THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

Honorable J.C Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2018-000332

Stephen G. Brock, ...Appellant

v.

Town of Mount Pleasant .....Respondent

REPLY OF APPELLANT

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January 23, 2019

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ARGUMENTS

1. **RESPONDENT MISCHARACTERIZES THE FACTS OF THE CASE**

2. **RESPONDENT MISCHARACTERIZES SPECIAL MEETINGS AND APPLICATION OF RULES OF ORDER**

3. **RESPONDENT MISCHARACTERIZES THE PROCESS FOR INITIATION OF ORDINANCE AND APPLICABLE RULES OF ORDER**

RESPONDENT MISCHARACTERIZES THE FACTS OF THE CASE

Respondent's Initial Brief minimizes, ignores, and misstates facts and legal issues to support the contention that in the creation of dozens of amendments to the Zoning Code and Land Development Regulations of the Town of Mt. Pleasant, Respondent "touched all the bases". Additionally, Respondent proposes that its rules of order were consistently followed. Respondent's positions on several issues are in such contrast to the facts that they stand as evidence of questions of material fact for a jury.

Respondent's Initial Brief ends with the specific claim that the amendments at issue were "properly enacted" and that there were "no defects in the process...". At the same time, Respondent would lay an anchor to windward with the claim that if there are defects, they are forgiven under the Doctrine of Substantial Compliance (Respondent's Brief Pages 5&9.) Substantial compliance involving "directory" provisions of a statute is distinguished from mandatory (statutory) provisions. Both cases relied on in Respondent's Brief (page 9) support Appellant's argument rather than its own, to wit, that while "directory" language may be subject to a finding of substantial compliance, statutory language is not:

> The provisions of the statute with reference to the time of filing are directory rather then mandatory (emphasis added)...We should not, because of a merely technical failure to comply with a directory provision of the statute, deny the candidate the fruits of victory. (Lovelle v. Thornton 106 S.E.2d 531(S.C.1959)
>
> Nonobservance of mere directory provisions, slight irregularities, immaterial variances...will be disregarded where there is substantial compliance with the requirements. (Lathem v. City of Greenville 256 S.C. 586, 183 S.E.2d 455 (1971) citing 14 E. McQuillan, Law of Municipal Corporations, Sec. 38-175 (1970 rev. vol.)
>
> The district court's use of the substantial compliance doctrine in the face of ordinances that are expressly mandatory was erroneous. While substantial compliance with matters In which a municipality has discretion may indeed suffice, it does not when the

municipality itself has legislatively removed any such discretion. The fundamental consideration in interpreting legislation, whether at the state or local level, is legislative intent. (Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1030 (Utah 1983).

Application of the substantial compliance doctrine where the ordinances at issue are explicitly mandatory contravenes the unmistakable intent of those ordinances. (Springville Cit. for a Btr. Comm. v. Springville 979 P.2d 332 (Utah 1999)

The *doctrine* of *substantial compliance*..."cannot cure total omission of an essential element from the claim or remedy...". (Loehr v. Ventura County Community College Dist. (1983) 147 Cal.App.3d 1071, 1083 [195 Cal.Rptr. 576] (Loehr).

The doctrine of substantial compliance can have no application in the context of a clear statutory prerequisite that is known to the party seeking to apply the doctrine. (Bassei v. United States, 632 F 3d, 1145 (9th Cir. 2011)

Perfect compliance and substantial compliance are competing claims. Moreover, a claim to substantial compliance is *defacto* recognition by Respondent of the existence of the "scintilla of evidence" necessary to defeat summary judgment on a mandatory requirement.

As defined in the Mt. Pleasant Code of Ordinances (§156.006)(D) (R.p.83) "The term SHALL is always mandatory, and the word MAY is "permissive". (emphasis is contained in the original)

Throughout the ordinance-driven process of amendment-(Section 156.031 (R.pps.83-84) Zoning Code) as detailed in Appellant's Initial Brief, the word "shall" accompanies every step of that process beginning with submission to the Planning Commission and culminating in its report and recommendation and action by Town Council (§156.031C-F). The corresponding statute (Comprehensive Planning Enabling Act – (§6-29-760)(A) (R.p.74) mirrors the ordinance providing that the Planning Commission "shall have a time prescribed in the ordinance... within which to

submit its report and recommendation". Criteria for amendment are presented by the Ordinance providing that the Commission "shall" consider those criteria in preparing its report and recommendation.

