

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 PAUL CURRY, )  
 )  
 PLAINTIFF, )  
 )  
 V. )  
 )  
 TOWN OF ATLANTIC BEACH, )  
 )  
 DEFENDANT. )

IN THE COURT OF COMMON PLEAS  
 Civil Action No.: 2010-CP-26-10848

**ORDER DENYING  
 INJUNCTION AND DECLARATORY  
 RELIEF**

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This matter came before the Court on January 13, 2010 pursuant to an action Plaintiff, Paul Curry, brought against the Defendant, the Town of Atlantic Beach, seeking an Injunction and a Declaratory Judgment. Randall Mullins appeared on behalf of Plaintiff and Leah B. Moody appeared on behalf of Defendant. Based upon evidence presented, argument of counsel, and a review of applicable law, the Court denies the relief sought by Plaintiff.

**PROCEDURAL HISTORY**

The parties were involved in prior litigation, which commenced on February 28, 2005, when Plaintiff filed an action seeking a declaratory judgment and permanent injunction against Defendant. The previous action was based on alleged violations of the Freedom of Information Act (FOIA). On January 25, 2010, the Horry County Master in Equity, the Honorable Cynthia Graham Howe, issued an order making final a settlement negotiated between the parties.

On November 17, 2010, Plaintiff filed this action against Defendant again seeking an injunction and declaratory judgment alleging a violation of the FOIA. See S.C. Code Ann. §§ 30-4-40; 30-4-100 (2007 & Supp. 2013). Additionally, Plaintiff sought to have the court review the codified ordinances of the Town of Atlantic Beach to determine compliance with the

requirements of the Municipal Ordinance Codification statute (MOCS). *See* S.C. Code Ann. § 5-7-290 (2004).

On April 7, 2011, Plaintiff filed a Motion to Compel. On July 27, 2011, the Honorable Benjamin H. Culbertson heard and granted the motion, awarded attorney fees, and ordered Defendant to answer Interrogatories and a Request to Produce.

This matter was originally scheduled on the non-jury trial roster for January 14, 2013, and was rescheduled on October 14, 2013, before reaching trial on January 13, 2014. At trial, Plaintiff sought to exclude three defense witnesses. Plaintiff argued that allowing these witnesses to testify would result in unfair surprise to Plaintiff due to failure of Defendant to file discovery responses. The Court denied the Motion to Exclude and instead continued the case for several hours.

Plaintiff renewed his objection when the Court reconvened, but affirmed that he was prepared to proceed. The Court indicated that if the testimony provided by the three defense witnesses raised additional concerns during the trial, the Court would entertain a request for a continuance or adjournment of the proceedings.

#### **FINDINGS OF FACT**

In the 2005 action, Plaintiff sought access to public records from the Atlantic Beach Town Hall. The Plaintiff alleged that Defendant violated the FOIA by refusing to provide him with requested documents. Judge Howe found that Defendant violated the FOIA by failing to: (1) notify Plaintiff of Town Council meetings; (2) note in the minutes of the meetings the efforts of Defendant to comply with the requests of the Plaintiff; (3) provide Plaintiff with the prepared

minutes of the meetings; and (4) make requested public records available to Plaintiff. Judge Howe also granted a permanent injunction and awarded attorney fees to the Plaintiff.

In this action, Plaintiff makes the same allegations: that Defendant violated the FOIA. Plaintiff alleges that Defendant failed or refused to respond to his requests to review the ordinances of Defendant from June 2003 to August 2010. Plaintiff seeks an injunction, requiring Defendant to make its ordinances available to the public for review and inspection. Defendant contends that the FOIA claim of the Plaintiff involves the same issues that were settled in the 2010 order issued by Judge Howe, and the Plaintiff is, therefore, collaterally estopped from re-litigating the same allegations.

Plaintiff also alleges that Defendant has not made its ordinances available to the public for review and inspection, as required under the MOCS. He alleges that Defendant “is required to codify and index all ordinances,” though he fails to specify the manner in which codification is required for compliance with the statute. *See* Complaint at 5, *Curry v. Town of Atlantic Beach*, No. 2010-CP-26-10848 (Cir. Ct. S.C. 2010). Plaintiff posits that a codified ordinance must be bound, indexed, and current with respect to amendments and repeals. Plaintiff concedes that, while the ordinances of Defendant are organized by year, they are unbound and lacking of an index and ordinance history. Plaintiff, in effect, seeks a declaratory judgment in which the Court is to declare the meaning of codification under the MOCS.

Defendant concedes that the ordinances of Defendant are not bound in a set and published by a third party vendor, as would be ideal under optimal circumstances. Defendant asserts, however, that it is in compliance with the MOCS in that the ordinances are organized by year, properly indexed, reflective of ordinance history and amendments, and exist in two copies—one for the public and the other for the administrative office.

