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STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC COURT OF APPEALS

APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 11-CP-06-476

Don Alexander, Carolyne Williams, Georgia F. Fields,  
William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie  
Wright, and Dr. M.O. Khan, ..... Appellants,

v.

Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr.,  
Joe Smith, Harold Buckmon, and Travis Black, individually and in  
their capacity as members of Barnwell County Council ..... Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF BARNWELL )

SECOND JUDICIAL CIRCUIT

Don Alexander, Carolyne Williams, )  
Georgia F. Fields, William R. "Bob" Dixon, )  
Colonel Joe H. Zorn, Jr., Melanie Wright, )  
and Dr. M.O. Khan, )

Civil Action No. 11-CP-06-476

Plaintiffs, )

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

vs. )

Freddie Houston, David Kenner, Keith )  
Sloan, Lowell Jowers, Sr., Joe Smith, )  
Harold Buckmon, and Travis Black, )  
individually and in their capacity as )  
members of Barnwell County Council. )

Defendants. )

FILED FOR RECORD  
2012 MAY -2 AM 9:12  
RHONDA D. McELVECH  
CLERK OF COURT  
BARNWELL COUNTY, S.C.

This matter is before the Court on Defendants' Motion to Dismiss pursuant to Rule 12 (b)(6) SCRCP, for failure to allege facts sufficient to constitute a cause of action, filed on January 17, 2012, and thereafter served on Plaintiffs. Subsequently, on February 7, 2012, Plaintiffs filed a Motion to Dismiss or to Strike Defendants' Motion, asserting the insufficiency of Defendants' statement of grounds or reason for their motion. This case came before the Court for hearing on February 9, 2012. At that time and date, counsel for both parties had presented their respective briefs, and it was agreed at oral argument that counsel for both parties would have an opportunity to supplement their briefs and/or arguments with additional material within 10 days.

After due deliberation, review of the memoranda, case law, exhibits and argument of counsel, the Court grants Defendants' Motion to Dismiss. By letter to the Court dated March 19, 2012, Plaintiffs withdrew their February 7<sup>th</sup> Motion and it is therefore not addressed further in this Order.

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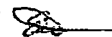
Defendants identified four distinct legal arguments on which the justification of dismissal of the Plaintiffs' Complaint could be based. These are: Plaintiffs' lack of standing; a lack of justiciable issue (political question) and infringement of separation of powers; lack of cognizable claim relating to the breach of fiduciary duty claim, and inapplicability of the dual office-holding prohibition.

#### DISCUSSION

On a Motion to Dismiss, under Rule 12(b)(6), the factual allegations of the Complaint are taken as true, and the court is limited to a consideration of the allegations contained within the four corners of the complaint. Charleston County School District v. Harrell, 713 S.E.2d 604 (2011). In the case at bar, taking the allegations in the Plaintiffs' Amended Complaint as true, the underlying factual backdrop is presented in paragraphs 1-8, 18, and 19. In particular, Paragraph 19 of the Amended Complaint outlines the creation of the Barnwell County Hospital Board that is the subject of this action. It also refers to the Hospital Board as "*a governmental sub-entity of Barnwell County.*"

The reestablishment of the Hospital Board was a direct result of the passage of the "Home Rule Act", SC Code Ann. 4-9- et seq. Subsequently, Barnwell County decided that it would be a County Council type of Government, under the Act. According to § 4-9-310, the Council has full administrative power over County government. This means that the elected County Council has the power to create and disband any sub-entities or Boards it sees fit. With this brief factual setting in mind; the issues raised by the Defendants' Motion to Dismiss and the arguments made in opposition, are addressed.

Plaintiffs have pled two causes of action: 1) Seeking a Declaratory Judgment that the Barnwell County Council's decision to replace the members of the Hospital Board with members

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of County Council was prohibited by the South Carolina Constitution's dual office holding clause; and damages relating to a Breach of Fiduciary Duty for failure to provide adequate funding for the Hospital.

To successfully prosecute an action in the courts of this state, a plaintiff must demonstrate both a justiciable controversy and that plaintiff must also have standing to bring the suit.

A. Standing

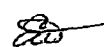
"Standing is 'a personal stake in the subject matter of a lawsuit.' " Newman v. Richland County Hist. Preserv. Com'n, 480 S.E.2d 72, 74 (1997) quoting Bailey v. Bailey, 441 S.E.2d 325, 327 (1994). To have standing ... one must be a real party in interest. A real party in interest is defined as one who 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. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999), quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992).

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 danger of sustaining, prejudice therefrom.

'(I)t is not sufficient that he has merely a general interest common to all members of the public.'

Florence Morning News, Inc. v. Building Comm'n, 265 S.C. 389, 218 S.E.2d 881 (1975).

"Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public." Joytime Distribs & Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999); Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000).

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Plaintiffs cite Baird v. Charleston County, 511 S.E. 2d 69 (1999) in support of their assertion that Plaintiffs have standing. According to Baird, "'Sloan standing' may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." Baird, 511 S.E. 2d 69 at 75.

The United States Supreme Court has established the following requirements to show standing: (1) the plaintiff must suffer an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct.App.2001), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992).

Plaintiffs have contended that they have suffered an injury from the impending loss of the County Hospital, resulting from the actions of County Council complained of herein. This Court does not believe the subject matter at bar is of such degree of public importance, as contemplated in Sloan and Baird, to confer standing on citizens of Barnwell County with no more stake in the outcome than their status as citizens.<sup>1</sup>

Of the seven present plaintiffs, only Don Alexander and Carolyn Williams have standing to bring this action. At the time of County Council's vote to terminate the service of seven out of eight Board members and replace them with members of County Council, Alexander was actually serving as Chairman of the Barnwell County Hospital Board of Trustees and Ms. Carolyn Williams was a member of the Hospital Board. The other plaintiffs listed in Paragraphs 3-8 of the Amended Complaint do not have standing; while they may have a general

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<sup>1</sup> Plaintiffs' argument for standing depends on the success of subsequent arguments raised by Plaintiffs, addressed herein, *infra*.

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interest in this matter, this general interest does not rise to the standard necessary to confer standing upon them in this case.

Despite Don Alexander and Carolyne Williams having standing to bring this action, this case must be dismissed on other grounds, as set forth below.

B. Nonjusticiability/Political Question

In order to survive a motion to dismiss, even if the standing requirement is met, plaintiffs' complaint must present a justiciable controversy. See, Sloan v. School Dist. of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (S.C. App. 2000). In the case at bar, Plaintiffs have not satisfied the justiciable controversy requirement because their challenge to the actions of the Barnwell County Council is a non-justiciable matter affected by the separation of powers created by the South Carolina and United States constitutions.

The acts and actions by County Council, of which Plaintiffs complain were clearly within the powers specifically and statutorily committed to Barnwell County by the South Carolina General Assembly in the Home Rule Act, sections 4-9-30 (5) and (6). In particular those sections provide:

(5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

(6) to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any

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such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title.

Fifty years ago, in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691(1962), the U.S. Supreme Court articulated the standard for determining the justiciability of an act of another branch of government, ruling that the judicial branch would not decide a cause of action for which there existed a "textually demonstrable commitment of the issue to a coordinate branch of the government."

"The nonjusticiability of a political question is primarily a function of the separation of powers." Seegars Andrews v Judicial Merit Selection Committee, 387 S.C. 109, 691 S.E. 2d 453 (2010), citing S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) (hereinafter SCPIF ).

"The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." Seegars-Andrews, at 460. See also, SCPIF, 369 S.C. at 142-43, 632 S.E.2d at 278, citing U.S. v. Munoz-Flores, 495 U.S. 385, 393-94, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990).

In Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008), the Supreme Court was asked by the Anderson County Administrator to give to a councilmember full access to all financial records pertaining to operation of county government. In her concurring opinion, Chief Justice Toal joined in the majority's decision to deny the relief sought and articulated her view of the political question and separation of powers saying:

"In my view, issues related to the propriety of Respondent's actions in this case present purely political questions, the resolution of which rests solely within the Council's domain. In my opinion, any ruling from this Court would impermissibly operate as judicial review of the Council's policy decisions, and I would decline Appellant's request to intrude in this area."

Wilson, 378 S.C. at 359, 662 S.E. 2d at 586.

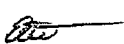
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Plaintiff argues that this is a Constitutional matter and is a justiciable issue that can be ruled on by this Court, while Defendant claims that it is a purely political question and therefore a declaratory judgment would not be proper. This Court respectfully agrees with the Defendant; the remedies being sought are not proper for this Court to determine. Because the Home Rule Act constitutes a textually demonstrable commitment of the administration of Barnwell County to the duly elected County Council, under the council form of government, the court would violate the constitutional separation of powers by accepting this lawsuit for judicial resolution.

C. Dual Office Holding

The Home Rule Act, § 4-9-10 et seq., allows a county to determine the form of government under which the county will be administered. That Barnwell County has decided to operate under the pure Council form of government is undisputed. The citizens of the County thus select and vote for those who will serve on the County Council, and whose powers and duties are outlined in § 4-9-30 (5) and (6). Section 4-9-30(6) specifically enumerates the powers of the County Council to establish such agencies, departments, boards, commissions and other subordinate entities as may be necessary and proper to provide services for local public purposes. Section 4-9-30 (14) also gives the Council the power to enact ordinances for the implementation and enforcement of the power granted by this section. Therefore, the County Council has the power to create, but also to dissolve any entity which they have created by these ordinances.

Plaintiffs also argue that by removing the previously appointed members of the County Hospital Board and placing themselves in those positions, the members of County Council have effectively violated the South Carolina Constitution which says that, "No person may hold two offices of honor or profit at the same time." S.C. Const. Art. VI, Sec. 3.

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Plaintiffs urge this Court to follow the reasoning found in an Attorney General opinion which advised that being a member of the Barnwell City Council and the Barnwell Hospital Board would violate the dual office holding prohibition. Op. Atty. General. February 26, 2007. There is, however, a vital distinction between the facts of that opinion and those in the case at bar. In the February 26, 2007 Opinion, an individual who attempts to serve on Barnwell City Council would expand his or her power by also serving on the County Hospital Board. Since the City Council is wholly separate and distinct from the Hospital Board, the individual would acquire powers through the Hospital Board that they had not possessed from service solely on County Council. Conversely, one serving on County Council experiences no power increase whatsoever, since the powers of the Hospital Board are derivative of and wholly contained within the powers of County Council.

In this case, there is a vertical relationship between the two offices in question. While both the County Council seat and the Hospital Board seat could be considered offices as contemplated by the dual office holding prohibition in the state Constitution, because the Council has the power to perform the duties that they delegated to the Hospital Board without its existence, by removing the members of the Board and installing themselves in their stead the Council members gain no new or additional powers beyond those which they previously possessed. With the powers afforded to County Council under the Home Rule Act, the Council would have the legal power and authority to eliminate the Hospital Board altogether and run the hospital itself directly. Therefore, the members of County Council have gained no new powers than they previously held as members of the Council. Further, the Hospital Board is indisputably a sub-entity of County Council, which was created by the Council and was replaced by members of the same Council, who have no powers other than those assigned to the Hospital Board by the

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County Council. It seems that the County Council could have simply eliminated the Hospital Board and run the hospital based on the aforementioned authority, but instead chose to remove the members of the Board and place themselves in the positions. The Court finds this legally insignificant. Since the Councilpersons have gained no new power and the Hospital Board is a sub-entity of the County Council, created and disbanded by the Council, the position are purely symbolic. Thus, the evil sought to be avoided by the constitutional prohibition against dual office holding does not exist in this case.<sup>2</sup>

The political, non-judicial remedy for claimed unsatisfactory acts or actions of County Council can be found in the Home Rule Act. Sections 4-9-1210 -1230 prescribe in detail how the electorate can challenge and repeal ordinances passed by the County Council. Moreover, to the extent the acts or actions of county council are considered disagreeable or unacceptable within the community, the residents of the community have a nonjudicial remedy available at the ballot box.

C. Breach of Fiduciary Duty

Plaintiffs' claim of Breach of Fiduciary Duty presents a further judicial intrusion into the business and operation of County Council, by seeking to have the court sit as a super-council, overseeing the budget, taxation and priorities of the County which the members of County Council were elected to perform.

This Court finds that there is no precedent in the jurisprudence of the state of South Carolina that establishes that members of a County Council have a judicially remediable fiduciary duty to citizens or other members of the Boards or any other Council created entities.

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<sup>2</sup> The Court notes that, even if County Council's occupying the seats of the Hospital Board were to be construed as dual office holding, only those actions taken by the Council concerning the hospital would be invalidated, and the other ordinances made by County Council during the time would not be affected.

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Taking all allegations as true, there is nothing in the record that establishes a fiduciary duty of the County Council to the Plaintiffs. If there is no duty, it is impossible to breach. Therefore, this cause of action is dismissed.

Whether or not the decisions and handling of these matters is satisfactory or unsatisfactory to the Plaintiffs or to any other group of county residents, the doctrine of separation of powers, along with recognition of political questions require that the Court not exercise jurisdiction over this matter.

#### CONCLUSION

Plaintiffs' Complaint must be dismissed according to Rule 12 (b)(6). Of the seven Plaintiffs before the Court, only two (Alexander and Williams) can satisfy the fundamental requirement of "standing" under this state's interpretations of the requirement. The remaining Plaintiffs do not have standing and the action must be dismissed as to them.

The case must also be dismissed as to Plaintiffs, Alexander and Williams, because their declaratory judgment cause of action presents a non-justiciable political question, which seeks to have the court improperly decide a matter which has been textually and demonstrably committed to a coordinate branch of government, in contravention of the separation of powers.

While Plaintiffs rely heavily on their contention that County Council members have violated the constitutional prohibition against dual office holding, after due and careful consideration of the pleadings, arguments of counsel, review of statutory and case law including opinions of the attorney general, the court finds no such violation in County Council's removal and replacement of the members of the Hospital Board.

10/11 *Geo*

Finally, as to the breach of fiduciary duty cause of action, the remaining Plaintiffs' claim must be dismissed because this cause of action also presents a non-justiciable controversy, and because South Carolina has hitherto not recognized a duty owed by a county council to the citizenry, a breach of which may be cognizable in the courts.

Accordingly, Plaintiffs' Complaint, as well as Amended Complaint and Second Amended Complaint are dismissed in their entirety. AND IT IS SO ORDERED.

  
Edgar W. Dickson

April 30, 2012  
Orangeburg, SC

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STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Don Alexander, Carolyne Williams, Georgia  
F. Fields, William R. "Bob" Dixon, Colonel  
Joe H. Zorn, Jr., Melanie Wright, and Dr.  
M.O. Khan,

Plaintiffs,

v.

Freddie Houston, David Kenner, Keith  
Sloan, Lowell Jowers, Sr., Joe Smith, Harold  
Buckmon, and Travis Black, individually and  
in their capacity as members of Barnwell  
County Council,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE  
SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO. 11-CP-06-476

**SECOND AMENDED  
COMPLAINT (corrected)**  
(Jury Trial Demanded)

Plaintiffs Don Alexander, Carolyn Williams, Georgia Fields, William R. "Bob" Dixon,  
Colonel Joe H. Zorn, Jr., Melanie Wright, and Dr. M.O. Khan, respectfully bring this action against  
Defendants named herein and would show this Court the following:

**PARTIES - PLAINTIFF**

1. Plaintiff Don Alexander is a citizen and resident of Barnwell County, South Carolina. Mr. Alexander served as Chairman of the Board of Trustees for Barnwell County Hospital until April 26, 2011.
2. Plaintiff Carolyne Williams is a citizen and resident of Barnwell County, South Carolina. Ms. Williams is the former finance chairperson of the Barnwell County Hospital.

3. Plaintiff Georgia F. Fields is a citizen and resident of Barnwell County, South Carolina.
4. Plaintiff William R. "Bob" Dixon is a citizen and resident of Barnwell County, South Carolina.
5. Plaintiff Colonel Joe H. Zorn, Jr. is a citizen and resident of Barnwell County, South Carolina.
6. Plaintiff Melanie Wright is a citizen and resident of Barnwell County, South Carolina.
7. Plaintiff Dr. M.O. Khan is a citizen and resident of Barnwell County, South Carolina.

**PARTIES – DEFENDANT**

8. Defendant Freddie Houston is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
9. Defendant David Kenner is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
10. Defendant Keith Sloan is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
11. Defendant Lowell Jowers, Sr. is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
12. Defendant Joe Smith is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
13. Defendant Harold Buckmon is a citizen and resident of Barnwell County and, at all times relevant herein, was a member of Barnwell County Council.
14. Defendant Travis Black is a citizen and resident of Barnwell County, at all times relevant herein, was a member of Barnwell County Council.

### **JURISDICTION AND VENUE**

15. This Court has jurisdiction over these matters based upon S.C. Code § 15-53-10 et seq.
16. Venue is proper in this Court as the Defendants are citizens and residents of Barnwell County and the actions and omissions giving rise to this case took place in Barnwell County, South Carolina.

### **FACTS**

17. In 1953, the South Carolina General Assembly initially created Barnwell County Hospital Board, to acquire land and construct hospital, to be owned and operated by Barnwell County Hospital's board of trustees.
18. On September 26, 1988, and after the passage of South Carolina's Home Rule Act, Barnwell County Council passed Ordinance 1988-35 reestablishing the body governing the Barnwell County Hospital ("the Hospital"). This body is now known as the Barnwell County Hospital Board of Directors ("Hospital Board") and is a governmental sub-entity of Barnwell County.
19. Over the years, Barnwell County Council amended the ordinances as to the Hospital Board, with the most recent amended being passed in June 3, 2003, which, among other things increased the number of trustees to nine members.
20. The members of the Hospital Board must be appointed by Barnwell County Council. Under the governing ordinances, each Hospital Board member is appointed to a three- year term and must be a resident of Barnwell County. Each County Council member nominates one appointee, preferably from their district. Two appointees are from the Hospital medical staff. The members

of the Hospital Board are compensated at a rate of \$50.00 per meeting, with a cap of \$1,200 per year.

Any requested compensation must be approved by the Barnwell County Council.

21. The members of the Hospital Board are afforded an extensive list of powers and duties, including the authority to adopt bylaws, operate the hospital and its facilities, establish rates charged by the hospital, expend the proceeds of Hospitals revenue, sue and be sued, adopt a budget, and employ personnel needed to operate the Hospital.

22. In 2009, the Hospital Board, at the instructions of Defendants to improve the Hospital's operation, employed a consultant to make suggestions as to how the Hospital could improve financially. After implementing the majority of the recommendations of the consultant, the overall condition of the Hospital began to improve.

23. However, around that same time, Defendants were developing a strategy, along with Bamberg and Allendale Counties, to close the various county hospitals and construct one hospital for all three counties.

24. As a part of its intentional plan, Defendants lowered the millage rates for the Hospital. Historically, the millage rate for the Hospital had been in the 20s, with a high of 23 mills, giving the Hospital funding of \$1,150,000 (23 mills x rate of \$50,000) . In 2011, the millage rates for the Hospital totaled 12, the lowest since some time before 2000, and three mills were to be used for debt repayment, leaving only 9 mills for operation. That reduced the funding to the Hospital to \$450,000 (9 mills x rate of \$50,000).

25. In addition, while providing Barnwell County Hospital with limited operating funds, Defendants have also paid the Williston Rescue Squad ("Rescue Squad"), which is not a sub-entity

of Barnwell County as the Hospital is, excessive amounts. The Rescue Squad, a 501(c)(3) entity, has a contract with Barnwell County, approved by Defendants, to provide emergency services. Over the past seven years, the Rescue Squad has been paid an average of \$830,000 per year, while the Hospital has only received an average of \$870,000 for the past ten years. For the year 2011-2012, the Rescue Squad was paid \$895,000, or the value of 18 mills at \$50,000 mill rate.

26. The director of the Rescue Squad is paid approximately \$149,000 per year, even though he has a full-time position with SCE&G and therefore cannot devote his full time to the Rescue Squad.

27. The Rescue Squad has consistently and wrongfully taken patients to other hospitals outside of Barnwell County, even though they are contracted and paid by Defendants, to the detriment of the Hospital.

28. In addition, in January 2011, the Hospital had arranged to get a \$1.4 million loan through the USDA with which to pay monies owed to Medicare and Medicaid (as a result of audit finding the Hospital had been overpaid by these agencies). However, Defendants refused to approve this loan, which had an interest rate of 4%, so the Hospital was forced to continue to pay 11% interest. Defendants wanted to force the Hospital into bankruptcy in order to eliminate this debt.

29. The old Hospital Board had also, upon the recommendation of an outside consultant, had almost completed the process to apply for the Hospital to be designated as a critical access facility which would increase the amount of Medicare and Medicaid reimbursements per patient as well as increased overhead payments. The State and federal administrative approval had been obtained. The process was 95% complete and would have substantially improved the Hospital's revenues immediately. Defendants vetoed this proposal.

30. While the various actions of Defendants financially crippled the Hospital, Defendants then continued with their plan to develop a tri-county hospital. Defendants then entered into negotiations with Health Management Partners( "HMP") and Dobbs Equity Partners, LLC ("Dobbs Equity") regarding a new tri-county medical facility.

31. Dobbs Equity is a private business that makes equity investments in existing and start-up companies, often partnered with other companies, like HMP, with experience in a particular field. On December 1, 2010, a letter of intent was approved by HMP/Dobbs Equity regarding acquisition of three county hospitals and creation of Tri County Regional Health Care System ("Tri County Regional"). The three counties who would make up Tri County Regional were Barnwell, Allendale and Bamberg.

32. The consideration described in the letter was payment to the to the three Counties (Barnwell, Allendale and Bamberg ) the amount necessary for existing obligations under tax exempt bond (approx \$4.35 million); the assumption of certain obligations; and the assumption of transaction costs up to \$1 million. Under the terms of the agreement, HMP/Dobbs Equity would be solely responsible for site selection of Tri County Regional. HMP/Dobbs also agreed to operate a non-emergency transportation system and operate or contract with ambulance service. Under the Letter of Intent, Tri County Regional would not assume liabilities for the pension or health benefit plans of the Hospital. As of October 1, 2010, the Hospital pension plan, which is an obligation of Barnwell County, had an unfunded plan termination liability of \$1,483,547 and a current net pension obligation of \$789, 535.00.

33. On December 15, 2010, the Defendants passed Resolution No. 2010-12-350, authorizing

the Chairman of Barnwell County Council to enter into letter of intent with HMP/Dobbs Equity. On that same date, the Letter of Intent was approved and signed by Thomas Williams, then Chairman of .

