IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Civil Action No. 2012-CP-6830
Appellate Case No. 2014-002128

Martha Smith, Kathleen Post, and William Post ..... Appellants,

v.

Town of Sullivan's Island ..... Respondent.

FINAL BRIEF OF RESPONDENT

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I. Whether the trial court correctly found that the Town of Sullivan's Island complied with South Carolina law in responding to a citizen petition for a referendum by filing a declaratory judgment action seeking a declaration that the Initiated Ordinance was facially invalid, but later dismissing that lawsuit when Appellants filed a lawsuit alleging the Initiated Ordinance was not facially invalid.

II. Whether Appellants, who do not assert any injury, have standing to seek a declaratory judgment that the Town of Sullivan's Island violated South Carolina law.

III. Whether Appellants' claim is moot because the school building, the size and design approval process of which they sought to determine by referendum, is now completed and, therefore, judgment in their favor would have no practical effect.

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 (the "Town") complied with South Carolina law in responding to a facially invalid citizen initiated ordinance (the "Initiated Ordinance") proposed by petition for a referendum (the "Petition"). The Initiated Ordinance sought to require the Town to take certain actions with respect to the design of a new elementary school (the "School") proposed by the Charleston County School District ("CCSD") to replace an old elementary school and with respect to the Town's lease of the land for the School to CCSD.

On February 13, 2012, the Town filed a declaratory judgment action in the Charleston County Court of Common Pleas against "Islanders for a Smaller School" seeking a ruling that the Initiated Ordinance was facially defective and that the Town was not required to submit the Initiated Ordinance to a referendum. **(R. pp. 407-469)**. On October 19, 2012, Appellants filed the instant action against the Town seeking a declaration that the Town failed to comply with South Carolina law in response to the Initiated Ordinance. **(R. pp. 027-059)**. On November 13, 2012, the Town answered Appellants' Complaint and asserted several defenses, including that "[t]he Town has no obligation to

place the proposed initiated ordinance on a ballot for referendum nor to conduct the referendum since the proposed initiated ordinance relates to improper subjects for an initiated ordinance including administrative matters, zoning and land use matters, and matters subject to statutes and regulations that require state and/or county wide uniformity, and otherwise conflicts with state law" and that "[t]he proposed initiated ordinance is invalid for the additional reason that it seeks to compel the Town to breach the lease which is contrary to and in violation of state law." **(R. p. 62, ¶¶ 21, 23).**

The Town moved for judgment on pleadings on the grounds that based upon the allegations of the pleadings "the proposed initiated ordinance . . . is legally invalid" and that "[t]he Defendant has no duty to submit the invalid initiated ordinance to the electorate as a matter of law." **(R. pp. 089-090).** On March 13, 2013, the trial court denied the Town's motion for judgment on the pleadings. **(R. pp. 002-003).**

On April 23, 2013, after the trial court's order denying the Town's motion for judgment on the pleadings, the Town voluntarily dismissed its complaint which sought a declaration that the initiated ordinance was facially invalid and proceeded to defend this action in part on the basis that the initiated ordinance was facially invalid. **(R. pp. 326-327).**

On September 5, 2013, Appellants amended their Complaint to add a claim under 42 USC section 1983 for a violation of their constitutionally protected rights to vote and procedural due process. **(R. pp. 091-097).** The Town answered the Amended Complaint, again asserting that "[t]he Town has no obligation to place the proposed initiated ordinance on a ballot for referendum nor to conduct the referendum since the proposed initiated ordinance relates to improper subjects for an initiated ordinance including administrative

matters, zoning and land use matters, and matters subject to statutes and regulations that require state and/or county wide uniformity, and otherwise conflicts with state law" and that "[t]he proposed initiated ordinance is invalid for the additional reason that it seeks to compel the Town to breach the lease which is contrary to and in violation of state law." **(R. p. 100, ¶¶ 25, 27)**.

The matter proceeded to a bench trial on May 15-16, 2014 before the Honorable R. Markley Dennis, Jr. After considering the testimony, exhibits, and arguments of counsel, the trial court entered a Final Order and Judgment (the "Order") setting forth findings of fact and conclusions of law, ruling in favor of the Town on Appellants' causes of action. **(R. pp. 004-025)**.

In so ruling, the lower court entered the following findings of fact that are fully supported by the evidence and have not been challenged on appeal by Appellants:

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:

> 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.

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.

***

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.

(R. pp. 004-010, ¶¶ 1-26).

