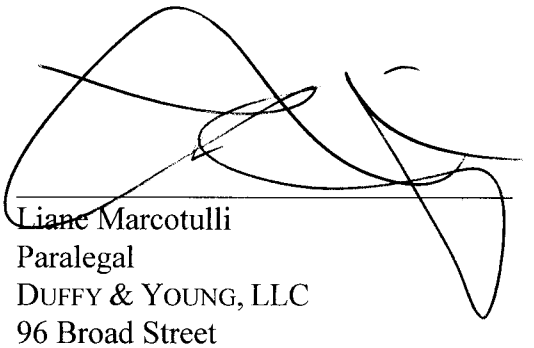

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December 30, 2014

VIA FED-EX OVERNIGHT 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 Aciton No.: 2012-CP-10-6830
Appellate Case No.: 2014-002128

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the following documents:

1. the original and one copy of Appellants' Initial Brief;
2. the original and one copy of Appellants' Proof of Service as to Appellants' Initial Brief;
3. the original and one copy of Appellants' Designation of Matter to be Included in the Record on Appeal; and
4. the original and one copy of Appellants' Proof of Service as to Appellants' Designation of Matter to be Included in the Record on Appeal.

Kindly return one stamped copy of each document to us in the envelope provided.

Thank you in advance for your assistance. Please do not hesitate to contact me with any questions or concerns.

Respectfully,

Liane Marcotulli
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Enclosures
cc: G. Trenholm Walker, Esq. (*via U.S. mail and e-mail*)
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