34. On January 1, 2011, Barnwell County Council wrote a letter to the Hospital Board of Trustees Board, with a copy of Letter of Intent to HMP/Dobbs Equity, requesting Board take no steps that could be construed as a violation of the Letter of Intent.

35. On February 10, 2011, HMP wrote a letter to Don Alexander, the then-Chairman of Board with the terms and conditions of engagement between HMP/Dobbs Equity and the Hospital.

36. On April 18, 2011, the Defendants and HMP/Dobbs Equity met with the Hospital Board for four hours in executive session to encourage the Hospital Board to proceed with HMP/Dobbs Equity plan. Defendants insisted that the Hospital file a bankruptcy petition under Chapter 9, which was the first time that anyone had raised the issue of bankruptcy.

37. The Hospital Board indicated that they were not in favor of proceeding with a contract with HMP/Dobbs Equity because that plan insisted on the Hospital filing for bankruptcy to eliminate all Hospital debt and specifically refused to honor the Hospital pension plan.

38. As a part of the contract, the Hospital would have to file bankruptcy to reorganize and/or discharge all debts, so that HMP/Dobbs Equity could purchase the hospital debt-free. The Hospital Board also knew that the Hospital was not insolvent or bankrupt, and thus it would not be proper to file a bankruptcy petition.

39. On April 25, 2011, Barnwell County Council gave 24-hours notice that meetings of both the County Council and the Hospital Board would take place on April 26, 2011.

40. On April 26, 2011, the Defendants voted to replace the Hospital Board-- who had not resigned as Hospital Board members-- with themselves, since the Hospital Board would not agree to file bankruptcy and approve of the contract with Dobbs Equity. As the new illegal Hospital Board, Defendants then approved the contract with HMP/Dobbs Equity.

41. Under the contract, the Hospital would implement bankruptcy proceedings and HMP/Dobbs Equity would manage the hospitals. The Hospital would be required to pay HMP/Dobbs \$33,333.33 per month for the managing the Hospital until the bankruptcy could be completed. The Hospital would also be required to pay Derek Pierce, an employee of HMP and/or Dobbs, \$17,000 per month to act as chief financial officer.

42. In July 2011, Allendale County withdrew from the Tri-County Regional plan.

43. Some time in early September 2011, Dobbs and HMP parted ways, and Dobbs Equity alone pursued the purchase of the Hospital.

44. In September, 2011, it was announced that the new regional medical center would be in Bamberg County, not Barnwell County. Hundreds of citizens attended the Barnwell County Council meeting of September 13, 2011 to protest the sale of the Hospital to Dobbs Equity. However, Council Chairman Travis Black, Councilman Charles Lowell Jowers Sr., Councilman Keith Sloan and Executive Vice Chairman Freddie Houston Sr. voted to approve the ordinance. Councilman Harold Buckmon, Councilman David Kenner and Councilman Joe Smith voted against the new ordinance. The majority vote meant the contract and deal with Dobbs Equity and the Hospital's bankruptcy petition could move forward.

45. On September 27, 2011, Defendants, in their capacities as the new illegal Hospital Board

passed a resolution authorizing the sale of the Hospital's assets to Dobbs Equity or its affiliate. The Asset Purchase Agreement ("APA") is unconscionable in that Barnwell Hospital does not receive any monies under the APA, but will be required to pay Dobbs Equity \$450,000 per year for at least three years to operate the Hospital. In addition, at the end of the three years, Barnwell County Council can only lease the property and the Hospital building from Dobbs for fifty years for \$1, but only if the building is not used as any type of health care facility, including a nursing home. The agreement also contains an unfair and unconscionable liquidated damages provision, a waiver of the right to jury trial, and gives Dobbs, in many instances, the unilateral ability to back out of the agreement.

46. On September 27, 2011, Defendants, in their capacities as the new illegal Hospital Board, also passed a resolution authorizing the Hospital to file a Chapter 9 bankruptcy petition.

47. On October 5, 2011, the Hospital, through Defendants as the new illegal Hospital Board, filed a petition for bankruptcy. All information regarding the sale of the Hospital, including the Asset Purchase Agreement and Development Plan, were not made available to the public until October 4, 2011. To date, the appraisals and valuations of the Hospital's 59-bed facility, 16 acres of land, and schedules of personal property and equipment have not been made available to the public. The reorganization plan has not been filed in the bankruptcy court and there has been no indication if Dobbs Equity will contribute any monies to pay the Hospital's creditors.

**FOR A FIRST CAUSE OF ACTION**  
(Declaratory Judgment)

48. Paragraphs 1 through 46 hereinabove are reiterated and realleged as though set forth

verbatim.

49. This is a proceeding for declaratory relief under the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 *et seq.* (1976).

50. Section 15-53-30 allows any party whose rights, status or other legal relations are affected by a statute, ordinance or contract may have determined any question of construction or validity arising under such statute, ordinance or contract, and obtain a declaration of rights, status or other legal relations thereunder.

51. Plaintiffs are parties whose rights, status or other legal relations are affected by an ordinance in that the resolution passed on April 26, 2011 by Defendants allowed Defendants to appoint themselves as members of the Board of Trustees of Barnwell Hospital, in violation of their own ordinances and in violation of S.C. Const. Art. VI Sec. 3, which prohibits dual office holding.

52. The Barnwell County ordinances set forth the method of appointing new Hospital Board members, which Defendants violated.

53. S.C. Const. Art. VI Sec. 3 prohibits a person from holding "two offices of honor or profit at the same time."

54. A position on Barnwell County Council is an office for the purposes of dual office holding. In addition, a position on the Hospital Board of Trustees is an office for the purposes of dual office holding.

55. Defendants' actions of appointing themselves as Hospital Board members and their continued service in that capacity constitutes impermissible dual office holding in violation of S.C. Const. Art. VI Sec. 3.

56. Plaintiffs seek a declaration that the resolution passed by Defendants is illegal, unconstitutional, and without force of law in that it violates the language of Barnwell County's ordinances as well as S.C. Const. S.C. Const. VI Sec. 3.

57. Plaintiff also seeks a declaration that Defendants, who purportedly acted in their capacity as new Hospital Board members, were without power and control to authorize a sale of the Hospital's assets to Dobbs Equity and without the power and control to authorize the Hospital's bankruptcy petition.

58. Plaintiff also seeks a declaration that Defendants, by appointing themselves as the new Hospital Board, have effectively vacated, resigned and/or forfeited their positions as members of Barnwell County Council.

**FOR A SECOND CAUSE OF ACTION**  
(Breach of Fiduciary Duty)

59. Paragraphs 1 through 57 hereinabove are reiterated and realleged as though set forth verbatim.

60. Defendants, as members of Barnwell County Council, owe a fiduciary duty to the citizens and taxpayers of Barnwell County, including Plaintiffs.

61. Defendants have breached their fiduciary duties by, *inter alia*:

- (A) Paying the Williston Rescue Squad \$830,000 per year, including \$149,000 per year to the director of the Rescue Squad;
- (B) Reducing the millage rate to the hospital to 12 mills (3 mills of which are to repay debt, leaving the Hospital to operate on 9 mills or \$450,000 per year); and
- (C) Refusing to approve a 4% interest loan to the Hospital from the USDA needed to pay

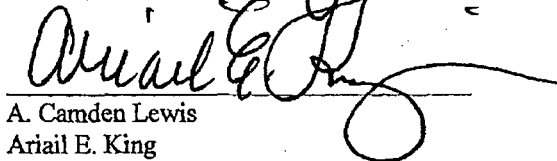
Medicare and Medicaid.

62. As direct and proximate result of Defendants' breach, Plaintiffs have been injured in an amount to be more specifically proven at trial.

WHEREFORE, Plaintiff prays for the following:

- 1) A declaratory judgment under S.C. Code Ann. § 15-53-10 *et seq.* (1976) declaring the resolution passed by Defendants is illegal, unconstitutional, and without force of law in that it violates the prohibition against dual office holding as set forth in S.C. Const. S.C. Const. XVII Sec. 1.A.
- 2) Judgment on Plaintiffs' second cause of action for breach of fiduciary duty, and actual and consequential damages incurred as result thereof;
- 3) For the costs of this action, including reasonable attorneys' fees, and other such relief as this Court deems just and proper.

LEWIS, BABCOCK, & GRIFFIN L.L.P.



A. Camden Lewis  
Ariail E. King  
1513 Hampton St.  
Post Office Box 11208  
Columbia, South Carolina 29211  
(803) 771-8000

Attorneys for Plaintiffs

Columbia, South Carolina  
April 4, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BARNWELL )  
 )  
Don Alexander, Carolyne Williams, )  
Georgia F. Fields, William R. "Bob" Dixon, )  
Colonel Joe H. Zorn, Jr., Melanie Wright, )  
Dr. M.O. Khan, and Janice Livingston, )  
Plaitiffs, )  
 )  
vs. )  
Freddie Houston, David Kenner, Keith )  
Sloan, Lowell Jowers, Sr., Joe Smith, )  
Harold Buckmon, and Travis Black, )  
individually and in their capacity as )  
members of Barnwell County Council. )  
Defendants. )

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

Civil Action No. 11-CP-06-476

NOTICE AND MOTION  
TO DISMISS

FILED FOR RECORD  
2012 JAN 19 PM 4:17  
RHONDA D. McELVEEN  
CLERK OF COURT  
BARNWELL COUNTY, S.C.

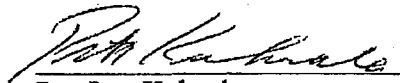
TO: PLAINTIFFS ABOVE NAMED AND THEIR ATTORNEY, A. CAMDEN LEWIS AND  
ARIAIL E. KING, ESQUIRE.

YOU WILL PLEASE TAKE NOTICE THAT Defendants, Freddie Houston, David  
Kenner, Keith Sloan, Lowell Jowers, Sr., Joe Smith, Harold Buckmon and Travis Black, will  
move through undersigned counsel, ten (10) days after service hereof or as soon thereafter as  
counsel may be heard at the Barnwell County Courthouse, Main Street, Barnwell, South Carolina  
pursuant to Rule 12(b)(6) SCRCPP, for an Order Dismissing the within lawsuit, on the ground that  
Plaintiffs have failed to allege facts constituting any cause of action against the Defendants, and  
the Complaint and Amended Complaint must be dismissed according to Rule 12(b)(6), SCRCPP.

Undersigned counsel affirms that, this motion to dismiss requires no prior consultation  
pursuant to Rule 11, SCRCPP.

Page 2

HARVEY & KULMALA, LLC  
Post Office Box 705  
Barnwell, South Carolina 29812  
(803) 259-5531

A handwritten signature in cursive script, appearing to read "Pete Kulmala", written over a horizontal line.

By: Pete Kulmala  
Attorney for Defendants

Barnwell, South Carolina  
January 19, 2012

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BARNWELL )

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

Don Alexander, Carolyne Williams, )  
Georgia F. Fields, William R. "Bob" Dixon, )  
Colonel Joe H. Zorn, Jr., Melanie Wright, )  
Dr. M.O. Khan, and Janice Livingston, )  
Plaintiffs, )

Civil Action No. 11-CP-06-476

MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS

vs. )

Freddie Houston, David Kenner, Keith )  
Sloan, Lowell Jowers, Sr., Joe Smith, )  
Harold Buckmon, and Travis Black, )  
individually and in their capacity as )  
members of Barnwell County Council. )  
Defendants. )

TO: Plaintiffs above named and their attorney, A. Camden Lewis and Ariail E. King, Esquire.

#### STATEMENT OF THE CASE

Plaintiffs, originally numbering nine, filed their initial Summons and Complaint in this matter on December 20, 2011, with service thereafter on the nine defendants, all current members of Barnwell County Council. An Amended Complaint was filed on January 4, 2012, and on January 31, 2012, Plaintiffs' sought to file a Second Amended Complaint, which would reduce to six the number of plaintiffs in this case. On January 19, 2012, Defendants filed their Motion to Dismiss the action pursuant to Rule 12(b)(6), for Plaintiffs' failure to allege facts sufficient to constitute a cause of action against the defendants.

On a Motion to Dismiss, under Rule 12(b)(6), the factual allegations of the Complaint are taken as true, and the court is limited to a consideration of the allegations contained within the four corners of the complaint. Charleston County School District v. Harrell, 713 S.E.2d 604 (2011).

In this case, Plaintiffs' have attempted to allege two causes of action: The first, for declaratory judgment that the "resolution passed by Defendants, [Exhibit 1], is illegal, unconstitutional and without force of law in that it violates the prohibition against dual office holding as set forth in S.C. Const. S.C. Const. XVII Sec. 1.A." or Article VI, Section 3. In their second cause of action Plaintiffs seek actual and consequential damages for defendants' alleged breach of fiduciary duty to the named plaintiffs. Complaint, Prayer for Relief.

Plaintiffs have asserted acts, resolutions and actions by defendants, members of Barnwell County Council, which they contend establish that the April 26, 2011 Resolution by which county council removed and replaced the members of the Hospital Board was null and void; and that certain of those acts, resolutions and actions by County Council, amounted to the breach of each council member's fiduciary to the Plaintiffs entitling the Plaintiffs to recover money damages from the defendants.

In addition to the two causes of action, Plaintiffs also, of course, are asking that Barnwell County pay for their attorney fees for this action.

The plaintiffs' Complaint sets forth the historic and chronological development of the Hospital Board from its inception in 1953 through the 2003 Ordinance revamping the Board's makeup and structure. "In 1953, the South Carolina General Assembly initially created the Barnwell County Hospital Board, to acquire land and to construct hospital, to be owned and operated by Barnwell County Hospital's Board of Trustees". Complaint, para. 19.

In Paragraph 20, Plaintiffs allege that Barnwell County Hospital Board of Directors "is a sub-entity of Barnwell County". And in Paragraph 22 that, pursuant to the County's 2003 Ordinance, 2003 -178, the "members of the Hospital Board must be appointed by Barnwell County Council".

Ordinances of Barnwell County Council, relating to creation and modification of the Hospital Board, 1986-26, 1988-35, 1993- 62, 1995-88, and 2003 -178, are attached hereto as Exhibits 2, 3, 4, 5 and 6. Interestingly, as demonstrated by the Ordinances, the County Council ran both the hospital and the County Nursing Home, directly for two years between the enactment of Ordinance No. 1986-26, and the enactment of 1988-35. When the Board of Trustees was created some two years later, it merely had custody of Barnwell County's property relating to the Hospital, while ownership remained with the County.

Plaintiffs have also alleged that the defendants, in conjunction with the county councils of Allendale and Bamberg, in 2009 began taking steps toward closing the county hospitals, and took steps to reduce county funding for the hospital (Complaint, para. 25); lowered millage rates and reduced funding for the Hospital (Complaint, para. 26); improperly paid excessive amounts to Williston Rescue Squad (Complaint, para. 27 – 29); frustrated the Hospital Board's efforts to secure a \$ 1.4 million USDA loan (Complaint, para. 30); and vetoed a nearly approved application for designation as critical access facility (complaint, para. 31); and pursued negotiations for the new three county hospital facility (Complaint, para.32 – 41); and on April 26, 2011 voted to replace the Hospital Board (Complaint, para. 42).

Plaintiffs assert in Paragraph 59 that the defendants, while acting as newly self-appointed Hospital Board, "were without power and control to authorize a sale of the Hospital's assets to Dobbs Equity and without power and control to authorize the Hospital's bankruptcy petition". In the next succeeding paragraph, Plaintiffs also assert that the defendants, "by appointing themselves as the new Hospital Board, have effectively vacated, resigned and/or forfeited their positions as member of Barnwell County Council".

## ARGUMENT

*Standing/political question/separation of powers* - As an initial matter, both the declaratory judgment and breach of fiduciary duty causes of action suffer from three inter-related problems: Plaintiffs' lack of standing; infringement of separation of powers; and political question. Based on these three initial issues, Plaintiffs' case must be dismissed.

A plaintiff attempting to prosecute an action under the South Carolina Declaratory Judgment Act, 15- 53 – 10, et seq., (1976) must demonstrate a justiciable controversy and that plaintiff must also have standing to bring the suit. As to both of their causes of action, Plaintiffs' lack standing – that is, these Plaintiffs have not and cannot demonstrate that they have the kind of stake in the outcome of this matter which would allow them, from a constitutional perspective, to assert these claims in the first place. "Standing is 'a personal stake in the subject matter of a lawsuit.' " Newman v. Richland County Hist. Preserv. Com'n, 480 S.E.2d 72, 74 (1997) (quoting Bailey v. Bailey, 441 S.E.2d 325, 327 (1994)).

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 danger of sustaining, prejudice therefrom. '(I)t is not sufficient that he has merely a general interest common to all members of the public.'

Florence Morning News, Inc. v. Building Comm'n, 218 S.E.2d 881 (1975).

The presence of a justiciable controversy, however, does not by itself give a litigant standing to sue. As the supreme court has stated, standing requires "a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest." With regard to taxpayer standing, "[t]he general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer." Stated another way, absent a truly individual injury, . . . a taxpayer plaintiff, must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of her fellow taxpayers.

Beaufort County v. Trask, 563 S.E.2d 660 (Ct. App. 2002).

Even if the Court considers Plaintiffs as having demonstrated the requisite stake in the outcome, their two causes of action present a non-justiciable political question.

The acts and actions by County Council, of which Plaintiffs complain were clearly within the powers specifically and statutorily committed to Barnwell County by the South Carolina General Assembly in the Home Rule Act, sections 4-9-30 (5) and (6). In particular those sections provide:

(5)(a) to assess property and levy ad valorem property taxes and uniform service charges, including the power to tax different areas at different rates related to the nature and level of governmental services provided and make appropriations for functions and operations of the county, including, but not limited to, appropriations for general public works, including roads, drainage, street lighting, and other public works; water treatment and distribution; sewage collection and treatment; courts and criminal justice administration; correctional institutions; public health; social services; transportation; planning; economic development; recreation; public safety, including police and fire protection, disaster preparedness, regulatory code enforcement; hospital and medical care; sanitation, including solid waste collection and disposal; elections; libraries; and to provide for the regulation and enforcement of the above.

(6) to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title.

“The nonjusticiability of a political question is primarily a function of the separation of powers.” Seegars Andrews v Judicial Merit Selection Committee, 691 SE 2d 453 (2010); citing S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) (SCPIF ) (citing Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

“The fundamental characteristic of a nonjusticiable ‘political question’ is that its adjudication would place a court in conflict with a coequal branch of government.” SCPIF, 369

S.C. at 142-43, 632 S.E.2d at 278 (citing U.S. v. Munoz-Flores, 495 U.S. 385, 393-94, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990)).” Seegars-Andrews, at 460.

Judicial inquiry into legislative motivation is to be avoided”. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir.1989). “Such inquiries endanger the separation of powers doctrine, representing a substantial judicial ‘intrusion into the workings of other branches of government.’ Id. at 1257 (quoting Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450, (1977)).

Pressley v. Lancaster County, 542 S.E.2d 366 (Ct. App. 2001).

In Wilson v. Preston, 662 S.E.2d 580 (2008), in which the Supreme Court was asked by the Anderson County Administrator to give to a councilmember full access to all financial records pertaining to operation of county government, Chief Justice Toal concurred in the majority’s decision to deny the relief sought and articulated her view of the political question and separation of powers:

“In my view, issues related to the propriety of Respondent's actions in this case present purely political questions, the resolution of which rests solely within the Council's domain. In my opinion, any ruling from this Court would impermissibly operate as judicial review of the Council's policy decisions, and I would decline Appellant's request to intrude in this area.

Wilson, at 586.

The Supreme Court refused to intrude upon the legislative branch’s exercise of its own powers, citing the separation of powers, in Culbertson v. Blatt, 9 S.E.2d 218 (1940), in which the plaintiff asked the Court to order certain office holders, including legislators, to vacate their “second” offices:

In our opinion the maintenance of this action is in the first instance precluded by a consideration of the traditional and constitutional division of powers among the legislative, executive and judicial branches of the government. That elementary constitutional doctrine puts it beyond the power of this court on a mere allegation that the Legislature has violated a constitutional mandate, to issue a prohibitive or other injunctive or mandatory decree which would have the effect of undoing such violation.

That Plaintiffs' claims present a non-justiciable controversy/political question is most evident when one considers the relief sought in the declaratory judgment claim. In Complaint, paragraphs 59 and 60, Plaintiffs essentially contend that by defendants assuming membership on the Hospital Board, the defendants ineffectively replaced the old board, and have vacated their positions on County Council, rendering all actions and Ordinances of County Council since April 26, 2011 void as if never enacted. Through the declaratory judgment action, Plaintiffs ask the Court to declare that County Council's removal of the members of the Hospital Board was null and void; similarly they seek a declaration that by attempting to remove the Hospital Board and assume those positions, the defendants have each and all resigned their positions on County Council, such that there will have been no County Council in place since April 26, 2011, and thereby rendering void *ab initio* the Ordinances and Resolutions passed or enacted in that time, including incentives for over \$ 112,000,000 in new business investment in the County and the County's \$ 12,900,000 budget. (Exhibit 7).

Additionally, the position the plaintiffs take regarding dual office holding would also potentially invalidate all of the standing sub-committees of the County Council, most of which have been in effect for more than two decades, and which touch directly on the governance of Barnwell County. By Ordinance, County Council members serve on the County's Finance committee which helps set the budget, the personnel committee, the safety committee, the judicial committee, the health care committee, the economic development committee, the service committee, the government committee, the science technology and regulatory matters committee, and the transportation committee.

Plaintiffs' claim of Breach of Fiduciary Duty presents a further judicial intrusion into the business and operation of County Council, by seeking to have the court sit as a super-council, overseeing the very business of the County which the members of County Council were elected to perform. Whether or not the decisions and handling of these matters is satisfactory or unsatisfactory to the Plaintiffs or to any other group of county residents, the doctrine of separation of powers, along with recognition of political questions require that the Court not exercise jurisdiction over this matter.

#### Declaratory Judgment

Rule 12(b)(6) provides for dismissal of a complaint where the Plaintiff has failed to allege facts sufficient to constitute a cause of action. By the language of the Rule, Plaintiffs' claim for declaratory judgment must be dismissed. This cause of action rests on the erroneous assertion that County Council's Resolution (removing the Hospital Board and assuming those positions themselves), is void because the defendants' serving on Hospital Board amounts to constitutionally prohibited "dual office holding". Careful reading of the constitutional limitation of dual office holding, along with the scarce caselaw and South Carolina Attorney General's opinions reveals convincingly that the defendants' service as members of county council and Hospital Board, does not present the kind of problem the "dual office holding" prohibition was designed to protect against.