After finding the above facts, the trial court concluded that the Initiated Ordinance was facially defective and, thus, not the proper subject of a public referendum. **(R. pp. 010-019)**. The trial court specifically found five independent reasons that Initiated Ordinance was facially defective: (1) it sought to control the design and size of the new school that are both inherently within the Town's zoning authority; (2) it involved matters which are subject to a uniform statewide statutory scheme; (3) it involved the entry into a contract,

which is an administrative matter; (4) it was 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 (5) it mandated the Town violate civil law and breach a binding lease. **(R. pp. 010-019)**.

The lower court also found that the Town had not violated any South Carolina law in the way that it responded to the Petition and Initiated Ordinance. The trial court noted that the Town filed a lawsuit seeking a judicial determination that the Initiated Ordinance was facially invalid and was not required to hold a public referendum on the Initiated Ordinance. The lower court found no violation of law when the Town dismissed the lawsuit it brought after this suit was filed against it involving the same issues:

> . . . 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.
>
> * * *
>
> 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.

(R. pp. 019-020).

Based upon the rulings above, the trial court declared that the Initiated Ordinance was facially invalid and that the Town had no obligation to adopt the Initiated Ordinance or to conduct a referendum, that Town did not violate any rights of Appellants, and that the

Town was entitled to judgment in its favor on Appellants' first cause of action seeking a declaration that the Town did not comply with South Carolina law. **(R. p. 024).** The Court further declared that the Town did not deprive Appellants of any state or federal constitutional right and that the Town was entitled to Judgment in its favor on Appellants' second cause of action under 42 USC section 1983. **(R. p. 024).** Finally, the trial court denied Appellants' request for a writ of mandamus directing the Town to adopt the Initial Ordinance or hold a public referendum and denied the Appellants requests for attorneys' fees. **(R. p. 024).**

Appellants filed a Motion to Reconsider, which was denied by Order filed September 5, 2014. **(R. p. 026).** Appellants then filed a Notice of Appeal on October 3, 2014. **(Notice of Appeal).** Appellants' Notice of Appeal purported to include the entirety of the trial court's Order and the court's order denying Appellants' Motion to Reconsider. **(Notice of Appeal).** However, Appellants have not (1) advanced any argument in their brief that the findings of fact were unsupported by the evidence; (2) contested on appeal that the Initiated Ordinance was facially invalid and, thus, not the proper subject of a public referendum; (3) contested the trial court's determination the right to vote is not implicated; (4) or contested the trial court's finding and conclusion that Appellants failed to prove that the Town violated any of their state or federal constitutional rights. See **Brief of Appellants, 1** (stating one issue on appeal: "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."). Therefore, to the

extent Appellants appealed those rulings, any argument as to those rulings have been abandoned and should not be considered. See e.g., Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.")(citations omitted). Additionally, the trial court's rulings which Appellant has not challenged on appeal are the law of the case. See e.g., Dreher v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 259, 266, 730 S.E.2d 922, 925 (Ct. App. 2012) (citation omitted); Burris v. Electro Motive Manuf. Co., 247 S.C. 579, 583, 148 S.E.2d 687, 688 (1966) (unappealed ruling becomes the law of the case).[1]

STANDARD OF REVIEW

"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." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." Id. (citing Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009)). Here, Appellants assert that the trial court made a single error of law. Appellants do not appeal any of the trial courts factual findings. Therefore, the trial court's

[1] Appellants' brief includes a statement of facts section in addition to the statement of the case. Because all of the facts relevant to this appeal were decided by the trial court and Appellants have not contested those findings by appealing any of the specific findings, Respondent has not included a separate statement of facts. S.C.R.A.P. 208 (b)(1)(D)(". . . A party may also include a separate statement of facts relevant to the issues presented for review . . . which may include contested matters and summarize the party's contentions."). As explained above, Appellants have not appealed any of the trial court's findings of fact, and thus, the statement of facts included in their brief should be disregarded to the extent it is inconsistent with the trial court's findings of fact.

findings of fact should not be disturbed and the court's review limited to whether the trial judge committed an error of law.

ARGUMENT

I. The trial court correctly found that the Town of Sullivan's Island complied with South Carolina law in responding to a citizen petition for a referendum by filing a declaratory judgment action seeking a declaration that the Initiated Ordinance was facially invalid, but later dismissing that lawsuit when Appellants filed a lawsuit alleging the Initiated Ordinance was not facially invalid.

The trial court correctly ruled that the Town, as a municipality faced with a petition for referendum that was facially invalid, complied with South Carolina law by seeking a judicial determination that the Initiated Ordinance was not the proper subject of a public referendum and litigating the issue to judgment in this case.

