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.

REPLY BRIEF OF APPELLANTS

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I. THE TOWN CANNOT RELY ON A NON-COMMENCED LAWSUIT TO SATISFY ITS OBLIGATIONS UNDER SECTION 5-17-30 OF THE SOUTH CAROLINA CODE.

Respondent's argument is essentially twofold: 1) defending an action brought by Appellants after the expiration of the one year period provided to the Town in section 5-17-30 is sufficient to comply with the law; and 2) Appellants' failure to challenge the trial court's ruling that the Initiated Ordinance is invalid is dispositive of the matter before the court. The validity of the Initiated Ordinance is neither dispositive nor informative of the issue to be decided on appeal. This case is about the process that the Town was required to follow as mandated by the Legislature. The statutory scheme mandates that a local government presented with a properly initiated ordinance either adopt it or conduct a public referendum. *See* S.C. Code § 5-17-30 (1975). Recognizing the significance of deviating from the statutory requirement, the *Expressway Opponent* court determined that the *only* way to avoid the mandate of section 5-17-30 is to seek pre-election ruling that the proposed ordinance is invalid. The court placed no additional burden on citizens who complied with the requirements of section 5-17-10. *See Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 415 S.E.2d 801 (1992).

The effect of the trial court's order is that the Town was unlawfully permitted to pass on the validity of the Initiated Ordinance itself, file but never serve a complaint, and then wait to see if Appellants would take legal action. Adopting such a view of the requirements imposed upon the Town renders the purpose of a citizen's right to

participate in local government—a right created and protected by the Legislature—meaningless.

II. APPELLANTS SUSTAINED INJURY AND THUS HAVE STANDING TO SEEK A DECLARATION THAT THE TOWN FAILED TO COMPLY WITH LAW REGARDING APPELLANTS' RIGHTS TO PROPOSE AN ORDINANCE.

Appellants have a real, material and substantial interest in the rights afforded to them by sections 5-17-10 and 5-17-30 of the South Carolina Code. Appellants have standing to pursue a declaration of their rights as set forth in the statutory scheme that provides them the right to propose "any ordinance." S.C. Code § 5-17-10 (1975). The injury sustained by Appellants is the Town's denial their rights to participate in their local government.

"To state a cause of action under South Carolina's Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 274, 705 S.E.2d 73, 77-78 (Ct. App. 2010) (citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Id.* Thus, "[a]ny person whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity . . . arising under the statute . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15–53–30 (2005).

"A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (Ct.

App. 2002). "To have standing . . . one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* (quoting *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999).

Here, Appellants assert a right to petition their local government and propose an ordinance. This right has been plainly provided for by statute as discussed throughout Appellants' Initial Brief as well as this Reply. Fundamental to this right is the obligation of a local government to respond in a manner provided for by law. The Town's response to the Initiated Ordinance violated Appellants' rights because the Town failed to either satisfy the statutory obligations or the common law. That is the injury suffered. Appellants have standing to seek a declaration of this right.

In addition, "[t]he rule [of standing] is not an inflexible one." *Sloan v. Greenville County*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (2003). Courts may confer standing upon a party "when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston County,* 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). The scope of a local government's power and the ability of a local government to eliminate the statutory right of a citizen to participate in local government is an issue of significant public importance. It stands to reason that the Legislature would not have conferred such rights on the electorate if it did not deem the rights to be worthy of protection and enforcement. Guidance from the Court as to the scope of the mandate of section 5-17-30 and *Expressway Opponents* could prevent future litigation as well as clarify the rights of the electorate to initiate law. *See Carolina Alliance for Fair*

Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 488, 523 S.E.2d 795, 801 (Ct. App. 1999) (discussing exceptions to requirement that a party have standing); *see also Thompson v. S.C. Comm'n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (conferring standing on plaintiffs because issues were of wide concern to government actors and public). Thus, even if Appellants otherwise lack standing, this Court should confer standing on Appellants and address this important public issue.