***Dual Office Holding*** – The South Carolina Constitution contains an express prohibition against dual office holding: "No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention." S.C. Const. Art. VI, Sec. 3.

In pursuing this lawsuit, Plaintiffs have apparently seized upon the stark language of the section, while giving no regard to the meaning of the prohibition nor any consideration to its underlying rationale. On this subject, there is a paucity of interpretive case law, none of which involve the holding of two offices in vertical relation to one another, and the meaning must be gleaned from context and a large number of South Carolina Attorney General's opinions.

The language of the provision prohibits the holding of two offices of honor or profit at the same time. It can be easily understood that the term "profit" refers to financial benefit including wages or salary. Although nowhere specifically defined, the term "honor or profit" has been treated as meaning, with or without pay. More important in the numbers of Attorney General opinions has been the distinction between officer and employee, with the position of "officer" being that described in Sanders v. Belue, 58 S.E. 762 (1907):

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employ  .

Sanders, at 763.

Of the numerous Opinions issued by the Attorney Generals office over the years, the determination of whether or not a position amounted to a prohibited second office has largely been an *ad hoc* exercise. Those opinions do not describe the particular harm sought to be avoided by prohibiting "dual office holding"; however that should be self-evident.

Initially, the dual office holding prohibition applied to two offices only if they were incompatible. "Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when, from the multiplicity of business in them, they cannot be executed with care

and ability; or when, their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty.” Ex Parte Ware Furniture Company, 27 S.E. 9 (1897).

“Incompatibility meant either that the offices involved “such a multiplicity of business” that one person could not adequately perform both, or that they were “sub-ordinate and interfering with each other, [inducing] a presumption that they cannot be executed with impartiality and honesty. Richardson v. Town of Mount Pleasant, 566 S.E.2d 523 (2002). Another reason to prohibit an individual from holding two “offices” is in order to prevent the state’s power and control from being concentrated in one individual; to avoid the conflicts of interest that would inevitably follow from one individual exercising power and influence in more than one distinct position or office.

Despite exhaustive review of attorney general opinions, none has been identified, which presents the kind of interrelationship between the two positions as that presented in this case. As set forth above, the County Council actually ran the hospital for two years in the 1980’s. In those cases where the attorney general opines that the two positions described in the inquiry are indeed offices of honor or profit, the positions are universally in a horizontal relationship with each other, so that the individual’s sphere of influence in one office is different from and in addition to his sphere in the other office, resulting in the individual accumulating broader powers by the combination than would be with just one office alone.

In this case, County Council’s assumption of membership on the Hospital Board results in no greater concentration of power or control than it has always had as County Council. Rather than a horizontal duality, as described in the Attorney General opinions, this matter presents a strictly vertical duality. All along, the Hospital Board has had only those powers originally

given to them by Ordinances of County Council. In effect, the Hospital Board functions merely as the agent of County Council, and can have no greater powers than those possessed by County Council, nor greater than those given to the Board by County Council.

So obvious is this status as vertical descendant of County Council, that the Plaintiffs have readily acknowledged in their Complaint that the Hospital Board "is a **sub-entity of Barnwell County**". Complaint, Paragraph 20. In this type of vertical duality, there is no possibility of greater concentration of power or influence in County Council – they have merely retaken from the Board, their agents, those powers which had earlier been entrusted in the Board. With the so-called "dual office" in this matter being nothing more than a principal retaking power/authority from its agent, there can be none of the harm sought to be avoided by the prohibition against dual office holding.

The common feature of those cases in which the duality of office was prohibited or opined as unacceptable, is that the offices were horizontally dual, while Barnwell County Council and Hospital Board are vertically dual. Consequently, there are no powers possessed by the County which have been expanded or increased by assuming the Board positions, and there can be no conflict of interest between the County Council and the Board.

The reason for the Constitutional limitation on dual office holding is not applicable where, as here, the second "office" position is merely a "sub-entity" of the primary "office". Plaintiffs' allegation that Hospital Board is a sub-entity of Barnwell County is significant for it concedes Defendants' major premise in this motion to compel: that the Hospital Board is indeed a sub-entity of Barnwell County. Recognition of this reality means that the members of county council did not, by assuming the position of Hospital Board, impermissibly hold dual offices.

Significantly, throughout the process of replacing the members of the Hospital Board, each and all of the actions of defendants, as Hospital Board, have been performed by the defendants acting in their *ex officio* capacity. See Resolution 2011 (Exhibit 6). The September 2011 Resolution reveals that the defendants, members of County Council, were acting in their capacity of Hospital Board members, *ex officio*. It was long ago recognized that *ex officio* membership does not violate the dual office holding limitation.

The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is *ex officio* membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.

Ashmore v. Greater Greenville Sewer District, 44 S.E.2d 88 (1947). See also, Welling v. Clinton Newberry Natural Gas Authority, 71 S.E.2d 7 (1952).

#### ***Violation of ordinances***

Plaintiffs also contend that defendants have failed to comply with unspecified county ordinances in their actions to remove and substitute members of the Hospital Board. Defendants' actions to remove and replace the Hospital Board have all been strictly pursuant to existing duly enacted Ordinances of Barnwell County. Other than the bare assertion in their Complaint, that defendants failed to follow their own Ordinances, Plaintiffs have given no indication in what particular they claim Ordinances have been disregarded.

In 2003, County Council enacted Ordinance 2003-176 (Exhibit 8) which provides, with respect to removal of members appointed to serve on County Boards: Furthermore, for any reason or no reason at all, Council may remove a board member by majority vote." The County's most recent procedures Ordinance, 2009-07-250 (Exhibit 9) describes Council's authority for appointment to committees and boards, and eliminated the 30 day notice

requirement of 2003-176, for replacement of appointees to a Board. Moreover, pursuant to S.C. Code Section 4-9-30 (6) the State legislature granted Counties the plenary power to create, merge, and abolish boards, commissions and positions at their discretion.

In general, it is well recognized that power of removal belongs to the one with the power of appointment: "for the absolute power of removal at pleasure is incident to the power of appointment, unless the law provides duration of the official term or mode of removal". Sanders v. Belue, at 765.

#### Breach of Fiduciary Duty

In their Breach of Fiduciary Duty claim, Plaintiffs ask the Court to second guess County Council in a number of their decisions, with which Plaintiffs disagree. Regardless of the truth or falsity of those allegations in paragraphs 25 through 49, they must be taken as true for purposes of this motion. Even accepting those allegations as true, Plaintiffs' second cause of action must also be dismissed under 12 (b)(6) because, as stated above, the subject matter of the claim of breach of fiduciary duty raises the specter of separation of powers and political question. In order for those claims to be considered on their merits, would require the Court to inject itself into not only County Council's decision making process, but into Council's decisions. See South Carolina Public Interest Fdn. v. Judicial Merit Selection Comm'n., 637 S.E.2d 277 (2006). Specifically, pursuant to S.C. Code Section 4-9-30 (5)(a) it is the sole prerogative of County Council to levy ad valorem taxes to pay for hospitals and medical care.

#### CONCLUSION

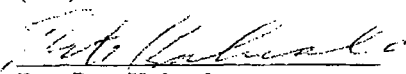
The two causes of action asserted by Plaintiffs in this matter pose serious concerns as a result of Plaintiffs' efforts to have the Court enter into an area for which decision-making

authority has been statutorily committed to the County. In order to accept this case for decision by the Court, this Court will need to be willing to ignore the Constitutional Separation of Powers, and to delve into the decisions and acts of County Council, and to sit in review of that body's decisions as a super-County Council. As the Chief Justice has recognized, matters of this sort present political questions, for which judicial intervention is not appropriate.

Additionally, the entire Breach of Fiduciary Duty Cause of action is compromised by Plaintiffs' efforts to have the Court second-guess the decisions which Plaintiffs have identified, which are uniquely within the domain of County Council.

On the matter of dual office holding, if the Court should elect to decide the matter, it is abundantly clear that the defendants, as members of county council, are and have always been ex-officio members of the Hospital Board; and that membership on the Hospital Board brings with it no new or additional powers nor control to defendants than that which they have always held by virtue of their position as members of County Council; and defendants' service as members of county council and of the Hospital Board does not amount to prohibited dual office holding, because the defendants have simply begun to exercise directly, as principal, those powers earlier delegated to their agent, the Hospital Board.

HARVEY & KULMALA, LLC  
Attorneys at Law  
Post Office Box 705  
Barnwell, South Carolina 29812  
(803) 259-5531

  
By: Pete Kulmala  
Attorney for Defendants

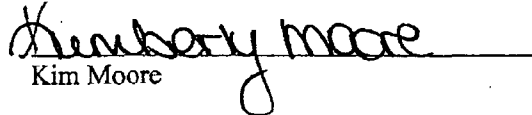
February 8, 2012  
Barnwell, South Carolina

**CERTIFICATE OF SERVICE**

I, Kim Moore, Paralegal for Pete Kulmala, attorney for the Defendants, Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr., Joe Smith, Harold Buckmon, and Travis Black, individually and in their capacity as members of Barnwell County Council, in the case of Don Alexander, Carolyn Williams, Georgia F. Fields, William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie Wright, Dr. K.O. Khan, and Janice Livingston vs. Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr., Joe Smith, Harold Buckmon, and Travis Black, individually and in their capacity as members of Barnwell County Council, Case No.: 2011-CP-06-476, do hereby certify I have served the foregoing **Defendants'** **Memorandum in Support of Motion to Dismiss**, on the date shown below by facsimile, and by mailing a copy of the same via first class, US mail, postage prepaid, to the person listed below:

A. Camden Lewis, Esquire  
Ariail E. King, Esquire  
Lewis Babcock Griffin, LLP  
1513 Hampton St.  
Columbia, SC 29201

facsimile (803) 733-3534

  
Kim Moore

February 8, 2012  
Barnwell, South Carolina

A RESOLUTION  
OF THE BOARD OF DIRECTORS FOR  
BARNWELL COUNTY HOSPITAL

AUTHORIZING THE EXECUTION AND DELIVERY OF CERTAIN  
AGREEMENTS TO PROVIDE FOR THE SALE OF ASSETS OWNED  
BY BARNWELL COUNTY, SOUTH CAROLINA, AND COMPRISING A  
PORTION OF THE BARNWELL COUNTY HOSPITAL; AND OTHER  
RELATED MATTERS.

WHEREAS, the availability of quality healthcare is an important issue for all citizens of Barnwell County ("County");

WHEREAS, the Barnwell County Hospital Board of Directors ("Board") along with the County Council, has engaged in a multi-year process to evaluate the County's healthcare options and, after examining a number of opportunities, has concluded the process and determined to pursue a regional healthcare system in partnership with Bamberg County, South Carolina ("Bamberg");

WHEREAS, Dobbs Equity Partners, LLC through its affiliate Regional Health System, LLC, along with one or more existing, or to-be-formed or acquired subsidiaries, or affiliated or related entities (collectively, "Company") is planning to establish a regional healthcare system serving the County and Bamberg (collectively, "Counties") and consisting of a new state-of-the-art regional hospital and multispecialty physician office centers in the Counties ("System");

WHEREAS, the Company is also planning to purchase the existing assets of the Barnwell County Hospital ("Hospital"), a portion, including the personal property, accounts and licenses, of which are owned by the Hospital and a portion, including the land and building comprising the Hospital, of which are owned by the County; and

WHEREAS, to memorialize the commitments of the parties, the Counties, the Hospital and the Company have negotiated a Development Agreement and an Asset Purchase Agreement (collectively, "Agreements"), the forms of which are attached to this Resolution.

NOW THEREFORE, BE IT RESOLVED, by the Board, which is comprised of the members of the County Council, each acting in an *ex officio* capacity:

**Section 1.** *Authorization to Execute and Deliver Agreements.* The Chair of the Board ("Chair") is authorized and directed to execute the Agreements, with any modifications and revisions as may be recommended by legal counsel and approved by the Chair in the name of and on behalf of the Hospital, and the Secretary of the Board is authorized and directed to attest the same; and the Chair is further authorized and directed to deliver the Agreements, as executed and attested, to the Company.

**Section 2.** *Further Assurances.* The Board confirms the authority of the Chair, and in the Chair's absence, the Vice-Chair, the Secretary of the Board, and various other Hospital officials and staff, acting at the direction of the Chair, or Secretary of the Board, as appropriate, to take whatever further action and to draft, execute, deliver and post whatever further documents as may be appropriate to effect the intent of this Resolution.

**Section 3.** *Savings Clause.* If any part of this Resolution is invalid, then the validity of the remainder is unaffected.

**DEFENDANT'S  
EXHIBIT**

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**Section 4. General Repealer.** All resolutions, and parts of the same in conflict with this Resolution are, to the extent of that conflict, repealed.

This Resolution takes effect and is in full force immediately on signing by the Chair.

BARNWELL COUNTY HOSPITAL

By: *Charles D. Jarnett*  
Chairman of the Board of Directors

**EXHIBIT A**

**FORM OF DEVELOPMENT AGREEMENT AND ASSET PURCHASE AGREEMENT**

**RESOLUTION OF THE BOARD OF DIRECTORS OF BARNWELL COUNTY  
HOSPITAL AUTHORIZING FILING OF A PETITION UNDER CHAPTER 9 OF THE  
UNITED STATES BANKRUPTCY CODE AND OTHER MATTERS RELATED  
THERETO**

WHEREAS, Barnwell County Hospital (the "Hospital") was created in 1933 by act of the South Carolina Legislature to provide hospital facilities to the residents of Barnwell County. The Barnwell County Council appoints the members of the Barnwell County Hospital Board of Directors (the "Board"). The Board is currently comprised of members of the County Council each acting in an *ex officio* capacity.

WHEREAS, the Hospital is and has been operating at a loss and is unable to consistently pay its debts as they become due;

WHEREAS, the Hospital has been exploring possible restructuring of its debts and the sale of all or some portion of its assets; and

WHEREAS, the Board has determined among other things that it is in its best interests of the citizens of Barnwell County and the Hospital that a petition for protection under the provisions of the United States Bankruptcy Code be filed by the Hospital.

NOW THEREFORE, BE IT RESOLVED by the Barnwell County Hospital Board of Directors, in meeting duly assembled, as follows:

1. The statements of facts set forth in the recitals of this Resolution are adopted as true and correct as of the date hereof.
2. The Hospital is hereby authorized to file a petition for protection under Chapter 9 of the United States Bankruptcy Code, and the same is hereby approved and adopted in all respects, and the Chairperson of the Board on behalf of and in the name of the Hospital, is hereby authorized to execute and verify such petition and cause the same to be filed with the United States Bankruptcy Court of the District of South Carolina.
3. The Chairperson of the Board and the other officers of the Hospital are further authorized, individually or collectively, to do all things, engage and pay any consultants, accountants, attorneys or other persons or entities and execute any documents, pleadings, amendments, registration statements, prospectuses, disclosure statements, contracts, deeds, conveyances, certifications or instruments necessary or convenient to implement this Resolution, to restructure the indebtedness of the Hospital or to promote the charitable and governmental purposes of the Hospital.
4. All actions previously taken by the officers, directors or agents of the Hospital, its committees or advisors, in connection with the matters which are the subject of this Resolution are hereby expressly ratified and approved by the Board.
5. This Resolution is effective as of the date noted below, and will continue in full force and effect until repealed by subsequent action of the Board.

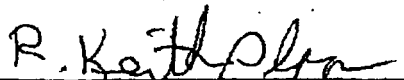
Passed and approved this 27 day of September, 2011.

**CERTIFICATE OF THE SECRETARY**

I, the undersigned Secretary of the Board of Directors (the "Board") of the Barnwell County Hospital (the "Hospital"), do hereby certify that I am a duly qualified and acting officer of the Board, and as such officer I hereby certify that the foregoing is a true and complete copy of the resolution duly adopted by the Board at a meeting thereof duly held on September 27, 2011, for which notice was accomplished in accordance with the requirements of South Carolina law and the By-laws of the Hospital, at which a quorum of the Board was present and participated throughout and that such Resolution has not been repealed, modified or amended and remains in full force and effect as of the date hereof.

WITNESS my signature this 27 day of September, 2011.

Barnwell County Hospital



Secretary, Board of Directors

1986-26

ORDINANCE

TO ABOLISH THE BARNWELL COUNTY HOSPITAL AND NURSING HOME BOARD, TO DIRECT THE TRANSFER OF TITLE TO ALL BARNWELL COUNTY HOSPITAL AND NURSING HOME ASSETS INCLUDING REAL PROPERTY TO THE BARNWELL COUNTY COUNCIL AND TO VEST FULL AUTHORITY FOR THE BARNWELL COUNTY HOSPITAL AND NURSING HOME IN THE BARNWELL COUNTY COUNCIL.

WHEREAS, SECTION 3 of Act No. 283 of 1975 of the South Carolina General Assembly authorizes county councils to enact ordinances in conflict with existing special laws relating to the particular county, including ordinances repealing such special laws; and,

WHEREAS, the Barnwell County Council deems it advisable to abolish the Barnwell County Hospital and Nursing Home Board ("Board"), to direct that title to all Board assets, including real property, be transferred to the Barnwell County Council and to vest in the Barnwell County Council all authority to operate, manage and control the Barnwell County Hospital and Nursing Home;

NOW, THEREFORE, BE IT ORDAINED, by the County Council of the County of Barnwell, this 3rd day of June, 1986, that the Barnwell County Hospital and Nursing Home Board, created by Act No. 298 of 1953, as last amended by Act No. 1347 of 1974, is abolished as of the effective date of this ordinance. Title to all assets, including real property, currently held in the name of the Barnwell County Hospital and Nursing Home Board shall be vested in the Barnwell County Council as of the effective date of this ordinance. The Barnwell County Council shall assume responsibility for the operation, management and control of the Barnwell County Hospital and Nursing Home as of the effective date of this ordinance.

Current members of the Barnwell County Hospital and Nursing Home Board shall constitute an Advisory Board to Barnwell County Council and

DEFENDANT'S  
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shall serve in such capacity until their successors are appointed but for not less than two years from the date hereof and shall have such duties as are delegated to them by the Barnwell County Council.

All ordinances inconsistent herewith are hereby repealed.

DONE in Council this 3rd day of June, 1986.

First Reading May 19, 1986

Second Reading May 20, 1986

Third Reading June 3, 1986  
(Amended)

Robert O. Collins  
Robert O. Collins, Chairman

ATTEST:

Loggy M. Reinhardt  
Clerk

ORDINANCE

AN ORDINANCE TO CREATE THE BOARD OF TRUSTEES FOR BARNWELL COUNTY HOSPITAL, PRESCRIBE ITS AUTHORITIES, DUTIES AND MEMBERSHIP (AMENDED, SECOND READING, SEPTEMBER 19, 1988, AND, AS AMENDED, THIRD READING, SEPTEMBER 26, 1988)

BE IT ORDAINED by the Barnwell County Council:

SECTION 1. Barnwell County Hospital Board of Trustees Created. - There is hereby created for the purposes of operating and maintaining adequate hospital facilities for the residents of Barnwell County a Board to be known as the Barnwell County Hospital Board of Trustees. This Board shall consist of seven (7) members appointed by the Barnwell County Council for terms of four (4) years and until successors are appointed and qualified. Vacancies shall be filled for the unexpired term in the manner of original appointment. All appointees to the Board shall be residents of Barnwell County, with the Hospital Administrator serving on the Board at the will of the Barnwell County Council, together with two (2) members of the Medical Staff of the Barnwell County Hospital to be recommended by the Medical Staff of the Barnwell County Hospital, and four (4) members from Barnwell County appointed at-large from the county. Three (3) members of the initial Board shall be appointed for a term of three (3) years and four (4) members of the initial Board shall be appointed for a term of two (2) years. The term of each appointee shall be at the election of the Barnwell County Council. Appointees to fill vacancies occurring by reason of resignation, death or removal shall be for the unexpired time of the term. No Trustee shall succeed himself more than once after serving a full four (4) year term, except that the Hospital Administrator shall be allowed to succeed himself.

SECTION 2. Compensation of Board Members. All Board members of the Barnwell County Hospital Board of Trustees shall be entitled to receive compensation for services as a member of the Board in the amount of \$600.00 per year, and shall be reimbursed for all reasonable expenses incurred directly and in connection with service as a Trustee of the Barnwell County Hospital.

SECTION 3. Powers and Duties. - The Board shall be authorized to do all things necessary or convenient for the operation and maintenance of adequate hospital facilities for Barnwell County, and without limiting in anyway the generality of the foregoing, shall be empowered as follows:

1. To adopt By-Laws governing the Board and the Medical Staff, and to make rules and regulations governing the business, financial and medical functions of the hospital system, and the use of the hospital facilities.

2. To extend the services of the hospital system to persons residing outside the County of Barnwell upon such terms and conditions as the Board may prescribe, preference always being given to citizens of Barnwell County.

3. To operate the hospital and hospital facilities now belonging to Barnwell County and such other hospitals and facilities as may be leased, acquired or constructed by Barnwell County.

4. To accept gifts, grants, donations, devises and bequests person or persons, firm, order, society, corporation, associ

DEFENDANT'S  
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governmental agency.

5. To improve and maintain any hospital buildings or hospital facilities owned by Barnwell County, and to utilize, regulate and have custody of all real estate upon which such hospital buildings are located.

6. To adequately staff and equip any hospital that it might operate.

7. To provide and operate out-patient departments.

8. To establish and operate such clinics as the Board may deem necessary to the health of the residents of Barnwell County.

9. To provide educational programs for the promotion of medical and nursing care, including a school for nurses, hospital technicians and physicians during internship and residency.

10. To establish rates and charges for the use of the hospital services and facilities and to make such contracts with other counties, hospitals, health facilities or health organizations and agencies as may promote the use of the services or facilities of the Barnwell County Hospital system and the improvement of the care therein.

11. To determine the fiscal year upon which the affairs of the Board shall be conducted.

12. To apply to the Federal Government and any other governmental agency for grant of monies to aid in the construction and equipment of any existing Barnwell County Hospital or facility or any hospital or facility to be constructed in the Barnwell County Hospital system.

13. To participate with other hospitals and health facilities in the organization and operation of joint facilities such as data processing and other ancillary services in such form and by such contractual arrangements as the Board may approve.

14. To contract for equipment, supplies and personal property for the operation of the hospital facilities of the Barnwell County Hospital system.