## LEGAL ANALYSIS

In this action, Plaintiff seeks an injunction and declaratory judgment. For a court to grant an injunction, a party must demonstrate: (1) irreparable harm; (2) a likelihood of success on the merits; and (3) an inadequate remedy at law. *See Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). In addition, a court may balance the equities between the parties to determine if the injunction is warranted. *See Kneale v. Bonds*, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1994).

For a court to review a cause of action under the Declaratory Judgment Act, a party must demonstrate the existence of a justiciable controversy; such a controversy “exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract . . . . If there is no actual controversy, [a court should] not decide moot or academic questions.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (S.C. 2006). The Declaratory Judgment Act, however, is not an independent grant of jurisdiction, and thus an actual controversy must exist before a court can render a judgment. *See Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (S.C. 2013). The proper party to file for declaratory judgment is, “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute [or] municipal ordinance . . . .” S.C. Code Ann. § 15-53-30 (Supp. 2013 & 2005). Any person “may have determined any question of construction or validity arising under the statute [or] ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder.” *Id.* A declaratory judgment may be proper when the meaning of a statute is in question, but questions of statutory interpretation by themselves do not rise to the level of an actual

controversy. See *Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374; *Ott v. Tindal*, 297 S.C. 395, 398, 377 S.E.2d 303, 305 (S.C. 1989).

#### I. FREEDOM OF INFORMATION ACT

The parties have a longstanding history, with the first alleged violation occurring eleven years ago and litigation commencing over nine years. The issues raised in this case by Plaintiff under the FOIA were adjudicated in the 2010 order. Re-litigating these issues in this action is barred by the doctrine of collateral estoppel.

For an action to be barred by collateral estoppel, Defendant must show that the issue in the present lawsuit was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The doctrine only bars particular issues that were actually litigated; therefore, collateral estoppel is inapplicable when a party argues that the other party should have litigated a particular issue in the prior action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (S.C. 1997). The availability of the ordinances of Defendant for public review was an issue that the parties litigated in the prior action. The order of Judge Howe provided injunctive relief and established the right of Plaintiff to review the ordinances. Plaintiff is not entitled to additional injunctive relief herein as he is collaterally estopped from obtaining the relief sought under the FOIA.

## II. MUNICIPAL ORDINANCE CODIFICATION

In seeking to have the Court review the ordinances of Defendant under the MOCS, the Declaratory Judgment Act requires Plaintiff to demonstrate that a justiciable controversy exists. The granting of a declaratory judgment “rests in the sound discretion of the trial court.” Plaintiff has failed to make a clear showing of the existence of an actual controversy and he is not entitled to the relief sought. *Ott v. Tindal* 297 S.C. at 398, 377 S.E.2d at 305.

In the absence of a justiciable controversy, the court lacks subject matter jurisdiction to provide relief. See *Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374 (“holding that parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.”) (citing *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970)). A justiciable controversy exists when “there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” *Graham v. State Farm Mutual Automobile Insurance Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 846 (S.C. 1995). If the judgment would not settle legal rights of the parties, the judgment would be merely advisory, and therefore beyond the scope of the purpose of a declaratory judgment. See *Tourism Expenditure*, 403 S.C. at 81, 742 S.E.2d at 374.

In *Ott*, the South Carolina Supreme Court upheld a declaratory judgment in which a trial court construed terms concerning compensation and the time frame to present a claim under the Guaranty Fund Act. 297 S.C. at 399, 377 S.E.2d at 306. There, a justiciable controversy existed because the statutory interpretation concerned terms affecting the parties’ legal rights to full compensation. Conversely, Plaintiff seeks a statutory interpretation without a showing of a legal right or duty. Whether Defendant organizes its ordinances in a bound volume versus an unbound

volume neither affects the positive legal duty of Defendant to make those ordinances available to the public, nor the legal right of Plaintiff to review those public ordinances. If the ordinances are readable so as Plaintiff can exercise his right to review them, interpretation under the MOCS would not resolve any further legal rights of the parties. In essence Plaintiff seeks to have the court issue an advisory opinion involving statutory interpretation which is contrary to case precedent in that no justiciable controversy exists. Our law does not permit this Court to issue merely advisory opinions and this Court therefore denies the request of Plaintiff to construe the meaning of codification under the MOCS.

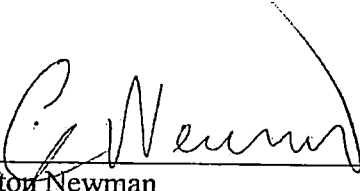
**CONCLUSIONS OF LAW**

**IT IS THEREFORE ORDERED** that the FOIA action is barred by the doctrine of collateral estoppel, and thus injunctive relief is denied.

**IT IS FURTHER ORDERED** that declaratory judgment is denied.

**IT IS SO ORDERED.**

June 2, 2014  
Charleston, South Carolina

  
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Clifton Newman  
Presiding Judge