III. THE ISSUE OF WHETHER THE TOWN COMPLIED WITH THE LAW IN RESPONSE TO THE INITIATED ORDINANCE IS NOT MOOT REGARDLESS OF THE COMPLETION OF CONSTRUCTION OF THE ELEMENTARY SCHOOL.

The issue before the Court is not moot. Respondent incorrectly characterizes this controversy as pertaining to the size and design of the Elementary School. That is not the controversy before the Court now and was not the controversy before the trial court. There remains a genuine controversy between the parties as to the rights conferred by statute and the obligation those rights place on the Town. Judgment in favor of Appellants would have the effect of declaring the rights of the parties.

The Declaratory Judgments Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595, 748 S.E.2d 781, 786-87 (2013) (quoting S.C. Code Ann. § 15–53–30 (2005)). The scope and purpose of the Act is determine the rights of parties—this is the remedy afforded by a declaratory action and this issue remains ripe between the parties to this controversy.

Respondent cites the Court to several cases which address the principle of mootness but do not address the justiciability of a declaratory judgment action. In *McMillan v. BCG Properties, LLC*, an appeal from the denial of a preliminary injunction was moot because the property subject to the injunction was demolished. In that case, the relief sought was injunctive—the remedy the plaintiff sought was to stop the demolition of the property. *See* 2007 WL 8326632 at *3. "Where only injunctive relief is sought and the need for that relief has ceased to be a justiciable issue, an appellate court should not review the merits, or consider the granting of a new trial after it has become impossible to have a new trial in the case." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 597 (2001).

In *Mathis v. South Carolina State Highway Department*, the challenged conduct was the suspension of a driver's license and the Supreme Court dismissed the appeal because the suspension period expired and the driver's license was eligible to be reinstated prior to oral argument. 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973). Rather than seeking a declaration of rights, the plaintiff was seeking the very—and only—thing which had been done by the time his case reached appeal. The issue of reinstatement was resolved and the appeal was moot.

In *Treasured Arts, Inc. v. Watson*, the plaintiff was a computer graphics company that created and distributed a promotional instant win game for some period of time. The solicitor informed Treasured Arts that the campaign violated state lottery laws and the county sheriff ordered that the promotional pieces removed from retail stores. Treasured Arts filed an action: 1) seeking a declaration of whether its promotion violated state lottery law and 2) seeking to temporarily enjoin the solicitor from taking any legal action

to prevent Treasured Arts' promotions. 319 S.C. 560, 562, 463 S.E.2d 90, 91 (1995). The trial court held there was no justiciable controversy between the parties and dismissed the case. *Id.*

While Respondent points out that the Supreme Court upheld the dismissal of the claim for injunctive relief in *Treasured Arts* as moot, Respondent ignores that the dismissal of the declaration action was reversed. *Id.* at 91, 463 S.E.2d at 563. The Supreme Court held that a justiciable controversy existed because Treasured Arts should not have to wait to be criminally prosecuted in effort to adjudicate the legality of his business. *Id.* ("It asserts a definite legal right and since that right is denied by the defendant there exists a justiciable controversy justifying maintenance of an action for declaratory judgment"). Here, judgment as to the existing controversy between the parties resolves of the right of Appellants to participate in local government as provided by statute—which Appellants contend has been denied by the Town. This case remains justiciable.

Even if the Court determined the issue on appeal is moot, the question of the scope of a local government's power to respond to an initiated ordinance satisfies two of the exceptions to the mootness doctrine. "In the civil context, there are . . . exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); *see also Byrd v. Irmo High Sch.*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996) (same). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596.