15. To expend proceeds derived from the charges made for the use of the services and facilities of the hospital system for the operation and maintenance thereof.

16. To sue and be sued.

17. To employ architects or engineers to supervise the construction, renovation and maintenance of any hospital building presently owned or to be constructed, and to let contracts therefor with or without competitive bidding.

18. To employ supervisors, assistants and such personnel as may be necessary to operate and maintain the hospital, including the appointment of a

Medical Staff, and appointment of officers, agents, employees and servants, to prescribe the duties of such, to fix their compensation, to employ consultants and fix their compensation, and to determine if and to what extent they shall be bonded for the faithful performance of their duties.

19. To provide, upon such terms and conditions as they may determine, free service for any residents of Barnwell County who are destitute and unable to pay for needed hospitalization.

20. To adopt personnel policies, purchasing policies and other policies, rules and regulations necessary for the proper functioning of the Barnwell County Hospital and related facilities.

21. To employ accountants, attorneys, consultants and other specialized professionals as in their opinion may be necessary for the proper functioning of the hospital.

22. To perform such other functions as may be properly committed to it by the Barnwell County Council.

23. The Administrator and/or Chairman of the Hospital Board of Trustees shall report quarterly to the Barnwell County Council on the current status of the hospital, to include its financial position, condition of the physical plant and equipment, and other related considerations and information which might be requested by Barnwell County Council.

24. To adopt a budget to be annually presented to and approved by the Barnwell County Council and to operate the hospital within the budget as approved by the Barnwell County Council.

SECTION 4. Records and Audit. - The Board shall at all times keep full and accurate accounts of its acts and operations and of its receipts and expenditures, and at least annually, a complete audit of its affairs shall be made by a certified public accountant. Copies of the audit shall be filed with the Barnwell County Council.

In addition to the audit report above required, the Hospital Administrator shall file with the Barnwell County Council an annual report on the status of the hospital within Ninety (90) days of the close of the fiscal year of the hospital.

SECTION 5. Time and Effect. - This Ordinance shall take effect October 1, 1988.

DONE AND RATIFIED as amended on Second Reading, this 19th day of September, 1988, and Third Reading, this 26th day of September, 1988.

BARNWELL COUNTY COUNCIL

BY: Robert O. Collins  
Robert O. Collins, Chairman

ATTEST:

Jane O. Bradley  
Jane O. Bradley, Clerk

*True copy  
of the original  
Ordinance  
8/29/07*

STATE OF SOUTH CAROLINA,  
COUNTY OF BARNWELL

ORDINANCE NO. 1993-62

AN ORDINANCE AMENDING ORDINANCE 1988-35  
RELATING TO THE BARNWELL COUNTY HOSPITAL

BE IT ORDAINED BY THE BARNWELL COUNTY COUNCIL:

1. Ordinance No. 1988-35 relating to the Barnwell County Hospital is hereby amended as set forth below:

Section 1 on Page 1 relating to the Barnwell County Hospital Board of Trustees is deleted and the following Section 1 inserted.

SECTION 1. Barnwell County Hospital Board of Trustees shall be comprised of eight (8) members to be appointed by Barnwell County Council. The eight (8) members of the Board shall be comprised of one (1) member from each of the Council Districts and a member of the medical staff of the Barnwell County Hospital. All appointees to the Board shall be residents of Barnwell County. If no member can be found from within a Council District then that district appointment shall be at large. The members shall be appointed for terms of four (4) years and until their successors are appointed and qualified. No member shall serve more than two (2) consecutive full terms. In case of any vacancy prior to the expiration of a regular term, the appointment to fill the vacancy for the unexpired portion of the term shall be made in the same manner as provided for the original appointment. The current members, with the exception of any medical staff appointees, shall serve until their current appointment expires at which time the County Council will consider the make-up of the members and determine which Council Districts are represented and which are not. The membership will thusly get to the required make-up. All membership seats which are rendered vacant the operation of this amendment shall immediately be considered for new appointment.

The eight (8) members shall elect a Chairman of the Board.

Appointment recommendations shall be made to the County Council Committee responsible for the Barnwell County Hospital. Recommendations made to this Committee, may be made by the Council Person for the specific district in question, however, other Council Members or other individuals from Barnwell County may also make recommendations regarding appointees to the Council Committee.

DEFENDANT'S  
EXHIBIT

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The Council Committee shall review the submissions and make appropriate recommendations to the full Council. The Board member or members shall then be chosen by vote of the full County Council.

BARNWELL COUNTY COUNCIL

BY: *D. Black*  
Danny Black

ATTESTED:

*Jane O. Bradley*  
Jane O. Bradley  
Clerk to County Council

First Reading Approval: Nov. 18, 1992

Second Reading Approval: Dec. 15, 1992

Third Reading Approval: Feb. 16, 1993

True copy  
of the original  
8/24/97

STATE OF SOUTH CAROLINA )  
COUNTY OF BARNWELL: )

EMERGENCY ORDINANCE  
1995-88

Whereas, Barnwell County Council hereby finds that the operation of the Barnwell County Hospital affects the life, health and safety of the citizens of Barnwell County; and

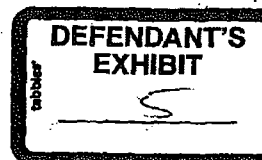
Whereas, County Council has determined that an emergency exists in that the Barnwell County Hospital is experiencing financial difficulties which may limit the effective operation of the hospital and services to be provided; and

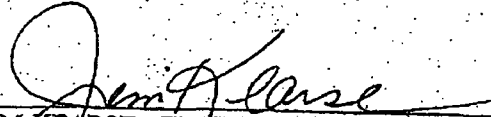
Whereas, County Council finds that in order to meet this emergency, it is necessary for the Barnwell County Hospital to negotiate and enter into a factoring agreement with a private entity in order to enhance its cash flow;

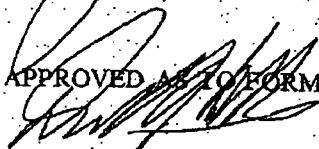
Therefore, it is hereby enacted that Barnwell County Ordinance No. 1988-35 is temporarily amended to allow the Board of Trustees for the Barnwell County Hospital to negotiate and enter into an agreement with a private entity to borrow up to Five Hundred Thousand (\$500,000.00) Dollars at an interest rate and terms to be negotiated and to assign payment of accounts receivables and insurance benefits not exceeding One Million (\$1,000,000.00) Dollars to the private entity in order to secure this debt. This Emergency Ordinance is enacted pursuant to South Carolina Code Ann. 59-4-9-130 (1976) and shall expire sixty (60) days after its enactment.

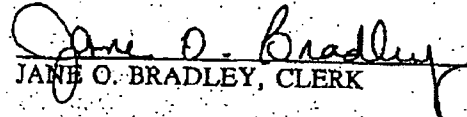
Enacted this 18th day of December, 1995, by a two-thirds majority of Council.

JHK



  
JIM KEARSE, CHAIRMAN

APPROVED AS TO FORM:  
  
DANIEL W. WILLIAMS, COUNTY ATTORNEY

  
JANE O. BRADLEY, CLERK

*Handwritten:*  
J. [unclear]  
[unclear]  
[unclear]  
8/24/07

CLERK

STATE OF SOUTH CAROLINA )

ORDINANCE NO. 2003-178

COUNTY OF BARNWELL )

First Reading: January 2, 2003

Second Reading: May 6, 2003

Third Reading: June 3, 2003

**TO AMEND HOSPITAL BOARD ORDINANCE**

Amending ordinance to Ordinances 1988-35, 1993-62, 1999-139 Ordinance to amend previous ordinances creating and governing the Barnwell County Hospital Board of Directors.

References are to paragraphs and/or sections of Ordinance 1988-35. Recommendations made herein are intended to reflect the desired final modified ordinance whether in agreement with subsequent amending ordinances or not.

**BE IT ORDAINED** by the Barnwell County Council:

Construction of Board of Directors:

The Board of Trustees of Barnwell County Hospital shall be comprised of nine members. Appointees must be current residents of Barnwell County and shall remain a resident at all times during their term. Terms shall be for a period of three years and until their successors are appointed and qualified. In case of any vacancy prior to the expiration of a regular term, the appointment to fill the vacancy for the unexpired portion of the regular term shall be made in the same manner as provided for the original term. Appointment to an unexpired term shall be for the period of time remaining on the original term and until a successor is appointed and qualified.

Each Council member shall nominate one appointee for recommendation to the County Council Committee responsible for the Barnwell County Hospital. Such recommendation shall be made in public session at a regularly scheduled meeting of the County Council. County Council members are encouraged to select an appointee from their district. If, in the opinion of the Council member, a more qualify person is available then the member shall nominate an appointee from the county at large.

Two appointees from the Barnwell County Hospital Medical Staff shall be appointed to the hospital Board. One member shall be appointed to the hospital Board by direct election of the medical staff. One advisor shall be recommended by the responsible County Council Committee.

DEFENDANT'S  
EXHIBIT

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TO AMEND HOSPITAL BOARD ORDINANCE #2003-178

Page 2

All appointees shall be reviewed by the Council Committee and presented to the full Council with appropriate recommendations at the next regularly scheduled meeting of the Council following the receipt of an appointee's nomination by the Council Committee. The proposed Board member shall be chosen by vote of the full Council within thirty days of presentation by the Council Committee.

**SECTION 2. Compensation of Board Members.** All members of the Board of Directors of Barnwell County Hospital shall be entitled to receive compensation for services as a member of the Board in the amount of a per diem of \$50.00 per meeting with a cap of \$1200, and shall be reimbursed for reasonable expenses incurred directly and in connection with service as a trustee of the Barnwell County Hospital.

**SECTION 3. Power and Duties.** The Board shall be authorized to do all things necessary or convenient for the operation and maintenance of adequate hospital facilities for Barnwell County, and without limiting in any way at the generality of the foregoing, shall be empowered as follows:

1. To adopt By-Laws governing the Board and the Medical Staff, and to make rules and regulations governing the business, financial and medical functions of the hospital system, and the use of the hospital facilities.
2. To extend the services of the hospital system to persons residing outside the County of Barnwell upon such terms and conditions as the Board may prescribe, preference always being giving to citizens of Barnwell County.
3. To operate the hospital and hospital facilities now belonging to Barnwell County and such other hospitals and facilities as may be leased, acquired or constructed by Barnwell County.
4. To accept gifts, grants, donations, devises and bequests from any person or persons, firm, order, society, corporation, association or governmental agency.
5. To improve and maintain any hospital buildings or hospital facilities owned by Barnwell County, and to utilize, regulate and have custody of all real estate upon which such hospital buildings are located.
6. To adequately staff and quip any hospital that it might operate.
7. To provide and operate out-patient departments.
8. To establish and operate such clinics as the Board may deem necessary to the health of the residents of Barnwell County.

TO AMEND HOSPITALBOARD ORDINANCE #2003-178

Page 3

9. To provide educational programs for the promotion of medical and nursing care, including a school for nurses, hospital technicians and physicians during internship and residency.
10. To establish rates and charges for the use of the hospital services and facilities and to make such contracts with other counties, hospitals, health facilities or health organizations and agencies as may promote the use of the services or facilities of the Barnwell County Hospital system and the improvement of the care therein.
11. To determine the fiscal year upon which the affairs of the Board shall be conducted.
12. To apply to the Federal Government and any other governmental agency for grant of monies to aid in the construction and equipment of any existing Barnwell County Hospital or facility or any hospital or facility to be constructed in the Barnwell County Hospital system.
13. To participate with other hospitals and health facilities in the organization and operation of joint facilities such as data processing and other ancillary services in such form and by such contractual arrangements as the Board may approve.
14. To contract for equipment, supplies and personal property for the operation of the hospital facilities of the Barnwell County Hospital system. **Contracts for equipment, real estate, and non-operating supplies in excess of \$250,000.00 shall be submitted to the Council Committee responsible for the hospital for review and recommendation to the full County Council for approval.**
15. To expend proceeds derived from the charges made for the use of the services and facilities of the hospital system for the operation and maintenance thereof.
16. To sue and be sued.
17. **To employ architects or engineers to supervise the construction, renovation and maintenance of any hospital building presently owned or to be constructed, and to let contracts with competitive bidding.**

TO AMEND HOSPITAL BOARD ORDINANCE #2003-178

Page 4.

18. To employ supervisors, assistants and such personnel as may be necessary to operate and maintain the hospital, including the appointment of a Medical Staff, and appointment of officers, agents, employees and servants, to prescribe the duties of such, to fix their compensation, to employ consultants and fix their compensation, and to determine if and to what extent they shall be bonded for the faithful performance of their duties.
19. To provide, upon such terms and conditions as they may determine, free service for any residents of Barnwell County who are destitute and unable to pay for needed hospitalization.
20. To adopt personnel policies, purchasing policies and other policies, rules and regulations necessary for the proper functioning of the Barnwell County Hospital and related facilities.
21. To employ accountants, attorneys, consultants and other specialized professionals as in their opinion may be necessary for the proper functioning of the hospital.
22. To perform such other functions as may be properly committed to it by the Barnwell County Council.
23. The Administrator and/or Designees of the Hospital Board of trustee shall report monthly to the Barnwell County Council on the current status of the hospital, to include its financial position, condition of the physical plant and equipment, and other related considerations and information which might be requested by Barnwell County Council.
24. To adopt a budget to be annual presented to and approved by the Barnwell County Council and to operate the hospital within the budget as approved by the Barnwell County Council.

SECTION 4. Records and Audit. The Board shall at all times keep full and accurate accounts of its acts and operations and of its receipts and expenditures, and at least annually, a complete audit of its affairs shall be made by a certified public accountant. Copies of the audit shall be filed with the Barnwell County Council.

In addition to the audit report above required, the Hospital Administrator shall file with the Barnwell County Council an annual report on the status of the hospital within Ninety (90) days of the close of the fiscal year of the hospital.

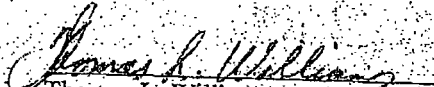
TO AMEND HOSPITAL BOARD ORDINANCE #2003-178  
Page 5

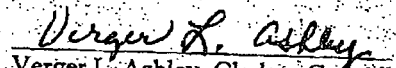
SECTION 5. Time and Effect. This ordinance shall take effect June 3, 2003.

DONE AND RATIFIED as amended on Second Reading, this 6 day of May,  
2003, and Third Reading, this 3 day of June 2003.

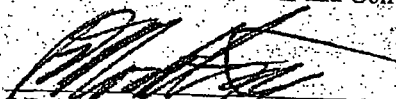
BARNWELL COUNTY

ATTEST

  
Thomas L. Williams, Chairman

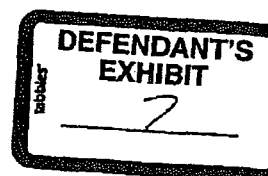
  
Verger L. Ashley, Clerk to Council

APPROVED: As to Form and Content

  
J.D. Mosteller, III, County Attorney

## Ordinances Passed After April 26, 2011

| Ordinance Number: | Name of Ordinance:                                                                        | Date of Ordinance: |
|-------------------|-------------------------------------------------------------------------------------------|--------------------|
| 2011-5-271        | Amended the Rules of Foreclosure                                                          | May 3, 2011        |
| 2011-6-272        | Fee in lieu & multi county park for Project Tissue \$100,000,000                          | July 5, 2011       |
| 2011-6-273        | Ordinance amending right-of-way requirements for Black River Road                         | June 14, 2011      |
| 2011-6-274        | Budget Ordinance \$12,925,889.00                                                          | June 29, 2011      |
| 2011-10-275       | Zoning Maps Amended                                                                       | September 13, 2011 |
| 2011-9-275 A      | Ordinance approving hospital sale                                                         | September 13, 2011 |
| 2011-11-276       | Redistricting plan for County Council seats                                               | November 8, 2011   |
| 2011-11-277       | Ordinance for the sale of land to Project Tissue                                          | December 8, 2011   |
| 2011-12-278       | Fee in lieu agreement and multi county park for Project Hurricane \$5,000,000 investment. | December 14, 2011  |
| 2011-12-279       |                                                                                           | December 14, 2011  |
| 2011-12-280       | Fee in lieu Climax Global Energy \$7,000,000                                              |                    |
|                   | Amending fee in lieu to add/expand park boundaries for Project Tissue.                    | December 14, 2011  |



STATE OF SOUTH CAROLINA )

COUNTY OF BARNWELL )

ORDINANCE NO. 2003 -176

Sponsor(s): County Council

First Reading: 01/14/03

Second Reading: 02/04/03

Public Hearing:

Third Reading: 03/04/03

**AN ORDINANCE AMENDING ORDINANCE  
NO. 1999-139 (RELATED TO BOARDS AND COMMISSIONS)**

**BE IT HEREBY ORDAINED** by the Barnwell County Council:

Ordinance No. 1999-139 related to Boards and Commissions is hereby amended by adding the following as set forth below:

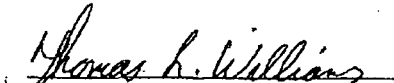
10. A minimum of a 30-day waiting period shall exist between the nomination for a board, commission or other appointment and the election of that member unless the nomination is held on a regularly scheduled monthly meeting date and the election is held on the next regularly scheduled meeting date.
11. Any board member who misses three consecutive board meetings without explanation, may be presumed by Council to have resigned and may be replaced as set forth above. Furthermore, for any reason or no reason at all, Council may remove a board member by majority vote. That board member may be replaced by the nominating procedure set forth above.

This Ordinance shall become effective upon its third and final reading.

Adopted at the regular meeting of the Barnwell County Council on March 4, 2003.

SIGNED:

ATTEST:

  
Thomas L. Williams, Chairman  
Barnwell County Council

  
Verger L. Ashley  
Clerk to Council

Approved: As to Form & Content

Council Vote:

|          |          |
|----------|----------|
| Favor:   | <u>7</u> |
| Against: | <u>0</u> |
| Absent:  | <u>0</u> |

  
J. D. Mosteller, III., County Attorney

**DEFENDANT'S  
EXHIBIT**

I certify this to be a true and exact copy of the original  
filed in the office of the Barnwell County Clerk to Council.

Debra D. Fickling  
Debra D. Fickling, Clerk to Council

STATE OF SOUTH CAROLINA )  
COUNTY OF BARNWELL )

ORDINANCE NO. 2009 - 07-250

**COUNCIL FORM OF GOVERNMENT FOR BARNWELL COUNTY**  
**(Permanent Rules of Procedure**  
**for Barnwell County Council)**

**This Ordinance Repeals and Replaces the Following Ordinance**  
**of**  
**Barnwell County**

**ORDINANCE NO. 1993-66 - AN ORDINANCE AMENDING  
BARNWELL COUNTY ORDINANCE NUMBER 1991-50 WHICH  
ESTABLISHES THE PERMANENT RULES OF PROCEDURE FOR  
BARNWELL COUNTY COUNCIL TO PROVIDE FOR REGULAR  
COUNCIL MEETINGS DURING JULY THROUGH DECEMBER  
TO BE HELD ON THE FIRST TUESDAY OF THE MONTH, AND  
TO PROVIDE MORE FLEXIBILITY IN CHANGING THE DATE  
AND TIME OF REGULAR COUNCIL MEETINGS WHILE  
ENSURING ADEQUATE NOTICE OF REGULAR SESSION  
MEETINGS TO THE PUBLIC**

**ORDINANCE NO. 1999-121 - AN ORDINANCE AMENDING  
ORDINANCE 1993-66 (RULES OF PROCEDURE)**

**ORDINANCE NO. 1999-137 - AMENDMENT OF ORDINANCE  
NO. 1991-50**

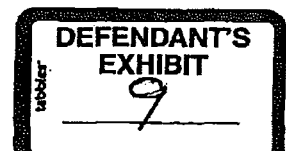
**ORDINANCE NO. 2001-160 - AN ORDINANCE TO AMEND THE  
PERMANENT RULES OF PROCEDURE FOR BARNWELL  
COUNTY COUNCIL AMENDING ORDINANCE NUMBER 1999-  
137**

**ORDINANCE NO. 2002-165 - AN ORDINANCE AMENDING  
ORDINANCE # 1999-137 (PERMANENT RULES OF  
PROCEDURE FOR BARNWELL COUNTY COUNCIL)**

**ORDINANCE NO. 2004-196 - AN ORDINANCE AMENDING  
ORDINANCE #1991-50 (PERMANENT RULES OF PROCEDURE  
FOR BARNWELL COUNTY COUNCIL) AND ALL OTHER  
RELATED AMENDING ORDINANCES**

**ORDINANCE NO. 2005-203 - AN ORDINANCE AMENDING  
ORDINANCE # 2002-165 (PERMANENT RULES OF  
PROCEDURE FOR BARNWELL COUNTY COUNCIL)  
(PERSONNEL COMMITTEE)**

FILED FOR RECORD  
2009 AUG 26 PM 3:55  
RHONDA D. McELVEEN  
CLERK OF COURT  
BARNWELL COUNTY, S.C.



*I certify this to be a true and exact copy of the original  
filed in the office of the Barnwell County Clerk to Council.*

*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

**NOW THEREFORE BE IT ENACTED BY THE BARNWELL COUNTY  
COUNCIL THAT:**

County Council hereby adopts permanent Rules of Procedures for the conduct of County Council business, a copy of which is attached, and by reference incorporated in this ordinance.

Upon final adoption of these Rules, the Council Clerk is directed to incorporate them into the Code of Ordinances of Barnwell County, so that they will be readily available to members of the press and the public.

Upon adoption of these rules, the Council Clerk is also directed to print copies of these rules of procedure so that they can be readily available to candidates for public office, members of the press, the citizens of Barnwell County, or any other interested party.

**WHEREAS:**

1. There is a need to establish permanent Rules of Procedure for Barnwell County Council; and
2. It is common for public governing authorities, such as, City and County Councils, Boards of Education, and Legislatures to have written rules and procedures; and
3. It is important that written Rules of Procedure be available to facilitate the orderly conduct of Council's business at meetings, public hearings, and through the Standing Committees of County Council; and
4. It is generally felt that, the length of County Council Meetings can be reduced through the adoption and use of Rules and Procedures; and
5. County Council meetings may become too lengthy, which is an inconvenience to both the press and the public that often desires to be present when important items of County business are conducted, but cannot remain in order to hear the items of interest to them.