South Carolina Code section 5-17-10 allows for electors of a municipality to propose ordinances to their local government by having petition consisting of signatures of at least fifteen percent of the registered voters at the last regular municipal election and certified by the municipal election commission. See S.C. CODE § 5-17-10 ("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."). South Carolina Code section 5-17-30 provides that a municipality who receives such a petition with an initiated ordinance may adopt the proposed initiated ordinance or submit the ordinance to the electorate as a referendum. See S.C. CODE § 5-17-30 ("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. . .").

However, our Supreme Court has found that a municipality is not required to place a facially defective ordinance on an election ballot. Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 806 (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)). In Town of Hilton Head, the Court ruled that the final determination of the legal validity of an initiated ordinance rests with the courts and that a municipality faced with an initiated ordinance that it believes to be invalid may bring a declaratory judgment action, rather than conduct a referendum on, or enact into law, a facially initiated invalid ordinance: "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*." Id. at 458, 415 S.E.2d at 806 (citation omitted) (emphasis added).

An initiated ordinance under this chapter is facially invalid if it concerns the municipality's zoning authority; involves matters which are subject to a uniform statewide statutory scheme; involves administrative actions; involves the appropriation money, or involves the authorizing of the levy of taxes. See e.g., I'on, LLC v. Town of Mt. Pleasant,

338 S.C. 406, 415-16, 526 S.E. 2d 716, 720-21 (2000) (affirming the trail court's ruling that a zoning provision cannot be enacted by referendum: "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); Town of Hilton Head, at 456, 415 S.E.2d at 805 (holding 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 457, 415 S.E.2d at 806 (("Only legislative questions may be referred to a vote of the people.") (citing State ex rel. Boynton v. Charles, 136 Kan. 875, 18 P.2d 149 (1933))); See Witcher v. Canon City, 716 P.2d 445, 450 (Colo. 1986) ("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. . . ."); Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (Colo. 1987) (the choice of location and structure for a new city hall is administrative).

Appellants do not contest the trial court's determination that the Initiated Ordinance was facially invalid. Instead, Appellants seek a ruling that the Town somehow violated South Carolina law by not serving, and ultimately dismissing, its action seeking a determination of the Initiated Ordinance's validity, even though it proceeded to seek that determination in this lawsuit.

After receiving the Petition and the Charleston County Board of Elections and Voter Registration certification that the Petition had been signed by more than 15% of the qualified electors of the Town. Town Council, consistent with the Town of Hilton Head

opinion, had the Town file a declaratory judgment action against "Islanders for a Smaller School", the unincorporated organization thought to be responsible for the Petition, seeking a ruling that the Initiated Ordinance was facially defective and that the Town was not required to submit the Initiated Ordinance to a referendum. See **(R. pp. 407-469)**; see also, **(R. p. 009, ¶¶ 18-19); (R. p. 221, line 18-p. 222, line 8); (R. p. 222, line 24-p. 223, line 19)**. After filing the action, "[t]he 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." **(R. p. 009, ¶ 20)**. "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." **(R. p. 009, ¶ 20)**; see also, **(R. p. 223, line 20-p. 224, line 7)**. "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." **(R. p. 009, ¶ 20)**.

On October 19, 2012, while the Town's action was pending but still unserved, Appellants filed the instant action 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. **(R. pp. 027-059)**. The Town asserted, as part of its defense, the same position in this action as it has in the action it filed against the unincorporated association thought to be responsible for the Petition—that the Initiated Ordinance was facially defective and that the Town was not required to submit the Initiated Ordinance to a referendum. See e.g., **(R. p. 062, ¶¶ 21, 23)** (asserting that "[t]he Town has no obligation to place the proposed initiated ordinance on a ballot for referendum nor to conduct the referendum since the proposed initiated ordinance relates to improper subjects for an

initiated ordinance including administrative matters, Zoning and land use matters, and matters subject to statutes and regulations that require state and/or county wide uniformity, and otherwise conflicts with state law" and that "[t]he proposed initiated ordinance is invalid for the additional reason that it seeks to compel the Town to breach the lease which is contrary to and in violation of state law."); **(R. pp. 089-090)** (moving for judgment on the pleadings on the basis that "the proposed initiated ordinance . . . is legally invalid" and that [t]he Defendant has no duty to submit the invalid initiated ordinance to the electorate as a matter of law.").