The ability of a local government to ignore its obligations upon receipt of an initiated ordinance is capable of repetition, but is likely to evade review. In *Byrd v. Irmo High School*, the Supreme Court applied the evading review exception to a student's challenge of his school's school suspension policy. 321 S.C. at 431-32, 468 S.E.2d at 864. By the time the case reached appeal, the student had returned to school from a short-term suspension and the suspension had been cleared from his record. *Id* at 429-30, 468 S.E.2d at 863. The Court found that the nature of a short-term suspension is such that they are completed "long before an appellate court can review the issues they implicate." *Id.* at 432, 468 S.E.2d at 864. The party bringing the action need only show the issue raised is capable of repetition and is not required to prove there is a "reasonable expectation" the issue will arise again. *Byrd*, 321 S.C. at 431–32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis); *see also Sloan v. Dep't of Transp.*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) (finding the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review).

This logic is equally appropriate here. It is undisputed that construction of the new elementary school is complete. It is disingenuous, however, for Respondent to maintain this controversy is moot on that basis. The completion the school building does not excuse the Town's conduct in responding to the Initiated Ordinance or terminate Appellants' rights. The Town proceeded to build the school with full knowledge of its legal obligation to respond to the Initiated Ordinance—regardless of the Town's view of its validity. Now, because construction is complete and this appeal remains, Respondent asks the Court to ignore the Town's conduct. The Town's conduct is capable of

repetition and will continue to evade review if a local government can simply disregard the requirements of the law.

Additionally, this issue is a matter of significant public importance and the second exception to the mootness doctrine is satisfied. *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. The Town has failed to follow a mandate placed upon it by statute and, in doing so, ignored an Initiated Ordinance properly presented to it by its electorate. The lawfulness of this conduct is a matter of important public interest. In *Ashmore v. Greater Greenville Sewer District*, the plaintiff sought to enjoin a government body from issuing bonds to fund the construction and maintenance of a new auditorium. 211 S.C. 77, 85, 44 S.E.2d 88, 91 (1947). The trial court denied the request for injunction. *Id.* An election was held in which the voters approved the sale of bonds, thereby rendering the issue moot. *Id.* The court nevertheless decided the case was justiciable because the issues raised were of substantial public importance, opining:

> If this were an ordinary case, our opinion might well stop here.... But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, *it is defended by an intended governmental agency which the legislature undertook to create by their enactments*; and raised on the record are earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that *questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.*

Id. at 96, 44 S.E.2d at 96–97 (emphasis added); *see also Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) ("[T]he issue must present a question

of imperative and manifest urgency requiring the establishment of a rule for future guidance in 'matters of important public interest.' This evaluation must be made based on the facts of each individual situation").

As discussed above with respect to the ability of the Court to confer standing to address an issue of significant public importance, the scope of a local government's power to interpret the mandate of section 5-17-30 and *Expressway Opponents* requires adjudication with respect to the a local government's authority to limit the right of a citizen to participate in local government. Even if the Court determines the controversy between the parties is moot, the issue presented is both capable of repetition that is likely to evade review and of significant public importance such that the Court's guidance is required.

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 then be remanded to the trial court for a determination of an award of costs recoverable under Section 15-53-10 of the South Carolina Code.

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PROOF OF SERVICE

I, Liane Marcotulli, of Duffy & Young, LLC, certify that I have served the **REPLY BRIEF OF APPELLANTS** on Respondent by U.S. mail on April 20, 2015 by depositing a copy of it to its attorneys of record as shown below:

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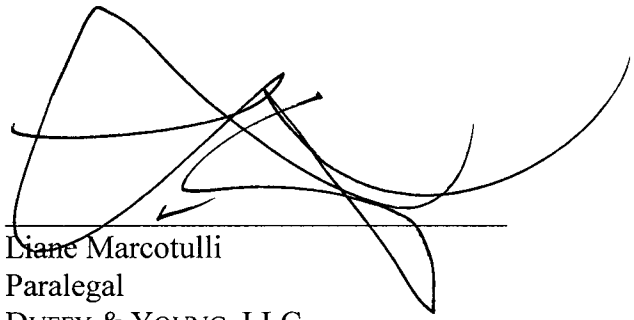

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