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*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

**RULES OF PROCEDURE  
FOR  
BARNWELL COUNTY COUNCIL**

**RULE ONE  
OFFICERS OF COUNCIL**

- 1.1 Beginning January 1, 2011 the office of the Chairperson must be filled by a duly elected member of council that has served on Council at least twelve months prior to the beginning of service as chairperson. The office of Chairperson of Council shall numerically rotate from district to district on a two year cycle, commencing with District 7.
- 1.2 The office of Vice-Chairman shall also numerically rotate on a two year basis from district to district, beginning January 1, 2011, commencing with District 1. The Vice-Chairperson shall be from the district numerically following the district of the elected Chairperson as of January 1, 2011, and that no district shall have a Chairperson twice before the rotation of Chairperson is complete.
- 1.3 The office of Chairperson shall automatically go to the Council person whose district is in numerical sequence upon the desire of a Council member choosing not to serve as Chairperson, or in the event that the next council member in the rotation has not met the one year of experience requirement set forth in 1.1, above. The office of Chairperson will revert to the district from which a member did not serve upon completion of the two-year term of the district to which the office of chairperson had skipped. The office of Vice Chairperson shall follow as defined in Section 1.2. Following such reversionary term, the ordinary sequence of rotation shall recommence.

**RULE TWO  
DUTIES**

- 2.1 The Chairperson shall preside at all meetings of Council and preserve order and decorum at all meetings, and state every question coming before Council.
- 2.2 Vice-Chairperson, in the event that the Chairperson is absent or unable to serve, shall serve as Chairperson.
- 2.3 The Chairperson shall sign all ordinances, resolutions, or other papers issued by the County Council on its behalf. Upon approval of any such item issued or approved by the Council, no further approval of the Council shall be required to authorize the signing thereof. The County Council Clerk shall witness all ordinances, resolutions, and other official documents of the Council, as to the true and original signature of the Chairperson, and shall place the official seal of Barnwell County upon the document.
- 2.4 The Chairperson shall decide all questions of order and the County Attorney shall serve as Parliamentarian of County Council to assist the Chairperson in all

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Debra D. Fickling  
Debra D. Fickling, Clerk to Council

- matters of procedure. Any Council member may appeal the decision on a question of order and a majority vote of the Council shall conclusively determine such question of order.
- 2.5 The Chairperson shall vote in all cases (except when a personal conflict of interest may exist). If with the vote of the Chair, the Council is equally divided, the question shall be decided in the negative.
  - 2.6 The Chairperson may give information or explain any matter on the approved agenda, before the Council, but should not use the office of chair to debate or wield influence over the other members.
  - 2.7 In all roll call votes, the Chairperson's name shall be called last. The vote of the Chairperson, and each member of County Council, shall be recorded by the Council Clerk upon each ordinance, resolution, or verbal motion passed by the Council. The names of any members absent or abstaining shall also be so recorded.
  - 2.8 If the Chairperson and Vice-Chairperson be absent, the Council shall have the right to elect any member to perform the duties of the Chairperson, but such substitution shall not extend beyond one (1) day. In the event of the extended absence or permanent resignation of the Chairperson, or his/her inability to perform the duties of the Chair, the position shall be filled as provided for by State Statutes.
  - 2.9 In the absence of a Clerk to Council or other designee as set forth in paragraph 3.9, below, the Chairperson shall be responsible for the opening of all mail addressed to the Chairperson of County Council on official business, and if it is official County business, a copy of such mail containing official County business will be given to each Councilperson, the County Administrator, and where appropriate the County Attorney. This same procedure will be followed by all Council members.

### RULE 3 APPOINTED OFFICIALS' DUTIES

- 3.1 County Council shall appoint a County Administrator to serve an indefinite term of office.
- 3.2 The County Administrator shall be the Chief Administrative Officer of the County, and he shall be responsible to County Council for the proper Administration of all County affairs.
- 3.3 The County Administrator shall appoint and supervise all appointive officers or employees of the County excluding the salaries of such officers and employees according to an overall pay plan adopted by Council. He may suspend and/or remove any employee for the good of the County, excluding the County Attorney and the Council Clerk in accordance with the rules and regulations governing County employees, as adopted by County Council.

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*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

- 3.4 The County Administrator shall prepare the Annual Operating and Capital Improvements Budgets, submit them to County Council, and be responsible for their administration after adoption.
- 3.5 The County Administrator shall keep County Council advised of the financial condition and future needs of the County and make such recommendations as may seem to him desirable.
- 3.6 The County Administrator shall be responsible for preparing and transmitting all official correspondence of the Council, except where the Council, by majority vote, designates to the Chairperson or another officer that responsibility.
- 3.7 The County Administrator shall be responsible for publishing all notices of Council public hearings, meetings, and actions, as are required by state law or by county ordinance.
- 3.8 The County Administrator shall be responsible for preparing the agenda with approval of the Chairman for all regular and special meetings of the County Council, and shall be responsible to the Council for the proper administration of all departments and affairs under the jurisdiction of the Council pursuant to state law. The County Council shall directly supervise, and be responsible for the performance and activities of the County Attorney. The County Administrator shall distribute all regular meeting agendas to the members, with associated background documents, the Thursday preceding a Tuesday Council meeting. The Administrator shall distribute an agenda of topics to be discussed and shall make the full agenda package available to the general public and the press by 4:00PM on the Friday afternoon preceding a Tuesday meeting. The Administrator shall distribute the list of agenda topics for special meeting to the members at least 24 hours in advance, and to the public and press at least 24 hours in advance. The Council Clerk shall post agendas for all regular and special meetings of Council, or of Council Committees, on the public bulletin board in the County Council Building, at least 24 hours in advance of the meeting, and such posting shall constitute public notice, as is required by state law. Members desiring to place an item on the agenda for a particular meeting shall notify the Administrator, and submit any associated documents, by 12:00 Noon on the Wednesday preceding a regular meeting or at least 24 hours before a special meeting.
- 3.9 County Council shall approve a Clerk to serve as Council Clerk. The Council Clerk will be an employee of the County Council, and may have other County related duties as set forth by the County Council in its discretion.
- 3.10 The Clerk to County Council or other person designated by Council, shall receive, open, and make all correspondence addressed to the County Council, as a whole, as a part of the public records of the Council, except where, by state law, said correspondence is not considered public record. The Clerk or designee shall make one copy of all said correspondence and forward it directly to each Council member, the County Administrator, and where appropriate, the County Attorney. The County Administrator shall appropriately distribute all such correspondence

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Debra D. Fickling, Clerk to Council

- to County Department Heads. The Clerk shall open the mail of only those Council members who have designated that responsibility to her.
- 3.11 The Council Clerk shall maintain a true copy of all resolutions, laws, and ordinances of Barnwell County, and all minutes of all regular and special meetings of the County Council.
  - 3.12 The County Administrator shall arrange for the publication of the notice of Special Meetings and Public Hearings in a newspaper of general circulation in the County.
  - 3.13 The County Administrator shall include any reports and recommendations of all Council Committees in the agendas of regular Council meetings.
  - 3.14 The Clerk is charged with the duty of notifying members of Council and members of committees of all meetings to be held.
  - 3.15 The Clerk shall also serve as Secretary of County Council and maintain the office for the public to air its views.
  - 3.16 County Council shall appoint a County Attorney to serve an indefinite term of office.
  - 3.17 The County Attorney shall advise the County Council on all matters of law, represent the County in all judicial and quasi-judicial proceedings, in bond issues, and perform such duties and responsibilities as the Council may, from time to time, so direct.
  - 3.18 County Council shall appoint a CPA firm to conduct the County's Annual External Audit. The CPA firm selected shall serve under a two (2) year contract.
  - 3.19 County Council shall appoint all members to committees and boards falling under the jurisdiction of County Council as adopted by ordinance.
  - 3.20 In all cases, at least four (4) votes of Council shall be necessary to make or remove an appointee to County Administrator, County Attorney, Council Clerk, CPA firm, and Boards and Committee members.

#### **RULE FOUR** **STANDING COMMITTEES OF COUNCIL**

- 4.1 All standing committees shall consist of a Chairperson and one other Councilman and shall serve a two year term. All other members shall be appointed by the Chairman no later than the last scheduled meeting of Council in January of the year the Chairperson assumes office.

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- 4.2 **Finance Committee** – Oversees budgetary process, CPA. Board Members will consist of: County Administrator, County Treasurer, and two (2) Council members appointed by the Chairperson.
- 4.25 **Personnel:** Annually reviews job titles, grades, salary ranges and position requests of County employees and provides recommended adjustments to the Finance Committee prior to the adoption of the County's annual budget, and will also review the County Personnel Policy Manual. Members will consist of: two (2) Council Members, County Administrator, and the County Business Manager.
- 4.3 **Judicial Committee**  
Sheriff (Animal Control), Family and Circuit Court, Probate Judge, Coroner, Public Defender and Solicitor.
- 4.4 **Economic Development:** EDC, Southern Carolina Alliance, Chamber of Commerce (liaison only), and Airport.
- 4.5 **Health Care:** Health Department, Mental Health, DSS, Barnwell County Commission on Alcohol and Drug Abuse (Axis I), Hospital and Nursing Home.
- 4.6 **Safety:** Fire Departments and **Emergency Medical Services.**
- 4.7 **Service Committee**  
Recreation, Museum, Cemetery, Election Commission, Solid Waste, Recycling Programs, Library, and Generations Unlimited.
- 4.8 **Government:** Council Chairperson, Planning Commission, Building Inspector, Treasurer, Auditor, County Administrator, Council of Government. A committee of citizens, one from each Council District, will work with the Government Committee to establish guidelines regarding the naming of County buildings and the use of County property. The committee of citizens will be called the "Building Naming and Land Use" committee.
- 4.8.1 **Transportation:** Oversees the Council appointed County Transportation Committee that is responsible for the administration of the "C" Fund Program. One Council member representing each school district shall be appointed to the Standing Committee. The Chairman of this Council Committee or another member of this Committee shall serve on the Rural Transportation Technical Advisory Committee at the Lower Savannah Council of Governments.
- 4.9 **Science, Technology and Regulatory Matters:** Council Chair and two appointees from the Council. Monitors nuclear regulatory issues and other regulatory, technological or scientific developments which impact or could impact Barnwell County.
- 4.10 The Chairperson of County Council shall be an ex-officio, non-voting member of all Standing Committees.

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Debra D. Fickling, Clerk to Council

- 4.11 All matters, excluding pending motions, emergency matters, appropriation of discretionary funds, appointments to boards, commissions, committees, and authorities, and improvement fund grants designated for a particular purpose by a member of the Legislative Delegation may be referred by the Chair or a majority of County Council to a Standing Committee for recommendations to Council.
- 4.12 Unless otherwise ordered, committees may have jurisdiction over matters pertaining to the subjects indicated by the names of the respective committees.
- 4.13 Any ordinance or resolution, which has been referred to a committee, may be recalled by an affirmative vote of five (5) of the members of the Council.
- 4.14 No members of the County Council, or of a committee, shall be allowed under any circumstances to vote by proxy at any Council or Committee meeting. A majority of the committee members present shall agree by their votes upon the disposition of any matter considered by the Committee.
- 4.15 Each committee shall follow the procedures set forth by these rules, and shall be authorized to invite public officials and private individuals to appear before the Committee for the purpose of submitting information to it. If County employees under the supervision of the County Administrator are desired before a committee, the arrangements shall be made through the County Administrator.
- 4.16 Each Committee may appoint one of its members to meet and investigate with other counties, municipalities, public officials, employees, and private individuals in order to gather information on any subject within the jurisdiction of the Committee or Council.
- 4.17 Each Committee shall have the authority to hold joint meetings with other committees or agencies of the County and each member of Council shall have the right to attend meetings of any committee or agency of the County, including Executive Session, other than personnel matters, of those agencies unless invited by the Board of the agency to attend Executive Session involving personnel. When called for a joint meeting, agencies and committees of the County shall attend meetings with County Council's standing committee calling the joint meeting or face censure, dismissal or other action by County Council.

#### RULE FIVE TIME AND ORDER OF MEETINGS

- 5.1 The County Council shall meet in regular session on the first Tuesday of each month. All such regular meetings shall commence at the designated time
- 5.2 If a regular meeting falls on a holiday or election day, the meeting will be moved to the following Tuesday. Council Chairperson shall have the authority to reschedule any meeting of Council.

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*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

- 5.3 The County Council shall meet in special session at the written call of the Chairperson, or if at least four (4) members call for the meeting in a signed writing (or writings) or verifiable email addressed to the County Administrator. The reason or reasons for the special called meeting shall be set forth in the writing calling for the meeting. All members of Council and the public shall be given at least twenty-four (24) hours written notice of all such meetings.
- 5.4 A quorum for the transaction of official business of Council shall consist of four (4) members.
- 5.5 The regular order of business shall be as follows:
  - a) Call to Order
  - b) Invocation
  - c) Approval of Minutes
  - d) Approval of Agenda
  - e) Public Comment
  - f) Committee Reports
  - g) Financial Status
  - h) Old Business
  - i) New Business
  - j) Items for Information and the Public Record
  - k) Executive Session, if necessary
- 5.6 All meetings of Council, which include Committee meetings, shall be open to the public, except as provided for in the Freedom of Information Act.
- 5.7 The agenda is set by the County Administrator with approval of the Chairperson on Thursday of the week preceding the regular Tuesday meeting. Background information will be furnished to Council members on the agenda items and any other information of general interest to Council members.
- 5.8 Should any person, group, or organization, request to be heard on any matter at a regular or special meeting of Council, such person, group, or organization shall request the County Administrator to place such matter on the agenda with background information included four (4) days preceding the regular or special meeting. This requirement may be waived by two-thirds vote of Council if the matter is presented in writing and every member of Council is provided with a copy prior to the commencement of the meeting.
- 5.9 No matter shall be entered on the agenda, or heard by Council unless it is within Council's authority or jurisdiction, provided, the Council may entertain requests that it make recommendations to other governmental bodies, departments or agencies. Council may modify or amend the agenda by motion and majority vote at the meeting to take up additional matters within its jurisdiction.
- 5.10 Any person or group may speak to the Council during Public Comment with permission of the Chair and shall address the Chair; each person, after stating his/her name and address, may make comments which are relevant to the subject

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*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

- matter at hand and which are limited to three (3) minutes per person, or ten (10) minutes per group, unless additional time is granted in advance by the Council.
- 5.11 At public hearings, the County Council shall give a reasonable opportunity to any person or representatives desiring to make a presentation or to be heard.
- 5.12 No person will be recognized, at any regular or special meeting of the Council, to speak upon any matter which has previously been heard by the Council at a duly called public meeting unless approved by a two-thirds vote of Council,
- 5.13 The current edition of Roberts Rules of Order Revised, shall govern the County Council in all cases in which they are applicable and in which they are not in conflict with the Rules of the Council or State Law. It shall be the duty of the Chairperson, or the presiding officer, to interpret all rules, subject to any member appealing a ruling of the Chair to County Council.
- 5.14 No member of Council shall speak upon a matter for more than ten (10) minutes except by the Consent of the Council. No member shall speak more than twice upon the same matter without the consent of the Council.
- 5.15 For decorum and order, any member of Council or staff (Administrator or Attorney, etc.) shall be recognized by the Chair before commenting and shall address the Chair.

#### **RULE SIX**

#### **LEGISLATIVE ACTION**

- 6.0 All votes of Council on motions, ordinances, resolutions or other matters before Council shall be on a roll call vote in public session and properly recorded by the Clerk. The minutes of each meeting shall reflect the record of each members vote on all matters.
- 6.01 Members of Council have the authority pursuant to various ordinances of the County Council to appoint members from their District to various committees, boards and agencies established by County Council. To the extent that any ordinance of County Council requires that committee appointments of each member to be approved by the remainder of Council, that portion of those ordinances are hereby repealed. Each member of County Council is hereby entitled to appoint qualified electors of their District to committees, boards and agencies of the County, without the advice and consent of the remaining members of Council. If a councilperson seeks to appoint a qualified elector to a committee, board or agency from outside of their District, that appointment is subject to the advice and consent of County Council.
- 6.1 The Council shall take legislative action by ordinance. Resolutions shall not have the force of law, but shall express the opinion of Council concerning a particular matter. Proposed Ordinances and Resolutions shall be in writing with a copy furnished to each member prior to introduction.

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Debra D. Fickling, Clerk to Council

- 6.2 With the exception of emergency ordinances, all ordinances shall be read at three (3) public meetings of the Council, on three (3) separate days, with an interval of not less than seven (7) days between the second and third reading; provided that a verbatim reading of an ordinance shall not be required unless such reading is requested by a member.
- 6.3 Each ordinance shall be approved as to form and legality by the County Attorney prior to third and final reading, and the stamp and approval of the County attorney shall be placed on the ordinance.
- 6.4 Certain types of ordinances require that a public hearing be held prior to third and final reading. Not less than fifteen (15) days notice of the time and place of such hearing shall be published in at least one newspaper of general circulation in the County.
- 6.5 Any member or committee may introduce an ordinance for first reading at any meeting of the Council. No vote shall be taken and no debate or amendment shall be in order, and the reading shall be in name only. The ordinance may be referred by the Chairperson to the appropriate committee unless the proposed ordinance shall have been introduced by a committee.
- 6.6 Second reading on a proposed ordinance shall carry the recommendation of the committee prior to consideration and adoption by Council, unless approval of two-thirds Council vote. Committees shall make recommendation within forty-five (45) days of initial consideration.
- 6.7 After the ordinance has been given second reading, a public hearing if required will be held before third reading and final action is taken.
- 6.8 Following the public hearing, the Council Clerk shall record proof of publication and the date of said publication, on the ordinance or resolution where such publication is required by state law or county ordinance.
- 6.9 If a proposed ordinance or resolution is adopted, the Chairperson or Vice-Chairperson shall execute the ordinance or resolution and the Council Clerk shall attest to the Chairperson's or Vice-Chairperson's signature. The Council Clerk shall transmit all adopted ordinances to the body responsible for codification, to the County Administrator and to any member requesting a copy of said adopted ordinance or resolution. In the official records of the County Council, each adopted ordinance and resolution shall be serially numbered by calendar year and month, in the order in which they are adopted.
- 6.10 In the case of a vote on the final passage of any ordinance or resolution, the vote of each member and the Chairperson shall be recorded in the minutes, and noted on the ordinance or resolution.
- 6.11 Amendment of these rules shall be by ordinance adopted pursuant to Rules 6.5 through 6.9.

*I certify this to be a true and exact copy of the original  
filed in the office of the Barnwell County Clerk to Council.*

*Debra D. Fickling*  
Debra D. Fickling, Clerk to Council

- 6.12 These rules, upon adoption, repeal all previously adopted Rules of County Council.
- 6.13 If any portion of these Rules should be declared unlawful, such unlawful section of these rules shall be severed, and shall not affect the validity of the remainder of the ordinance or any other rule contained therein.

**NOW, THEREFORE, BE IT ENACTED BY THE BARNWELL COUNTY COUNCIL THAT:**

1. County Council hereby adopts permanent Rules of Procedures for the conduct of County Council business, a copy of which is attached, and by reference incorporated in this ordinance.
2. Upon final adoption of these Rules, the Council Clerk is directed to incorporate them into the Code of Ordinances of Barnwell County, so that they will be readily available to members of the press and the public.
3. Upon adoption of these Rules, the Council Clerk is also directed to print copies of these Rules of Procedure so that they can be readily available to candidates for public office, members of the press, the citizens of Barnwell County, or any other interested parties.

This ordinance becomes effective upon three readings and a majority vote of County Council.

**BARNWELL COUNTY COUNCIL**

*Joe Smith*  
Joe Smith, Chairman

**Approved as to Form And Content:**

*James D. Mosteller III*  
James D. Mosteller III, County Attorney

1<sup>st</sup> Reading: April 7, 2009  
2<sup>nd</sup> Reading: June 2, 2009  
3<sup>rd</sup> Reading: July 7, 2009

**Attest:**

*Debra D. Fickling*  
Debra D. Fickling

Favor: 4  
Against: 2  
Abstain: 1

STATE OF SOUTH CAROLINA

COUNTY OF BARNWELL

Don Alexander, Carolyne Williams, Georgia  
F. Fields, William R. "Bob" Dixon, Colonel  
Joe H. Zorn, Jr., Melanie Wright, Dr. M.O.  
Khan, and Janice Livingston,

Plaintiffs,

v.

Freddie Houston, David Kenner, Keith  
Sloan, Lowell Jowers, Sr., Joe Smith, Harold  
Buckmon, and Travis Black, individually and  
in their capacity as members of Barnwell  
County Council,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE  
SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO. 11-CP-06-476

PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS

Plaintiffs file this Memorandum in Opposition to the Motion to Dismiss of Defendants. For the reasons set forth herein, the motion must be denied.

#### STANDARD OF REVIEW

When a defendant seeks dismissal under Rule 12(b)(6), SCRCP, the allegations in the Complaint are construed in the light most favorable to the non-moving party-plaintiff. *Woodell, Allen v. Marion School District One*, 307 S.C. 297, 414 S.E.2d 794 (Ct.App. 1992). All well pled allegations are to be taken as true. *Carolina Winds Owner's Association v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct.App. 1988). Defendant's motion to dismiss must be denied if the facts and inferences reasonably deducible from them show that Plaintiff could prevail on any of the

causes of action pled. See *Murrow Crane Co. v. T.R. Tucker Construction Co.*, 296 S.C. 427, 373 S.E.2d 701 (Ct.App. 1992).

A Rule 12(b)(6) motion "is directed to the factual and legal sufficiency of the complaint... and only that document is considered." <sup>1</sup>*Woodell, by Allen v. Marion School District One*, 307 S.C. 297, 414 S.E.2d 794 (Ct.App. 1992), citing, H. Lightsey and J. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 276 (1985). A court ruling on a Rule 12(b)(6) motion must construe the complaint in the light most favorable to the nonmoving party and it must consider all of the facts alleged in the Complaint as true. *Id.*; *Carolina Wind Owners' Assn. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct.App. 1988). Should any allegations of the Complaint give rise to competing inferences on any issues material to the claims asserted, then the motion must be denied. *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 414 S.E.2d 784 (Ct.App. 1992), *aff'd*, 310 S.C. 514, 426 S.E.2d 304 (1993).