On April 23, 2013, after the trial court's order denying the Town's motion for judgment on the pleadings, the Town voluntarily dismissed its complaint, but thereafter continued to litigate the issues raised in the Complaint against Appellants in this case. **(R. pp. 326-327); (R. p. 100, ¶¶ 25, 27)** (asserting that "[t]he Town has no obligation to place the proposed initiated ordinance on a ballot for referendum nor to conduct the referendum since the proposed initiated ordinance relates to improper subjects for an initiated ordinance including administrative matters, zoning and land use matters, and matters subject to statutes and regulations that require state and/or county wide uniformity, and otherwise conflicts with state law" and that "[t]he proposed initiated ordinance is invalid for the additional reason that it seeks to compel the Town to breach the lease which is contrary to and in violation of state law.").

Even though they accept that the Initiated Ordinance was legally invalid, Appellants argue that South Carolina law was violated when the Town did not proceed to serve and prosecute its declaratory judgment action until conclusion. They do not dispute the trial court's conclusion that this action involved the same issues but rather argue,

without citation to any authority, that the Town's litigating the issue to judgment in this action, rather than in the initial action it filed, somehow puts a burden on the electors to seek obtain a judgment that a particular Initiated Ordinance is facially valid.

Here, as concluded by the trial court, the second action joined the same issues and resulted in a judicial determination of the validity of the proposed ordinance, consistent with the process espoused by the Court in Town of Hilton Head.

Additionally, Appellants' argument on this point overlooks that Appellants have no right under South Carolina law to have the Town adopt, or hold a referendum on, their Initiated Ordinance, which is facially invalid. The statutes providing for initiative and referendum, as applied by our 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. See Town of Hilton Head, at 456, 415 S.E.2d at 806. In fact, the Court in Town of Hilton Head specifically determined that a municipality is under no obligation to adopt or place a facially defective ordinance on a ballot. Id. ("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)).

Appellants do not argue that the Initiated Ordinance was valid and could have been enacted or submitted to a referendum vote. Instead, they argue that the Town violated South Carolina law by not suing them personally in a lawsuit that they concede they would have lost. Therefore, because Appellants 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 by proceeding against them in this lawsuit rather than amending its first lawsuit to name them as individual defendants.

II. Appellants, as individual petitioners have no standing to seek a declaration that the Town did not comply with South Carolina law, because, as Appellants concede, the Initiated Ordinance was facially invalid.

Appellants do not contend that they have been injured. Instead they invoke judicial resources to seek a declaration that the Town did not comply with South Carolina law in the way it handled the Petition and Initiated Ordinance, but do not contest the trial court's conclusion that the Initiated Ordinance was facially invalid and thus not appropriate for a referendum. This Court should affirm the trial court's judgment in favor of Respondent because even if Appellants were able to prevail on their legal argument, they have not sustained any injury or prejudice. See e.g., Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) ("[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.") (citing Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985)).

"The principle of standing under the United States Constitution is 'an essential and unchanging part of the case-or-controversy requirement of Article III.'" ATC South, Inc. v. Charleston County, 380 S.C. 191, 195-196, 669 S.E.2d 337, 339 (2008) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)). In Lujan, as quoted by the South Carolina Supreme Court, the United States Supreme Court has provided a three-part test to establish standing:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained

> of-the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (quoting Lujan, 504 U.S. at 560-61 (internal citations omitted) and citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, 126 S. Ct. 1854 (2006)).

Here, Appellants do not assert any injury in fact. They assert no personal right has been violated. Instead, they seek a declaration that a municipal government did not comply with South Carolina. This is the precisely the type of action the standing requirement of an injury in fact precludes. Therefore, the court should affirm the trial court's judgement in favor of Respondent for the additional reason that the Appellants lack constitutional standing because they do not assert any injury or prejudice.

III. Appellants' claim is moot because the school building, the size and design approval process of which they sought to determine by referendum, is now completed and, therefore, judgment in their favor would have no practical effect.

"A threshold inquiry for any court is a determination of justiciability, *i.e.,* whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (S.C. Ct. App. 2002) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. (quoting Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Id. (quoting Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845-46 (1995)) (additional citation omitted). "The

concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Id. (citation omitted). "'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

As explained in detail below, Appellants' claims are moot because the School, the size and design of which Appellants sought to affect through this lawsuit about a referendum on those aspects of the School building is completed.

The Initiated Ordinance that Appellants assert was improperly handled by the Town is directed at the size and design of the new elementary school. However, the school structures that were substantially completed at the time of trial are now fully complete and put in use at the beginning of the school year in August 2014. Judgment in favor of Appellants would have no practical effect. As Justice Holmes stated in Wingert v. First Nat. Bank, a case seeking to enjoin the erection of a new bank building, which was erected while the case was pending: "***It is enough to say that the whole case is disposed of by the erection of the new bank.***" 223 U.S. 670, 32 S.Ct. 391 (1912) (double emphasis added).