## FACTS

The Barnwell County Hospital Board was initially created in 1953 by the General Assembly for the purposes of acquire land and construct hospital, to be owned and operated by Barnwell County Hospital's board of trustees. Am. Cmpt. ¶ 18. On September 26, 1988, and after the passage of South Carolina's Home Rule Act, Barnwell County Council passed Ordinance 1988-35 reestablishing the body governing the Barnwell County Hospital ("the Hospital"). Am. Cmpt. ¶ 19. This body is now known as the Barnwell County Hospital Board of Directors ("Hospital Board") and is a governmental sub-entity of Barnwell County. *Id.*

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<sup>1</sup>Plaintiffs have attached multiple documents to the Memorandum in Support of the Motion to Dismiss that are outside of the pleadings and should not be considered.

Over the years, Barnwell County Council amended the ordinances as to the Hospital Board, with the most recent amended being passed in June 3, 2003, which, among other things increased the number of trustees to nine members. Am. Cmpt. ¶ 20. The members of the Hospital Board must be appointed by Barnwell County Council. Am. Cmpt. ¶ 21. Under the governing ordinances, each Hospital Board member is appointed to a three- year term and must be a resident of Barnwell County. Id. Each County Council member nominates one appointee, preferably from their district, and two appointees are from the Hospital medical staff. Id. The members of the Hospital Board are compensated for their services. Id.

The members of the Hospital Board are afforded an extensive list of powers and duties, including the authority to adopt bylaws, operate the hospital and its facilities, establish rates charged by the hospital, expend the proceeds of Hospitals revenue, sue and be sued, adopt a budget, and employ personnel needed to operate the Hospital. Am. Cmpt. ¶ 22 . In 2009, the Hospital Board, at the instructions of Defendants to improve the Hospital's operation, employed a consultant to make suggestions as to how the Hospital could improve financially. Am. Cmpt. ¶ 23 After implementing the majority of the recommendations of the consultant, the overall condition of the Hospital began to improve. Id. However, around that same time, Defendants were developing a strategy, along with Bamberg and Allendale Counties, to close the various county hospitals and construct one hospital for all three counties. Am. Cmpt. ¶ 24.

As a part of its intentional plan, Defendants lowered the millage rates for the Hospital., to the lowest rate since 2000, which produced reduced the funding to the Hospital to \$450,000 (9 mills x rate of \$50,000). Am. Cmpt. ¶ 25. In addition, while providing Barnwell County Hospital with limited operating funds, Defendants have also paid the Williston Rescue Squad ("Rescue Squad"),

which is not a sub-entity of Barnwell County as the Hospital is, excessive amounts. Am. Cmpt. ¶26. The Rescue Squad, a 501(c)(3) entity, has a contract with Barnwell County, approved by Defendants, to provide emergency services. Id. Over the past seven years, the Rescue Squad has been paid an average of \$830,000 per year, while the Hospital has only received an average of \$870,000 for the past ten years. Id. For the year 2011-2012, the Rescue Squad was paid \$895,000, or the value of 18 mills at \$50,000 mill rate. Id. The director of the Rescue Squad is paid approximately \$149,000 per year, even though he has a full-time position with SCE&G and therefore cannot devote his full time to the Rescue Squad. Am. Cmpt. ¶27. The Rescue Squad has consistently and wrongfully taken patients to other hospitals outside of Barnwell County, even though they are contracted and paid by Defendants, to the detriment of the Hospital. Am. Cmpt. ¶ 28.

The Defendants have taken other detrimental actions toward the hospital. For example, Defendants refused to approve a low interest loan so that the Hospital could repay Medicare and Medicare for overpayments that were uncovered during an audit. Am. Cmpt. ¶ 29. Defendants also vetoed a proposal (a process that was almost complete) to become designated as a critical care facility that would increase the amount of Medicare and Medicaid reimbursements per patient as well as increased overhead payments. Am. Cmpt. ¶ 30.

While the various actions of Defendants financially crippled the Hospital, Defendants then continued with their plan to develop a tri-county hospital. Defendants then entered into negotiations with Health Management Partners( "HMP") and Dobbs Equity Partners, LLC ("Dobbs Equity") regarding a new tri-county medical facility. Am. Cmpt. ¶ 31. Dobbs Equity is a private business that makes equity investments in existing and start-up companies, often partnered with other companies, like HMP, with experience in a particular field. Am. Cmpt. ¶ 32.

On December 1, 2010, a letter of intent was approved by HMP/Dobbs Equity regarding acquisition of three county hospitals and creation of Tri County Regional Health Care System ("Tri County Regional"). Am. Cmpt. ¶ 32. The three counties who would make up Tri County Regional were Barnwell, Allendale and Bamberg. Id. The consideration described in the letter was payment to the to the three Counties (Barnwell, Allendale and Bamberg ) the amount necessary for existing obligations under tax exempt bond (approx \$4.35 million); the assumption of certain obligations; and the assumption of transaction costs up to \$1 million. Am. Cmpt. ¶33. Under the terms of the agreement, HMP/Dobbs Equity would be solely responsible for site selection of Tri County Regional. Am. Cmpt. ¶33. Under the Letter of Intent, Tri County Regional would not assume liabilities for the pension or health benefit plans of the Hospital. Id.

On December 15, 2010, the Defendants passed Resolution No. 2010-12-350, authorizing the Chairman of Barnwell County Council to enter into letter of intent with HMP/Dobbs Equity. Am. Cmpt. ¶34. On April 18, 2011, the Defendants and HMP/Dobbs Equity met with the old Hospital Board for four hours in executive session to encourage the Hospital Board to proceed with HMP/Dobbs Equity plan. Am. Cmpt. ¶ 37. Defendants insisted that the Hospital file a bankruptcy petition under Chapter 9, which was the first time that anyone had raised the issue of bankruptcy. Am. Cmpt. ¶ 37. The old Hospital Board indicated that they were not in favor of proceeding with a contract with HMP/Dobbs Equity because that plan insisted on the Hospital filing for bankruptcy to eliminate all Hospital debt and specifically refused to honor the Hospital pension plan. Am. Cmpt. ¶ 38. The old Hospital Board also knew that the Hospital was not insolvent or bankrupt, and thus it would not be proper to file a bankruptcy petition. Am. Cmpt. ¶ 39.

On April 25, 2011, Barnwell County Council gave 24-hours notice that meetings of both the

County Council and the Hospital Board would take place on April 26, 2011. Am. Cmpt. ¶ 40. On April 26, 2011, the Defendants voted to replace the Hospital Board-- who had not resigned as Hospital Board members-- with themselves, since the Hospital Board would not agree to file bankruptcy and approve of the contract with Dobbs Equity. Am. Cpt. ¶41. As the new illegal Hospital Board, Defendants then approved the contract with HMP/Dobbs Equity. Id. The contract required the Hospital to implement bankruptcy proceedings and allowed HMP/Dobbs Equity would manage the hospitals for the sum of \$33,333.33 per month. Am. Cmpt. ¶ 42 The Hospital would also be required to pay Derek Pierce, an employee of HMP and/or Dobbs, \$17,000 per month to act as chief financial officer. Id.

In September, 2011, it was announced that the new regional medical center would be in Bamberg County, not Barnwell County. Am. Cmpt. 45. Hundreds of citizens attended the Barnwell County Council meeting of September 13, 2011 to protest the sale of the Hospital to Dobbs Equity but the ordinance was approved, which allowed the contract and deal with Dobbs Equity and the Hospital's bankruptcy petition could move forward. Id. Defendants, in their capacities as the new illegal Hospital Board also passed a resolution authorizing the sale of the Hospital's assets to Dobbs Equity or its affiliate. Id. The Asset Purchase Agreement ("APA") is unconscionable in several respects, including, *inter alia*, that Barnwell Hospital does not receive any monies under the APA, but will be required to pay Dobbs Equity \$450,000 per year for at least three years to operate the Hospital. Id. In addition, at the end of the three years, Barnwell County Council can only lease the property and the Hospital building from Dobbs for fifty years for \$1, but only if the building is not used as any type of health care facility, including a nursing home. Id.

Defendants, in their capacities as the new illegal Hospital Board, also passed a resolution

authorizing the Hospital to file a Chapter 9 bankruptcy petition, such petition was filed on October 5, 2011. Am. Cmpt. ¶ 47-48. All information regarding the sale of the Hospital, including the Asset Purchase Agreement and Development Plan, were not made available to the public until October 4, 2011. Id.

Plaintiffs are all citizens of Barnwell County. Am. Cmpt. ¶ 1- 8. Plaintiff Alexander was a member of the Barnwell Hospital Board of Trustees until April 26, 2011. Am. Cmpt. ¶ 1. They filed this action for declaratory judgment and breach of fiduciary duties. Both of these causes of action are proper and supported by the facts alleged.

### **ARGUMENT**

#### **1. Plaintiffs have standing to bring this action.**

Plaintiffs have standing to bring this action pursuant to the Declaratory Judgment Act, which affords Plaintiffs an avenue for relief and public policy requiring this matter proceed as an initial matter. The Declaratory Judgment Act gives courts the " power to declare rights, status and other legal relations whether or not further relief is or could be claimed" 15-53-20. The Act states that:

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

15-53-30. The Declaratory Judgment Act is " to be liberally construed and administered." § 15-

53-130. As the South Carolina Supreme Court stated:

The Declaratory Judgment Act is "remedial" and designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (1976). Further, under Rule 57 of the South Carolina Rules of Civil Procedure, "[t]he existence of another adequate

remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Cf. Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949).

Ott v. Tindal, 297 S.C. 395, 397-98, 377 S.E.2d 303, 304-05 (1989).

Defendants argue that Plaintiffs have no standing because they do not have a sufficient stake in the matter. Here, Plaintiffs are parties whose rights, status, or other legal relations are affected by an ordinance. Defendants passed a resolution on April 26, 2011 allowing them to appoint themselves as members of the Board of Trustees of Barnwell Hospital, in violation of their own ordinances and in violation of S.C. Const. Art. VI. Sec. 3, which prohibits dual office holding. Plaintiff Don Alexander was one of the members of the Board of Trustees of Barnwell Hospital who was ousted from his seat when the Defendants voted to replace the old Hospital Board with themselves.<sup>2</sup> The other Plaintiffs are residents and taxpayers of Barnwell County. Am. Cmpt. ¶61. All of the Plaintiffs have an interest into the validity of the ordinance allowing the Defendants to replace the Hospital Board with themselves and then taking actions which result in the Hospital in Barnwell being closed, in favor a new facility located outside the County. The Plaintiffs, as citizens of Barnwell County, obviously have an interest in adequate medical care.

Furthermore, "the rule of standing is not an inflexible one." Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Standing may be conferred upon a party "when an issue is of such public importance as to require its

---

<sup>2</sup>Defendants argue that a board member can be removed at any time by majority vote. Def. Memorandum, p. 12. However, Defendants do not have the power to violate the Constitution in removing Hospital Board members and replacing those members with themselves.

resolution for future guidance.” Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Recently, South Carolina courts have held standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. See Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005); see also Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004) (finding standing existed to challenge governor's commission as an officer in the Air Force reserve); Sloan v. Greenville County, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App.2003) (finding standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement of construction services on design-build public works projects).

This case involves “an issue is of such public importance as to require its resolution for future guidance.” Baird, supra. If Defendants have violated the provision of dual office holding, they effectively resigned their positions as County Council Members on April 26, 2011. Thus, any actions taken by Defendants in their purported capacity as County Council after the date is may be null and void. This issue must be resolved in order for the County to function effectively. The standing requirements have clearly been met.

**2. The issue is one of constitutionality and does not involve a political question or infringe on the separation of powers.**

The Defendants also argue that the Court cannot rule on the question presented because to do so would be a violation of the separation of powers and the political questions doctrine. The question here, is not a question of legislation or politics but one of law. Plaintiff does not challenge the fact that the Home Rule Act and the County Council Ordinances permit it to elect a Hospital Board; Plaintiffs’ challenge goes to whether the Defendants can elect *themselves* to the

Hospital Board without violating the Constitution. Defendants are simply trying to characterize their actions as political to avoid review. However, “[t]he courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.” Segars-Andrews v. Judicial Merit Selection Comm’n, 387 S.C. 109, 123, 691 S.E.2d 453, 460 (2010). “Indeed, this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional, as the above reference to Sloan v. Hardee illustrates.” Segars-Andrews v. Judicial Merit Selection Comm’n, 387 S.C. 109, 123, 691 S.E.2d 453, 460-61 (2010).

The cases cited by Defendants regarding political questions and separation of powers do not apply. In Wilson v. Preston, 378 S.C. 348, 353, 662 S.E.2d 580, 582 (2008), a county council member sought a writ of mandamus requiring the county administrator to give her full access to all financial records pertaining to the operation of the county government. The issue in that case was the ministerial versus discretionary acts of the administrator and whether a writ of mandamus was appropriate. The case involved no constitutional issues and only involved, as Chief Justice Toal’s concurrence states “policy decisions.” In Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940), the court simply found that the plaintiff, unlike the Plaintiffs in this matter, had not alleged any diversion of funds or impairment of rights that infringed on the rights of citizens or taxpayers. The court specifically stated:

But it must not be inferred from the foregoing that when confronted with the constitutional issue presented by the pleadings herein, in a suit brought in the manner prescribed by law, by one having a legal interest in the controversy, or on any of the recognized grounds of proceedings by taxpayers, we will hesitate to declare the law respecting the holding of two offices under the constitutional provisions hereinabove adverted to

Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218, 221 (1940). As already set forth, the Plaintiffs here have a legal interest. Plaintiff Alexander was removed from the Board through Defendants' unconstitutional actions, while the other Plaintiffs have alleged a diversion of funds to the Williston Rescue Squad, an improper bankruptcy filing, and other taxpayer rights upon which Defendants have infringed.

Defendants also claim that Plaintiffs' position on dual office holding would also invalidate County Council's standing subcommittees should also be rejected. Service on standing subcommittees would fall with a narrow exception to dual office holding:

Our jurisprudence has a narrow, yet firmly established, exception which provides that "double or dual office holding in violation of the constitution is *not applicable to those officers upon whom other duties relating to their respective offices are placed by law.*" This exception is commonly referred to as the "ex officio" or "incidental duties" exception.

Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010) (emphasis in original, internal citations omitted). Standing subcommittees created by the County Council to deal with incidental aspects of government are quite different than the statutorily created Hospital Board, with terms of office, compensation, and specified duties, as more fully explained in Section 3 herein.

**3. Service on County Council and the Hospital Board clearly constitutes dual-office holding.**

The South Carolina Constitution prohibits dual office holding: "No person may hold two offices for honor or profit at the same time." S.C. Const. Art. VI, § 3 and S.C. Const. Art. XVII § 1A. The Attorney General has issued an opinion almost directly on point with the facts in this case. In an Opinion dated February 26, 2007 (Ex. A hereto), the Attorney General addressed the

issue of whether a member of the Barnwell City Council could be appointed to the Barnwell County Hospital Board of Trustees without violating the provision against dual office holding. The Opinion noted that it had repeatedly held that a position on a city or town council was an office for purpose of dual office holding.<sup>3</sup> The Attorney General then turned to the issue of whether a seat on the Hospital Board constituted an office, and stated:

...the Board was established by statute, which sets forth the members' terms of office, compensation, and qualifications. Accordingly, the ordinance indicates membership on the Board is likely an office.

Atty Gen. Op. ( Ex. A, p. 2). The Opinion continued:

In addition, the ordinances contains an extensive list of powers and duties afforded to the members of the Board....We believe these powers evidence the Board's ability to exercise some sovereign power of the State.

Id. The Attorney General concluded that membership of the board constituted an office for the purposes of dual office holding:

Finding both membership on the Barnwell City Council and the Board to be offices for purposes of dual office holding, we conclude simultaneous service in both positions constitutes dual office holding in violation of Article XVII, section 1A of the South Carolina Constitution.

Id.<sup>4</sup>

Here, the members of County Council have elected themselves members of the Hospital Board, and thus "simultaneous service in both positions constitutes dual office holding." Defendants' arguments that the Hospital Board is merely an agent of County Council (Def. Memorandum, p. 8) or that they acting in *ex officio* capacities must rejected, and the motion to

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<sup>3</sup>The Attorney General has also found that service on a county council constitutes an office for the purpose of dual office holding. Memo. Op. S. C. Att'y Gen. (Jun. 26, 1984).

<sup>4</sup>As noted, the prohibition against dual office holding appears in this section and in Art. VI, § 3.

dismiss should be denied.<sup>5</sup>

**4. Defendants, as public officials owed a fiduciary duty to taxpayers, which was breached.**

One standing in a fiduciary relationship with another is subject to liability to the other for the harm resulting from a breach of duty imposed by the relation. SSI Medical Service, Inc. v. Cox, 301 S.C. 493 39SE2D 789, 794 (1990). The concept of fiduciary relationship is somewhat amorphous, and courts have purposefully retained elasticity in the definition to allow new interactions. See, e.g., Steele v. Victory Savings Bank, 295 S.C. 290, 368 S.E.2d 91 (Ctr. App. 1988).

While South Carolina has not ruled there is a fiduciary duty between council members and the county's citizens and taxpayers, other courts have found that a public officer has a fiduciary relationship with citizens and taxpayers. See, e.g., Timbs v. Straub, 117 S.E.2d 462, 464 (Ga. 1960)(Commissioner of Roads and Revenues was a public officer occupying a fiduciary relationship requiring him to exercise the utmost good faith, fidelity, and integrity in dealing with county property as a trustee and servant of the people); City of Chicago ex rel. Cohen v. Keane, 357 N.E.2d 452 (Ill. 1976) (In finding that an alderman had a fiduciary duty to a taxpayer, court stated: "The fiduciary responsibility of a public officer cannot be less than that of a private individual"); Harrell v. Powell, 106 S.E.2d 160, 164 (N.C. 1958) ("Unquestionably, a public official occupies a fiduciary relationship to the governmental unit or agency which he serves"); Hobbs, Wall & Co. v. Moran, 293 P. 145 (Cal. Ct. App. 1930) The theory of the law is that a councilman or other officer of a city sustains the same fiduciary relationship toward the citizens

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<sup>5</sup>In fact, Defendants' arguments that ex officio membership does not violate dual office holding actually undercuts their argument that Plaintiffs' case would invalidate County Council's subcommittees. As Defendants' noted, ex officio membership is when the officer of a unit of government serves upon a board or commission as part of his duties of office.

of his community that a trustee bears to his cestui que trust, and should therefore act with the utmost good faith." ).

Thus, it is well established in multiple jurisdictions that public officials, such as the Defendants here, owe a fiduciary relationship to citizens and taxpayers.<sup>6</sup> Furthermore, the facts alleged here clearly meet the pleading standard for breach of that duty, in that Plaintiff have alleged the following facts:

1. Defendants pay the Williston Rescue Squad \$830,000 per year, including \$149,000 per year to the director of the Rescue Squad; Am Cmpt. ¶ 16-27; 62;
2. Defendants reduced the millage rate to the hospital to 12 mills (3 mills of which are to repay debt, leaving the Hospital to operate on 9 mills or \$450,000 per year); Am Cmpt. ¶ 25, 62; and
3. Defendants refused to approve a 4% interest loan to the Hospital from the USDA that needed to pay Medicare and Medicaid, which resulted in the Hospital having to get a loan with an 11% interest rate. Am Cmpt. ¶ 29, 62.

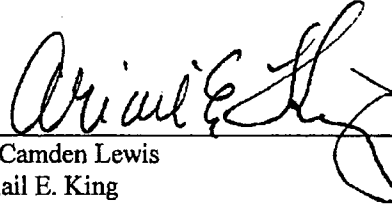
These facts must be taken as true for the purposes of this motion and, if true, clearly support a claim for breach of fiduciary duties.

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<sup>6</sup>Since South Carolina has not ruled definitively on this matter, the claim should not be dismissed. Novel issues should not be determined on a Rule 12(b)(6) motion. *See, Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001)(As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRPC, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial).

**CONCLUSION**

For the reasons set forth herein, the Motion should be denied.



A. Camden Lewis  
Ariail E. King  
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Attorneys for Plaintiffs

Columbia, SC  
February 8, 2012



HENRY McMASTER  
ATTORNEY GENERAL

February 26, 2007

Thomas M. Boulware, Esquire  
Brown, Jefferies & Boulware  
Post Office Box 248  
Barnwell, South Carolina 29812

Dear Mr. Boulware:

From your letter, we understand you represent the City of Barnwell. You informed us that a member of the Barnwell City Council "has been asked to consider an appointment to the Barnwell County Hospital Board of Trustees." Thus, on behalf of the City of Barnwell, you ask "whether or not service and acceptance of an appointment to the Barnwell County Hospital Board of Trustees will create a dual office"?

#### Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In numerous opinions, this Office opined that a position on a city or town council is an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., December 28, 2006; November 5, 2003; April 2, 1998. In fact, in an opinion issued on October 25, 1984, we opined that a position on the Barnwell City Council is an office. Op. S.C. Atty. Gen., October 25, 1984. Thus, we must

Exhibit  
A

Mr. Boulware  
Page 2  
February 26, 2007

determine whether a position on the Barnwell County Hospital Board of Trustees is also an office.

In 1984, we issued an opinion finding members of the Barnwell County Hospital and Nursing Home Board are officers for purposes of dual office holding. Op. S.C. Atty. Gen., September 6, 1984. We based our opinion on our examination of the enabling legislation passed by the Legislature establishing the Barnwell County Hospital and Nursing Home Board. *Id.* Since the issuance of that opinion, we understand the Barnwell County Council reestablished the body governing the operations of the hospital via an ordinance dated September 26, 1988. Attached to your request, you included a copy of that ordinance, which establishes the seven-member board now known as the Barnwell County Hospital Board of Trustees (the "Board"). According to the ordinance, members of the Board serve four-year terms and must be residents of Barnwell County. The ordinance specifies the Board shall include the hospital administrator, two members of the hospital's medical staff, and four residents of Barnwell County appointed at large by the Barnwell County Council. The ordinance sets for the compensation of the Board's members at \$600.00 per year and allows reimbursement for reasonable expenses incurred in connection with the members' service on the Board. Thus, the Board was established by statute, which sets forth the members' terms of office, compensation, and qualifications. Accordingly, the ordinance indicates membership on the Board is likely an office.

In addition, the ordinance contains an extensive list of powers and duties afforded to the members of the Board. These powers and duties include, but are not limited to, the authority to adopt bylaws; operate the hospital and its facilities; accept gifts, donations and devises; improve and maintain the hospital facilities; establish rates charged by the hospital; contract for equipment, supplies, and personal property used in the operation of the hospital; expend the proceeds derived from revenue generated by the hospital; sue and be sued; employ various personnel needed to operate the hospital; establish personnel policies; and adopt a budget to be approved by the Barnwell County Council. We believe these powers evidence the Board's ability to exercise some sovereign power of the State.