South Carolina mootness case law supports the position that even if Appellants had a justiciable controversy when they initiated this the action, the substantial completion of construction of the School building has rendered the case moot. For example, the South Carolina Court of Appeals has found that the demolition of building that was the subject of the controversy rendered a case moot because a decision in the plaintiff's favor would have no practical effect on an existing controversy:

McMillan argues Judge Thomas erred in denying his motion for a preliminary injunction. Specifically, he contends he had "a valid, enforceable long-term lease and met the test for issuance of a preliminary injunction."

* * *

Here, McMillan sought a preliminary injunction to restrain BCG from demolishing the building, turning off the utilities, and otherwise interfering with his quiet enjoyment of the property. The parties, however, both state in their briefs that the leased premises at issue in this appeal have been demolished. Thus, even if we were to find Judge Thomas erred in denying McMillan's motion, ***it would have no practical effect on this controversy***. Because a decision on this issue would not grant McMillan any effectual relief, we hold the issue is moot.

McMillan v. BCG Properties, LLC, App. No. 2007 –UP-0882007 WL 8326632, *3 (Ct. App., Feb. 23, 2007) (double emphasis added). Similarly, in Mathis v. South Carolina State Highway Dept., the plaintiff brought an action against the Highway Department seeking an order directing the department to revoke the suspension of his driver's license (which was suspended on March 23, 1972). 260 S.C. 344, 345-46, 195 S.E.2d 713, 714 (1973). The Court held that the plaintiff's claims were moot because by the date of the hearing, the suspension was no longer in place:

> Upon the call of the case, we were advised that the respondent would be entitled to the return of his driver's license on March 23, 1973. This date now having passed, and the respondent being entitled to the return of his driver's license, has rendered the issues made by this appeal, moot and academic.

Id. at 346, 195 S.E.2d at 714. See also, Treasured Arts, Inc. v. Watson, 319 S.C. 560, 563, 463 S.E.2d 90, 92 (1995) (finding plaintiff's claim for injunctive relief moot because "a[n] order for injunctive relief would have no practical legal effect upon the existing case. . . [Therefore,] although Treasured Arts had a justiciable controversy when it brought the action, events occurring subsequent[ly] . . . have rendered any injunctive relief moot."

Here, even if there existed a justiciable controversy at the time Appellants filed this action, this case is moot because of the substantial completion of the School building. The two alternative provisions of the Initiated Ordinance concern the design and size of the School building. At the time of the trial, May 2014, the design of the School had already been completed and approved, the square footage of the School had been established by completion of the design, and the construction of the School was substantially complete. **(R. p. 010, ¶ 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"); **(R. p. 252, lines 3-7)** (Counsel for Appellants stating that ". . . [t]he School is 75 percent built" and that "[t]he students are slated to start in August," and agreeing with the Court that "there is no question about that").

Therefore, the court should affirm the trial court's judgement in favor of Respondent for the alternative reason that a ruling in Appellants' favor would have no practical effect and the whole case is disposed of by the substantial erection of the School.

CONCLUSION

Therefore, for the reasons explained above, the court should affirm the judgement of the trial court in favor of Respondent because the trial court correctly held that the Town violated no rights of Appellants in not proceeding to judgment in the action that the Town initiated when Appellants filed a separate lawsuit seeking relief that required the same determination—whether the Initiated Ordinance was legally invalid. Additionally, the court should affirm the judgement of the trial court in favor of Respondent on the alternative affirming grounds that the Appellants lack standing and their claim is moot.

Respectfully Submitted,

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June 4, 2015
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2012-CP-10-06830

Appellate Case No. 2014-002128

Martha Smith, Kathleen Post, and William Post,

Appellants,

v.

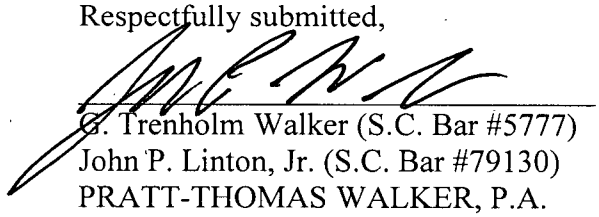
Town of Sullivan's Island,

Respondent.

CERTIFICATE OF COUNSEL

Respondent, by and through its undersigned attorneys, certifies that the Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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PROOF OF SERVICE

I, Christine Morrow, of Pratt-Thomas Walker, P.A., certify that I have served the RESPONDENT'S FINAL BRIEF on Appellants by U.S. Mail on June 4, 2015 to Appellants' counsel of record as shown below:

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