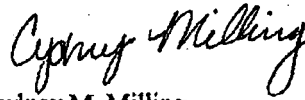
Based on our review of the ordinance establishing the Board, we believe membership on the Board constitutes an office for purposes of dual office holding. This conclusion is consistent with several other opinions of this Office finding membership on a county hospital board is an office for purposes of article XVII, section 1A of the South Carolina Constitution. *See, e.g.*, Ops. S.C. Atty. Gen., June 1, 2005 (Bamberg County Hospital Board); April 20, 2004 (Abbeville County Memorial Hospital Board of Trustees); January 11, 1999 (Regional Medical Center of Orangeburg Board of Trustees); January 9, 1992 (Edgefield County Hospital Board); August 6, 1991 (Live Oaks Hospital Board of Commissioners).

Mr. Boulware  
Page 3  
February 26, 2007

Finding both membership on the Barnwell City Council and the Board to be offices for purposes of dual office holding, we conclude simultaneous service in both positions constitutes dual office holding in violation of article XVII, section 1A of the South Carolina Constitution.

Very truly yours,

Henry McMaster  
Attorney General



By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General

|                                              |   |                               |
|----------------------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA                      | ) | IN THE COURT OF COMMON PLEAS  |
|                                              | ) | FOR THE                       |
| COUNTY OF BARNWELL                           | ) | SECOND JUDICIAL CIRCUIT       |
| Don Alexander, Carolyne Williams, Georgia    | ) |                               |
| F. Fields, William R. "Bob" Dixon, Colonel   | ) | CIVIL ACTION NO. 11-CP-06-476 |
| Joe H. Zorn, Jr., Melanie Wright, Dr. M.O.   | ) |                               |
| Khan, and Janice Livingston,                 | ) |                               |
| Plaintiffs,                                  | ) |                               |
|                                              | ) |                               |
| v.                                           | ) | PLAINTIFFS' SUPPLEMENTAL      |
|                                              | ) | MEMORANDUM IN OPPOSITION TO   |
| Freddie Houston, David Kenner, Keith         | ) | DEFENDANTS' MOTION TO DISMISS |
| Sloan, Lowell Jowers, Sr., Joe Smith, Harold | ) |                               |
| Buckmon, and Travis Black, individually and  | ) |                               |
| in their capacity as members of Barnwell     | ) |                               |
| County Council,                              | ) |                               |
|                                              | ) |                               |
| Defendants.                                  | ) |                               |
|                                              | ) |                               |
|                                              | ) |                               |
|                                              | ) |                               |

Plaintiffs file this Supplemental Memorandum in Opposition to the Motion to Dismiss of Defendants. Plaintiffs did not receive Defendants' Memorandum in Support of their Motion to Dismiss until the afternoon before the hearing. Thus, Plaintiffs requested the opportunity to respond to certain points that they were unable to respond to in their Response Memorandum.

**1. Service on County Council and the Hospital Board constitutes dual office holding.**

As Plaintiffs argued in their initial Memorandum, the Attorney General has issued an opinion almost directly on point with the facts in this case. In an Opinion dated February 26, 2007 the Attorney General addressed the issue of whether a member of the Barnwell City Council could be appointed to the Barnwell County Hospital Board of Trustees without violating

the provision against dual office holding. The Opinion stated that:

...the Board was established by statute, which sets forth the members' terms of office, compensation, and qualifications. Accordingly, the ordinance indicates membership on the Board is likely an office.

Atty Gen. Op. The Opinion concluded that membership of the board constituted an office for the purposes of dual office holding:

Finding both membership on the Barnwell City Council and the Board to be offices for purposes of dual office holding, we conclude simultaneous service in both positions constitutes dual office holding in violation of Article XVII, section 1A of the South Carolina Constitution.

Id.<sup>1</sup>

Defendants argue that the Attorney General opinion does not apply to the type of "dual office holding" in this case. Defendants argue that the Hospital Board is merely an agent of County Council, and that this kind of "vertical" relationship does not violate the prohibition on dual office holding because there is no incompatibility or conflict in holding both offices. Def. Memo, p. 10. The common law "prohibited a person from holding two offices only if they were incompatible." Richardson v. Town of Mt. Pleasant, 350 S.C 291, 293, 566 S.E.2d 523, 525 (2002). However, "[t]he 1895 Constitution **extended** the dual office holding proscription **to all persons holding positions of 'honor or profit'...**". Id. at 294, 566 S.E.2d at 525 (emphasis added). Thus, whether or not there is any incompatibility in holding two office is irrelevant. There can be no question that the offices in this case are both for "honor or profit" and thus, simultaneous service would violate the extended definition of dual office holding.

---

<sup>1</sup>The prohibition against dual office holding appears in this section and in Art. VI, § 3. Furthermore, S.C. Code § 4-9-100 states that "No member of council, including supervisors, shall hold any other office of honor or profit in government, except military commissions and commissions as notaries public, during his elected term."

Furthermore, while no case law or attorney general opinion appears to have addressed the issue of a person simultaneously serving on both county council and a county hospital board, the Attorney General has found the holding of two county offices violates the prohibition on dual office holding. *See, e.g.*, S.C.A.G. Op., 1997 WL 87868 ( Jan. 7, 1997) (Service on Barnwell County Hospital Board and Barnwell County Transportation Committee would most probably violate the dual office holding provisions of the State Constitution); S.C.A.G. Op., 1985 WL 165972 (January 4, 1985)(service on Laurens County Council and on the Laurens County Water Resources Commission would violate the dual office holding prohibition).

Defendants' arguments that they are merely serving *ex officio* must also be rejected. In order to constitute *ex officio* service, the ordinance should expressly provide for such and reflect that the relationship between the two entities has been considered by council S.C.A.G. Op. 1989, WL 508572 (July 18, 1989). In that Attorney General opinion, the ordinance at issue specifically stated that one member of the Barnwell County Community Service Commission was to be appointed from the membership of Barnwell County Council. The Opinion noted that normally, a position on the Service Commission would be an office,<sup>2</sup> but the ordinance and the proposed by laws specifically provided for the appointment of a council member and thus, was permissible as *ex officio* membership. In the ordinances creating the Hospital Board, there is no such provision. The ordinance re-creating the Hospital Board (after the Home Rule Act was passed) states:

---

<sup>2</sup>Some of the facts in 1989 opinion included: The initial term of service on the Service Commission was to be two years, with subsequent appointments for four years; Service Commission members were not compensated, but could be reimbursed for actual expenses; and members were required to take an oath of office. Similarly, in this case, there is specific term of office provided (3 years) and the Hospital Board members receive not only reimbursement for actual expenses, but a *per diem* compensation as well.

The Board of Trustees of Barnwell County Hospital shall be comprised of nine members. Appointees must be current residents of Barnwell County and shall remain a resident at all times during their term.

\* \* \*

Each Council Member shall nominate one appointee for recommendation to the County Council Committee responsible for the Barnwell County Hospital. Such recommendation shall be made in a public session at a regularly scheduled meeting of County Council. County Council members are encouraged to select an appointee from their district. If, in the opinion of the Council member, a more qualified [sic] is available then the member shall nominate an appointee from the county at large.

Ordinance No. 2003-178. Clearly, the ordinance did not envision members of County Council being appointed to the Hospital Board, as the ordinance detailing the appointment procedure demonstrates.

Finally, as there has been neither a South Carolina case nor a Attorney General opinion on the issue of whether a County Council member can simultaneously serve on a County Hospital Board, it is a novel, factual issue, that should be decided on the merits, not on a Motion to Dismiss. *See, Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001)(As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRPC, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial).

**2. Whether Barnwell County Council ran the hospital for two years is irrelevant to dual office holding.**

As set forth in the extensive fact situation of Plaintiffs' initial Memorandum, the Barnwell County Hospital Board was initially created in 1953 by the General Assembly for the purposes of acquiring land and to construct a hospital, to be owned and operated by Barnwell

County Hospital's board of trustees. Am. Cmpt. ¶ 18. On September 26, 1988, and after the passage of South Carolina's Home Rule Act, Barnwell County Council passed Ordinance 1988-35 reestablishing the body governing the Barnwell County Hospital ("the Hospital"). Am. Cmpt. ¶ 19. This body is now known as the Barnwell County Hospital Board of Directors ("Hospital Board") Id.

In their Memorandum, Defendants claimed that Barnwell County Council "ran both the hospital and the County Nursing Home, directly for two years between the enactment of Ordinance No. 1986-26, and the enactment of 1988-35." Def. Memo., p. 3. Defendants also seem to argue that the Hospital Board was completely dismantled during that two year period. This argument is not accurate as demonstrated by Ordinance 1986-26 which states:

Current members of the Barnwell County Hospital and Nursing Home Board shall constitute an Advisory Board to Barnwell County Council and shall serve in such capacity until their successors are appointed but not for less than two years....

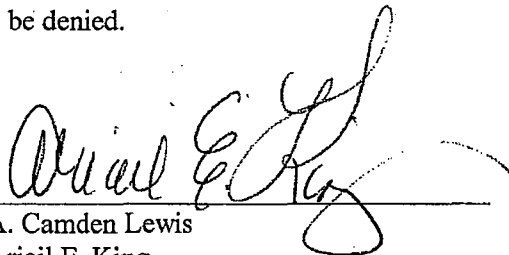
Ordinance 1986-28. Thus, the Hospital Board was not completely eliminated during that two year period.<sup>3</sup> Finally, even if County Council did "run the Hospital" (or there was no Hospital Board in existence at that time), that has no effect on this case because Ordinance 1988-35 created the office of the Hospital Board, with its own compensation and duties, and the ability to act without approval of the County Council. For example, the Hospital Board can sue and be sued on its own. Ordinance 2003-178. In other words, County Council has given up the right to run the Hospital by creating the Hospital Board who have their own rights and responsibilities.

---

<sup>3</sup>In 1988, Ordinance 35 created the Hospital Board with the same powers and duties as the Hospital Board currently has.

## CONCLUSION

For the reasons set forth in Plaintiffs' Memorandum in Opposition to the Motion to Dismiss and herein, the Motion should be denied.

A handwritten signature in black ink, appearing to read "Ariail E. King", written over a horizontal line.

A. Camden Lewis  
Ariail E. King  
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Attorneys for Plaintiffs

Columbia, SC  
February 23, 2012

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

---

**RECEIVED**

MAY 02 2012

**SC Court of Appeals**

Don Alexander, Carolyne Williams, Georgia F. Fields,  
William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie  
Wright, and Dr. M.O. Khan, ..... Plaintiffs/Appellants,

v.

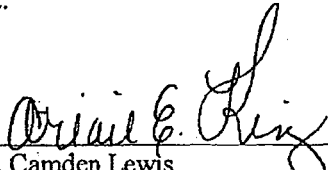
Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr.,  
Joe Smith, Harold Buckmon, and Travis Black, individually and in  
their capacity as members of Barnwell County Council ..... Defendants/Respondents.

---

**NOTICE OF APPEAL**

---

Plaintiffs/Appellants Don Alexander, Carolyne Williams, Georgia F. Fields,  
William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie Wright, and Dr. M.O. Khan appeal  
the order of the Honorable Edgar W. Dickson dated April 30, 2012. Appellant received written  
notice of the entry of this order on May 2, 2012.

  
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Ariail E. King  
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**Other Counsel of Record**

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Post Office Box 705  
Barnwell, South Carolina 29812

State of South Carolina )

County of Barnwell )

Court of Common Pleas  
2011-CP-06-00476

Don Alexander, et al. )  
Plaintiffs )  
vs. )

Transcript of Record

Freddie Houston, et al. )  
Defendants )

February 9, 2012  
Barnwell, South Carolina

B E F O R E:

The Honorable Edgar W. Dickson, Judge.

A P P E A R A N C E S:

A. Camden Lewis, Esq.  
Ariail E. King, Esq.  
Attorneys for the Plaintiff

Elmer (Pete) Kulmala, Esq.  
J. D. Mosteller, Esq.  
Attorneys for the Defendant

Lisa H. Davenport, RPR  
Official Court Reporter

I N D E X   O F   W I T N E S S E S

Statement by Mr. Kulmala..... 3,5,25  
Statement by Mr. Lewis..... 3,16,27

E X H I B I T S

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EV</u> |
|------------|--------------------|-----------|-----------|
|------------|--------------------|-----------|-----------|

(none offered)

1 (Whereupon, on February 9, 2012 the following  
2 proceedings were held:)

3 THE CLERK: Don Alexander, et al, versus Freddie  
4 Houston, et al.

5 THE COURT: This is case number 2011-CP-06-476; Don  
6 Alexander, et al, Plaintiff versus Freddie Houston, et al,  
7 Defendants. I've got -- This is a motion to dismiss by  
8 the defendants filed by Mr. Kulmala, and, Mr. Kulmala, I  
9 have a copy -- Well, I have your memorandum in support of  
10 that motion to dismiss that you have sent to me.

11 MR. KULMALA: Correct, Your Honor.

12 THE COURT: Do I have anything else? This is all my  
13 stuff; right?

14 MR. KULMALA: That package with the late attachment  
15 nine would be the complete Defendant's package.

16 THE COURT: All right. And, Mr. Lewis, have you sent  
17 me a memo or anything like that?

18 MR. LEWIS: No, sir. May I sit? It is hard for me  
19 to ---

20 THE COURT: If you don't mind Mr. Kulmala sitting,  
21 too, if he wants to.

22 MR. KULMALA: He is shorter than me. I don't mind at  
23 all.

24 THE COURT: All right. Did you have a memo as well?

25 MR. LEWIS: Yes, we do. Let me explain. We also

1 have pending a motion to strike this motion because they  
2 didn't give us their grounds. Upon filing that motion to  
3 strike yesterday afternoon we got their memorandum giving  
4 us the grounds of the motion. We have done a memorandum  
5 in one afternoon to mete that -- those grounds and I just  
6 wanted to let you know that this is just one afternoon's  
7 work to mete what we got yesterday afternoon and we  
8 apologize and will hand it up now.

9 THE COURT: I'm sure that was a spectacular job done  
10 by Ms. King; right?

11 MR. LEWIS: It was a great job done by Ms. King.

12 THE COURT: Have you got a copy now, Mr. Kulmala?

13 MR. KULMALA: I do have a copy.

14 THE COURT: All right. I am looking at your motion  
15 to strike. That was filed on February 8; is that correct?

16 MR. LEWIS: That's correct. And then once that was  
17 gotten that scared up the memo that came yesterday.

18 THE COURT: Okay. So we're okay with that now  
19 because you're just attacking his motion to dismiss;  
20 right?

21 MR. LEWIS: I am attacking it and in extra time if we  
22 haven't covered something I wanted you to know why and if  
23 you needed me to do something else I'll be glad to.

24 THE COURT: All right. Thank you, sir.

25 Mr. Kulmala, your motion.

1       MR. KULMALA: Your Honor, this case involves a number  
2 of issues and we certainly -- and, first, I want to thank  
3 the clerk for being able to get the hearing scheduled this  
4 quickly. I think it was filed on January 19 and scheduled  
5 for a hearing.

6       THE COURT: Should I thank the clerk as well?

7       MR. KULMALA: Basically, by establishing, you know,  
8 the timeframe, there's a number of issues --  
9 constitutional issues -- and we certainly don't want the  
10 plaintiffs to be prejudiced in any way by, you know, late  
11 -- I don't know if it is late, but in other words not  
12 having enough time to respond -- certainly would be  
13 agreeable to if the court desires if the plaintiff desires  
14 something like an additional 10 days to brief with us  
15 having any opportunity necessary to reply. You know, so  
16 it's -- This is not something that we want to necessarily  
17 rush to judgment. I mean, I think the issues need to be  
18 clearly articulated for the court and I apologize a little  
19 bit for the complexity of the issues, but I think they're  
20 implicated by the nature of the case.

21       THE COURT: All right, sir.

22       MR. KULMALA: And with that I'd like to proceed, if  
23 it please the Court, with the motion for dismissal  
24 pursuant to 12(b)(6).

25       THE COURT: All right, sir. Yes, sir, let me hear

1 from you.

2 MR. KULMALA: Your Honor, this motion essentially  
3 raises purely legal issues. I understand that the case is  
4 attended by a number of potential emotionally-charged  
5 matters, but our motion really revolves around the  
6 interpretation to be given to Rule 12(b)(6) and that is  
7 that under the prevailing law applicable in South Carolina  
8 the allegations of the complaint do not -- They do not  
9 allege facts that would amount to recognizable cause of  
10 action. There are several points or several issues I  
11 think that are crucial and I want to direct the Court's  
12 attention -- and I believe the 14 pages or so of the brief  
13 discuss in detail and I'll try to hit the high points and  
14 summarize for the court's benefit.

15 The first question we have is one of standing. The  
16 plaintiffs' case is a declaratory judgment -- a request  
17 for declaratory judgment and breach of fiduciary duty.  
18 The statute for declaratory judgment maybe doesn't make it  
19 clear. He not only has to have a justiciable issue but  
20 you also have to have standing. As I read the complaint  
21 this is not even really alleged as taxpayer standing.  
22 It's basically just we got a justiciable issue and, you  
23 know, let's roll with it and let the court decide it; so  
24 we feel like the standing matter is resolved, especially  
25 considering Chief Justice Toal's concurring opinion in

1 Wilson versus Preston case that we cited in our brief.

2 Let me see. I think I miscited it. Chief Justice  
3 Toal was in the Wilson versus Preston case. I guess the  
4 important language in the case is the non-justiciability  
5 of a political question is primarily a function of  
6 separation of powers. That's citing Segars-Andrews and  
7 the South Carolina Public Interest Fund. The political  
8 question goes back to 1962, U.S. Supreme Court case Baker  
9 versus Carr, and actually what that does is the standing  
10 and political question of separation of powers gets  
11 somewhat intertwined. As matter of fact, I think I treat  
12 them as three matters together in the brief.

13 The -- It's actually Newman versus Richland County  
14 Historic Preservation Society says that a plaintiff  
15 attempting to prosecute an action under Declaratory  
16 Judgment Act has to demonstrate justiciable controversy  
17 and must have standing to bring the suit and the standing  
18 being a personal stake in the subject matter of the suit.  
19 We feel like standing is an issue that based on the  
20 circumstances and the allegations of the complaint would  
21 be resolvable in favor of the defendants.

22 Proceeding from standing then into ---

23 THE COURT: And, Mr. Kulmala, I'll do this however  
24 you want to. Do you mind me stopping you and asking you  
25 questions?

1 MR. KULMALA: No, no problem.

2 THE COURT: Just so I'll know, who are the  
3 plaintiffs? I mean, I see their names. What were their  
4 roles?

5 MR. KULMALA: My knowledge and my understanding are  
6 that Don Alexander was Hospital Administrator -- Chairman  
7 of the Board of the hospital. Carolyn Williams was a  
8 financial officer for the hospital, Head of the Finance  
9 Committee on the Board.

10 THE COURT: All of these people had something to do  
11 with the hospital?

12 MR. KULMALA: The others my understanding is they're  
13 residents of Barnwell County --

14 THE COURT: Okay.

15 MR. KULMALA: -- and have no direct relationship,  
16 employment or otherwise, with the hospital board.

17 THE COURT: Okay. I am looking at the amended  
18 complaint; so it tells me -- Okay. I see.

19 MR. KULMALA: Other than Dr. Khan. Dr. Khan was a  
20 physician who a member of the hospital board.

21 THE COURT: Okay. But in the complaint he's just  
22 listed as a resident -- citizen and resident.

23 MR. KULMALA: That's correct.

24 THE COURT: They don't claim he worked there or  
25 anything like that. Okay. I'm with you. I'm sorry.

1 Thank you, sir.

2 MR. KULMALA: I think one of the -- Getting past  
3 standing one of the major issues is constitutional  
4 separation of powers which tends to merge with political  
5 question and the language that goes back to Baker versus  
6 Carr is along the lines of the political question of the  
7 court would not involve itself in an issue which is  
8 statutorily -- Let me see -- textually demonstrable  
9 committed statutorily to another branch of government.

10 What we've got here is the Home Rule Act which  
11 basically places the operation of Barnwell County within  
12 the form of government selected by Barnwell County which  
13 is pure council form of government; so we've got a statute  
14 textually demonstrable statutory commitment to Barnwell  
15 County Council to operate, administer, run all of the  
16 affairs of the county pursuant to the Home Rule Act, and  
17 therein lies the concern of it being a political question.  
18 It is that Barnwell County runs Barnwell County, has the  
19 legal authority from the legislature to run Barnwell  
20 County, and essentially what we would be engaging in here  
21 is having the judiciary interfere -- interject itself,  
22 intrude into the administration of Barnwell County in a  
23 fashion that is essentially recognized as not for the  
24 courts to do and that's really where Justice Toal's  
25 provision or commentary about not being involved -- and

1 it's on page six of my brief.

2 "In my view issues related to the propriety of the  
3 Respondent's actions in this case present purely political  
4 questions; the resolution of which rest solely within the  
5 council's domain." I want to emphasize that: "the  
6 resolution of which rests solely within the council's  
7 domain. In my opinion any ruling from this court would  
8 impermissibly operate as judicial review of the council's  
9 policy decisions. I would decline Appellants request to  
10 intrude in this area." That was not in the majority  
11 opinion. That was in a concurring opinion expressing her  
12 reasoning.

13 Clearly, political question is something that is  
14 alive and well and very important and, again, closely  
15 related to the separation of powers under the United  
16 States and South Carolina Constitutions.

17 The other significant issue is the one of dual  
18 office-holding and there's no -- there's no dispute that  
19 the Constitution says what it says and in at least two  
20 locations in the Constitution which is a prohibition on  
21 dual office-holding. It says, "No person may hold two  
22 offices of honor or profit at the same time." It goes on  
23 to express other limitations and exemptions.

24 It is the defendant's position that even if one were  
25 to recognize membership on county council and membership

1 on hospital board as being two offices, this is not the  
2 kind of dual office-holding that the prohibition is  
3 intended to protect against. What seems to be -- and I'm  
4 not going to go into the history -- I've got it set forth  
5 in the brief, but essentially it started out concerning  
6 incompatibility of positions -- a person holding office in  
7 two different positions.

8 Then what is clear is you're looking at a prohibition  
9 on horizontal offices where somebody holds one office and  
10 then they assume a second office and it brings with it a  
11 whole different set of duties. You could have potential  
12 conflict of interest or greater amassing of power and  
13 control into one individual, but this is clearly and  
14 purely vertical office-holding. As that matter of fact, I  
15 think the plaintiff's complaint concedes our point. They  
16 allege that Barnwell County -- the hospital board is a  
17 sub-entity of Barnwell County and that's exactly the case.

18 It almost puts us in a position of looking at this as  
19 agent and principal -- Barnwell County being -- county  
20 council being the principal and the hospital board being  
21 the agent. The members of the hospital board have not any  
22 greater powers nor could they have any greater powers.  
23 They're a creature of Barnwell County. It is essentially  
24 just a vertical line from the county down to the hospital  
25 board; so there's not the danger of amassing a

1 concentration of power or conflict of interest.

2 Agents -- I'm sorry. Principals have always been  
3 able to conduct their own business with or without the  
4 agent. In other words, they can transact the same  
5 business that they have authorized an agent to enact.  
6 Also, during a period in the mid 80's it's clear from the  
7 resolutions which are attached to the brief -- I'm sorry,  
8 to the ordinances; the ordinances attached to the brief --  
9 that the hospital operated without a board for two years  
10 and county council actually served in the capacity of the  
11 direct operation of the hospital.

12 All of the actions -- I think it's a significant to  
13 note members of county council as being ex officio members  
14 of county boards. They're already a part of ex officio  
15 the hospital board. This is not the amassing creation of  
16 broader powers within the members of county council. They  
17 gain no additional powers by virtue of taking on the  
18 positions of members of the hospital board.

19 I think one thing that's important to consider is in  
20 this Declaratory Judgment Act the plaintiffs are asking  
21 that the resolution concerning the hospital be declared to  
22 be without -- without force, without power, and that I  
23 think it's most important to recognize with this being a  
24 pure council form of government the other relief that the  
25 plaintiffs are asking for is that by virtue of attempting

1 to name themselves to the hospital board members of county  
2 council have vacated their positions as county council or  
3 members of county council; so, in essence, the plaintiff's  
4 lawsuit seeks to have county council become an empty  
5 set -- in other words, no members of county council.  
6 There would be no administrative government in Barnwell  
7 County.

8 That would also vitiate, render null and void  
9 everything that county council has done since August 26,  
10 2011 and I have attached --

11 THE COURT: I saw a list.

12 MR. KULMALA: -- a list and I recognize and I am not  
13 trying to interject documents or materials that are not  
14 within the four corners of the pleadings, but those are  
15 all the ordinances and if the Court desires I could have  
16 the ordinances attached which essentially have the force  
17 of law in the county. I understand that it's quite a  
18 number of several hundred pages, but that's basically a  
19 summary of what stands to be undone.

20 We also have breach of fiduciary duty in this case,  
21 and, again, just kind of causes one to go back and look at  
22 the standing question. What gives these -- it was  
23 originally nine. I think it's now seven or maybe six  
24 plaintiffs. What gives these plaintiffs standing to ask  
25 for money damages from Barnwell County and what

1 distinguishes their interest from other citizens or  
2 residents of Barnwell County?

3       When the court considers the breach of fiduciary duty  
4 cause of action essentially what it is asking the court to  
5 do is to sit as a super county council and cut and paste  
6 and, basically, for the court to legislate and administer  
7 as the county council form of government does. In other  
8 words, the court would be sitting as a super power in  
9 deciding which acts, which actions are legitimate or not  
10 or which are approvable or not, and I think that that is  
11 an extreme intrusion upon the rights, the powers of the  
12 county council as indicated through the Home Rule Act and  
13 supported by separation of powers.

14       THE COURT: Mr. Kulmala, may I ask a couple of  
15 questions? I want to make sure.

16       MR. KULMALA: Sure.

17       THE COURT: Okay. The county council was duly  
18 elected; is that correct?

19       MR. KULMALA: That's correct.

20       THE COURT: Okay. And they were elected pursuant to  
21 the -- under---

22       MR. KULMALA: Home Rule Act.

23       THE COURT: Okay. All right. There are no  
24 allegations that the council was not elected properly; is  
25 that correct?

1 MR. KULMALA: I don't see any allegations.

2 THE COURT: I was just kind of flipping through the  
3 complaint.

4 MR. KULMALA: No. I don't interpret any of the  
5 allegations as suggesting that.

6 MR. KULMALA: Okay. And Barnwell County chose the  
7 council form of government?

8 MR. KULMALA: Under the Home Rule Act they chose  
9 council -- pure council form of government.

10 THE COURT: Okay. And then the council created the  
11 hospital board?

12 MR. KULMALA: The hospital board -- well, in various  
13 -- it metamorphosized over the years, but essentially the  
14 hospital board as presently or recently constituted was  
15 created by county council by one of the ordinances that  
16 I've cited. I think it's on page five or six of the  
17 brief. It was a 1988 creation of county council. Okay.  
18 Was county council -- was that -- was county council then  
19 under the Home Rule Act in '88?

20 MR. KULMALA: That's correct.

21 THE COURT: They created the board in '88?

22 MR. KULMALA: They created it pursuant to their  
23 authority under the Home Rule Act.

24 THE COURT: Otherwise the county council would have  
25 been running the hospital or not?

1 MR. KULMALA: The ordinance in 1988 basically created  
2 new hospital board. There had been a two-year period from  
3 1986 that the county council was running the hospital.  
4 There was no board.

5 THE COURT: Okay. I guess my question is this: If  
6 there was no hospital board, okay, who would run the  
7 hospital? Who is in charge of running the hospital?

8 MR. KULMALA: There would still be county council.

9 THE COURT: Okay. All right.

10 MR. KULMALA: Essentially, Your Honor, just by  
11 further explanation, I mean, that's where we get into the  
12 idea of agent and principal. In other words, county  
13 council has demonstrated they had the ability and direct  
14 authority and this was created as the plaintiffs  
15 acknowledge as a sub-entity and the powers are confined  
16 within whatever the powers of county council has delegated  
17 to them.

18 THE COURT: Okay. All right. Thank you,  
19 Mr. Kulmala.

20 Mr. Lewis?

21 MR. LEWIS: Yes. May it please the Court.

22 THE COURT: Yes, sir.

23 MR. LEWIS: I want -- I'll just take them in the  
24 order he did them and then---

25 THE COURT: You can take them in any order you want.

1           MR. LEWIS: All right. And the first one is standing  
2 and we have, first, he admits there has to be a personal  
3 stake. We have Mr. Alexander who was on the board, other  
4 members of the board, and we have a doctor who worked in  
5 the hospital. They also just fail to ever recognize  
6 what's been known as the Sloan standing or the public  
7 policy standing argument that when something is important  
8 enough to the public standing will be given to the case or  
9 the people that bring the case purely upon the fact that  
10 it is very, very important to the public.

11           The hospital in Barnwell and the fact that the  
12 hospital is now going to be shut down in bankruptcy and  
13 the confusion over the hospital as to what would be the  
14 powers of county council or the hospital board in light of  
15 the dual office question is something that should very  
16 easily mete what is called the Sloan standing exception  
17 even if you didn't have a board member and even if you  
18 didn't have a doctor.

19           Now, he talks about that they are not two separate  
20 entities but are agent-principal type considerations.  
21 Everybody agrees that the -- we're talking about Barnwell  
22 County on the one hand and the hospital on the other hand.  
23 Well, in their filing in the bankruptcy court in a  
24 statement of qualifications under 11 USC 109(c) the debtor  
25 Barnwell County Hospital is a municipality as such term as

1 defined in 11 USC 101(40.)

2 What they're doing is they're trying to call  
3 themselves a municipality for bankruptcy and then say  
4 we're not a municipality over here today so we cannot have  
5 to defend this lawsuit. That's just simply not true.  
6 They are a separate entity by their own admission.

7 Now, this statement is not in the record. We didn't  
8 -- we just found it this morning and so we have it and we  
9 will be glad to furnish it to the court, but I don't think  
10 anybody questions that the debtor says -- the debtor is a  
11 municipality as such term as defined and this is signed by  
12 the attorney for debtor Barnwell County; so, there is no  
13 question that that is a filing.

14 Secondly, they keep telling you that this board --  
15 something about this board is the same as Barnwell County  
16 Board. It isn't. It gets different pay. It has  
17 different terms. It has separate duties. There is a way  
18 to how it's created, how the members are selected. It is  
19 a completely different entity from the county council.

20 THE COURT: Mr. Lewis, do you mind if I interrupt you  
21 and ask you a question?

22 MR. LEWIS: No, sir.

23 THE COURT: Or do you want to finish your argument  
24 and then me ask questions?

25 MR. LEWIS: No; right now.

1 THE COURT: Okay.

2 MR. LEWIS: The best time to ask a question is when  
3 it comes up. I forget them.

4 THE COURT: Me, too. That's why I wanted to ask. I  
5 have some attorneys that don't like me to interrupt them  
6 and ask them a question because they lose their train of  
7 thought.

8 MR. LEWIS: Well, they haven't ever been before  
9 Justice Toal.

10 THE COURT: I understand. I have been. I always  
11 like to be interrupted myself, but going back to some of  
12 the questions that I asked Mr. Kulmala, the plaintiffs are  
13 not contesting or saying that the council was not duly  
14 elected; is that correct?

15 MR. LEWIS: Not duly elected, but what their powers  
16 are in light of what's happened is a question.

17 THE COURT: I understand you're contesting one of  
18 their actions.

19 MR. LEWIS: We don't know which way to go.

20 THE COURT: Okay. All right. Let me get some of the  
21 basics now.

22 MR. LEWIS: All right. Yes, you're right on that.

23 THE COURT: Okay. So the council was duly elected  
24 and we're not complaining about that?

25 MR. LEWIS: No, sir.

1 THE COURT: Okay. And they were duly elected under  
2 the Home Rule Act?

3 MR. LEWIS: Yes, sir.

4 THE COURT: Okay. Now, my general reading of that is  
5 if they chose -- if Barnwell County chose to go under the  
6 Home Rule Act as a council then it is council's duty to  
7 essentially run the county; is that correct?

8 MR. LEWIS: Yes, if they don't have a manager.

9 THE COURT: Yea, and they don't have -- so county  
10 council is supposed to be running Barnwell County?

11 MR. LEWIS: I like the word supposed to.

12 THE COURT: Well, that's why I used it. Now, is  
13 there any question that the county council created the  
14 hospital board?

15 MR. LEWIS: There is an ordinance that the -- in 1952  
16 the General Assembly created the hospital board. It then  
17 when the Home Rule Act came in they continued the hospital  
18 board through an ordinance.

19 THE COURT: Okay. But because of the Home Rule Act  
20 they had to do that; is that correct?

21 MR. LEWIS: That's correct.

22 THE COURT: Okay. So in effect the council created  
23 the board or reauthorized the board?

24 MR. LEWIS: Reauthorized is a good word.

25 THE COURT: You like reauthorized better like

1 "supposed to?"

2 MR. LEWIS: Yes, sir.

3 THE COURT: Okay. Now, if they had not reauthorized  
4 the board, the board wouldn't have any power to act; is  
5 that correct?

6 MR. LEWIS: Well, that's an interesting point. They  
7 have an ordinance saying that the hospital shall be run by  
8 a board. Now, if you have a hospital that's supposed to  
9 be run by a board and you don't create a board, I don't  
10 know what you got. I'm not going to agree that by not  
11 doing what you're supposed to do under the law it gives  
12 you the ability to do it yourself. I am not going to  
13 agree to that. I don't think anybody will.

14 THE COURT: Okay. All right. Thank you, sir. Keep  
15 on; back to where you were.

16 MR. LEWIS: That's the hard part.

17 THE COURT: Yes, sir.

18 MR. LEWIS: So we were talking about two separate  
19 entities and they are two separate entities. There is no  
20 question about it when you look at the -- as I've already  
21 pointed out and they've even filed documents in bankruptcy  
22 court saying that.

23 Now you get to the dual office-holding and I was  
24 excited to see where the other side cited and looked hard  
25 for the Attorney General's opinions and said there wasn't

1 anything that would be helpful. Well, we have attached to  
2 our memorandum -- I think it's the last thing -- an  
3 Attorney General's opinion of February 26, 2007 that says  
4 if you are a member of Barnwell City Council you cannot  
5 sit on Barnwell County Hospital Board of Trustees as it's  
6 dual office-holding; so we have right here in Barnwell, we  
7 have the same hospital, and we have the difference is  
8 county council versus city council and that would be --  
9 that would fall back to the question is county council the  
10 same as the Hospital Board of Trustees and that would seem  
11 not to be -- In fact, here we have a city councilman  
12 wanting to be on it and we have the argument I just made  
13 about it being a municipality and it is separate duties,  
14 separate money, separate everything.

15 THE COURT: But there is no question that the City of  
16 Barnwell and the County of Barnwell are two different  
17 entities.

18 MR. LEWIS: No question about it.

19 THE COURT: Okay.

20 MR. LEWIS: And so is the County of Barnwell and the  
21 Barnwell Hospital Board two different entities as the city  
22 is a different entity to the county board. They're all  
23 different entities -- all three of them.

24 THE COURT: Well, the county didn't create the city.  
25 The county board did not create the city council, did

1 they?

2 MR. LEWIS: No, but the General Assembly created them  
3 all; so what we're going to say they're all the General  
4 Assembly? I don't think so.

5 THE COURT: All right. Okay. You were on dual  
6 office-holding.

7 MR. LEWIS: Yes, sir, and I think that this and the  
8 fact that you have two separate and distinct boards --  
9 that is, the county council and the hospital board -- just  
10 because one created the other doesn't mean that you can't  
11 have dual office-holding. That would mean that you  
12 couldn't have anything that was in government the way we  
13 have it now.

14 The kind of dual office-holding that is ex officio is  
15 much like the Budget and Control Board and that one was a  
16 stretch if you read the opinion, but in that opinion  
17 because the Budget and Control Board was part of your  
18 office -- in other words, it was just because you were  
19 there -- they said that that was different or if you were  
20 kind of -- if you were in your office and you were  
21 supposed to be in charge of the part of the county of  
22 recreation or something -- something that was in with your  
23 duties. In this case this is a separate and distinct  
24 entity.

25 THE COURT: Well, you brought up the Budget and

1 Control Board which is near and dear to my heart; so let  
2 me ask you a question regarding that since that goes to, I  
3 think, your damages for breach of fiduciary duty. What  
4 are the damages if you -- If the council does away with  
5 the hospital board, what are the damages?

6 MR. LEWIS: If the council does away ---

7 THE COURT: If the council does away with the  
8 hospital board, what are the damages?

9 MR. LEWIS: The damages are no hospital. That's what  
10 happened in this case.

11 THE COURT: Okay.

12 MR. LEWIS: Now, are you asking me is that a  
13 recognized cause of action in damages in South Carolina?

14 THE COURT: Yes, sir.

15 MR. LEWIS: We could not find a case that said one  
16 way or the other. The only cases we were able to cite of  
17 any help were from other states; so that is a novel issue  
18 and we would suggest as a novel issue that at least to go  
19 along until such time as they bring motion for summary  
20 judgment on the facts, but I will tell you right now it is  
21 a novel issue.

22 THE COURT: Thank you, sir. I enjoyed that. Let me  
23 ask you a question. If the legislature -- hypothetical  
24 question. If the legislature does away with the Budget  
25 and Control Board as they're talking about, will the

1 members of the Budget and Control Board be able to sue for  
2 breach of fiduciary duty?

3 MR. LEWIS: No, sir. Some of them might try.

4 THE COURT: Okay. Depending on how this case turns  
5 out.

6 MR. LEWIS: That's right.

7 THE COURT: And I didn't mean to interrupt you again.  
8 All right. Mr. Lewis, you had gone over ---

9 MR. LEWIS: I was at the breach of fiduciary duty.

10 THE COURT: Yes, sir.

11 MR. LEWIS: That was the last of the arguments.

12 THE COURT: Yes, sir.

13 MR. LEWIS: And so I've kind of exhausted all I  
14 should say.

15 THE COURT: All right. Thank you, sir.

16 Mr. Kulmala?

17 MR. KULMALA: Your Honor, I'll be brief in reply.

18 With respect to the bankruptcy matter the reference  
19 relying on pleadings, documents of bankruptcy court, it is  
20 a set of definition on rules in bankruptcy court. My  
21 understanding -- I don't practice bankruptcy, but my  
22 understanding is that a municipality within the bankruptcy  
23 practice rules would include things such as sub-entities  
24 of local governments; so it's not a question of taking  
25 liberality but rather -- I'd have to defer to the

1 bankruptcy lawyer, but my understanding is that it's  
2 perfectly appropriate to deal with the sub-entity. We do  
3 that for the hospital. Their financing is a sub-entity  
4 financially of Barnwell County.

5 I believe it really goes back to the distinction I  
6 attempted to make earlier that the prohibitions on dual  
7 office-holding even with the case that Mr. Lewis -- I'm  
8 sorry; the Attorney General's opinion that Mr. Lewis cited  
9 for February of 2007 I think the court recognized the  
10 differences between that and this right now. There would  
11 be dual office-holding between Barnwell City Council and  
12 Barnwell County Council or Barnwell City Council and the  
13 hospital board.

14 The way it appears to be the correct interpretation  
15 is a vertical line from the county council down to  
16 hospital board; so you don't have any territorial  
17 expansion or amassing of power that way, but if one were  
18 to be on hospital board and city council, then you would  
19 have the horizontal amassing of power and control. I  
20 think that's a crucial distinction.

21 Your Honor, I believe with respect to the standing  
22 under Sloan we had cited Trask which my recollection -- I  
23 looked at Sloan, although Sloan I think was a Supreme  
24 Court opinion and Trask a Court of Appeals opinion, but  
25 the Trask opinion is subsequent to -- subsequent to the

1 Sloan case and it recognizes essentially the basis for  
2 recognizing you still have to have some sort of  
3 demonstrable stake in the outcome or some sort of  
4 standing.

5 Bear with me one moment, Your Honor. Going back to  
6 the question -- I think Your Honor had a question during  
7 Mr. Lewis' presentation concerning so after 1988 the  
8 county council just continued the hospital board. That's  
9 -- There is a two-year gap in there. Essentially, in 1986  
10 the hospital board was canceled or discontinued and then  
11 for two years county council operated the hospital and  
12 then in 1988 by the ordinance that we referred to the new  
13 hospital board was created.

14 With that I think I've covered everything that I  
15 intended to by way of reply.

16 THE COURT: Okay. Thank you, sir.

17 And, Mr. Lewis, just on that one issue you mentioned  
18 about, there was a two-year gap where the county council  
19 ran the hospital?

20 MR. LEWIS: I don't --

21 THE COURT: You don't know?

22 THE COURT: I don't know.

23 MR. PEEPLES: I can explain that.

24 MR. LEWIS: I would say I don't think they would tell  
25 us something that could be checked out so easily and not

1 be truthful.

2 THE COURT: Okay.

3 MR. LEWIS: I don't know that because, you know, we  
4 just got it yesterday.

5 MR. PEEPLES: If Your Honor please, I can explain  
6 that if you'd like.

7 THE COURT: Well, that's okay. Thank you, sir.

8 MR. PEEPLES: All right.

9 THE COURT: Now I've got the briefs. Is there any  
10 reason for me to -- from either one of y'all's perspective  
11 that I need any more information?

12 MR. LEWIS: If you have any particular area because  
13 of the little time we had that you'd like some more  
14 information on we'll be glad to do it.

15 THE COURT: Okay. If after I finish going back over  
16 y'all's briefs and checking the law and reading the  
17 complaints and whatnot I'll get back in touch with y'all  
18 if I have any further questions. Thank you.

19 MR. KULMALA: Your Honor, just for certain -- we  
20 don't want -- it's a number of issues and if they feel  
21 like they need more time to expand or brief, you know,  
22 we're more than willing to go along with that.

23 THE COURT: Okay. Okay. Right now I believe it's --  
24 if I don't have any questions y'all are fine with me  
25 deciding on what I got is what I was told.

1 MR. LEWIS: Yes, sir.

2 THE COURT: Okay. All right. Thank y'all.

3 (Whereupon, a break was taken.)

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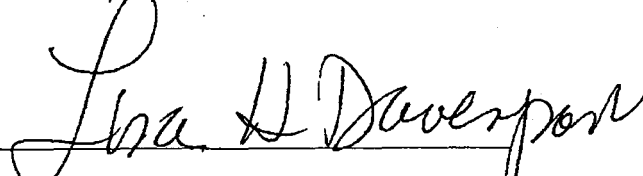
CERTIFICATE OF REPORTER

State of South Carolina )  
County of Aiken )

I, Lisa H. Davenport, Official Court Reporter for the  
Second Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete Transcript of Record of the proceedings had and  
evidence introduced in the trial of the captioned case,  
relative to appeal, in the Court of Common Pleas for  
Barnwell County, South Carolina, on the 9th day of  
February, 2012.

I do further certify that I am neither of kin,  
counsel nor interest to any party hereto.

June 3, 2012

  
Lisa H. Davenport, Court Reporter

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

---

Case No. 11-CP-06-476

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Don Alexander, Carolyne Williams, Georgia F. Fields,  
William R. "Bob" Dixon, Colonel Joe H. Zorn, Jr., Melanie  
Wright, and Dr. M.O. Khan, ..... Plaintiffs/Appellants,

v.

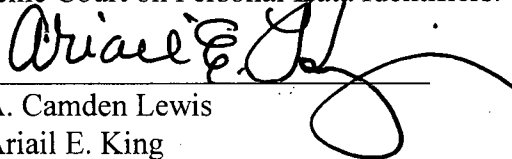
Freddie Houston, David Kenner, Keith Sloan, Lowell Jowers, Sr.,  
Joe Smith, Harold Buckmon, and Travis Black, individually and in  
their capacity as members of Barnwell County Council ..... Defendants/Respondents.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the Record on Appeal contains all material proposed to  
included by any of the parties and not any other material, and that Appellant has complied with  
the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers.



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STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BARNWELL COUNTY  
Court of Common Pleas

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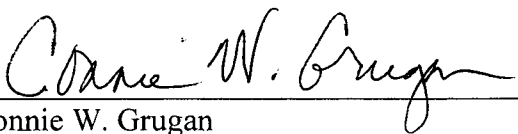
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I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P.,  
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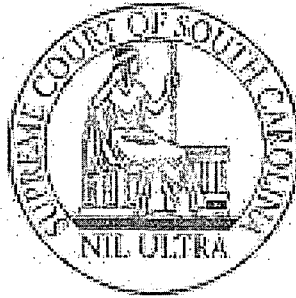
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