The result of the mandatory process of amendment is avoidance of "haphazard or thoughtless decisions" as expressed by our Supreme Court (I'On v. Town of Mt. Pleasant 526 S.E. 2d, 716 S.C. 2000 commenting on the Comprehensive Planning Enabling Act). Thoughtful zoning and land development serves the interests of the citizens of any jurisdiction with the tangential value of protecting the Town from legal challenges while creating historical record useful for deciding future zoning law. Four of the seven mandatory steps in the Town's Zoning Code amendment process that lead directly to the mandatory report and recommendation were ignored. The only steps accomplished by Town Council were notice and submission to the Planning Commission for public hearing. (Order p3) (R.p.4). As the minutes of the Planning Commission August 24, 2016, affirm, Commission failed to do its job and Town Council failed to require the lawful process for amendment. Remand was available as a remedy to secure the report and recommendation required by law.

Despite the clear language of the Zoning Ordinance regarding the Recommendation, Respondent expended considerable space (Respondent's Brief -pages 5-7) to inveigh against the perils of a "written" Recommendation from the Planning Commission. The exercise served only to raise the question whether Respondent knows the lawful process of amendment.

As briefly as possible for correction, from Appellant's experience on the Commission witnessing and personally formulating reports and recommendations, the findings of the Commission are expected to be incorporated into the motion for approval or disapproval.

Published minutes of the meeting provide additional material for Town Council from discussion among members of the Commission and comments from the public.

On the subject of amendment of the Land Use Regulations, Respondent notes that the statute does not require any action by the Planning Commission on the Land Development Regulations; however, Respondent failed to mention that approval by the Planning Commission is required by the Land Development Regulations. (§155.087) A public hearing is not required of the Commission for amendment of the Land Development Regulations, however, the amendments were inserted in the public hearing for the Zoning Code amendments without notice. The notice for the August 24, 2016, Planning Commission's special meeting and public hearing specifically excluded the Regulations from the Commission public hearing. Unnoticed for the public hearing before the Commission and not voted on as a separate issue, those amendments are of questionable standing and further reflective of the haphazard approach to zoning and land use by Respondent.

Respondent claims that it was "not the intention of the amendments" to take away powers of the Planning Commission. Intent is irrelevant in light of the fact that what were once public processes before the Commission - presentation and approval of preliminary and final plats - are now secreted within the Planning Department with no public exposure. Authority was taken from the Planning Commission; power was taken from the citizens of Mount Pleasant who no longer will even know when plans are submitted, much less what the Plans propose. Respondent's tepid affirmation that "public participation is good" supports Appellant's position, however, the Town's stated belief is contradicted by its actions on this and other matters of the amendments.

Respondent would place the burden of Appellant to prove that the Planning Commission did not consider the criteria for amendments to the Zoning Code. The minutes of the August 24,

2016, Planning Commission meeting contain no mention of any criteria considered, nor the mandatory report based on consideration of the criteria for amendment and the recommendation itself. Quite simply, Respondent offers no evidence of completion of the mandatory process of amendment.

RESPONDENT MISCHARACTERIZES SPECIAL MEETINGS AND APPLICATION OF RULES OF ORDER

Respondent's analysis of Appellant's position on special meetings and related reference to special meetings in Robert's Rules of Order (RRO) is inaccurate. Respondent misperceives the instruction of RRO on special meetings. As defined by RRO, "a meeting is a single official gathering of members for a length of time from which there is no cessation the proceedings".... (RRO Newly Revised 11th Edition, Chapter IV, §8) (R.p118). A session is a meeting or series of connected meetings devoted to a single order business, program, agenda, or announced purpose"...(id at page 82, line 6) Regardless of which might be involved, Roberts is clear, "The reason for special meetings is to deal with matters they may arise between regular meetings and that require action by the society before the next regular meeting...".

Public bodies routinely adopt RRO, often with little subsequent interest. That does not excuse any public body from abiding by those procedures relevant to its activities not barred by state law. In this case, a 3PM Special Meeting of the Mt. Pleasant Planning Commission, with a Public Hearing on its agenda, convened on August 24, 2016. On that same date, two hours later followed the regular monthly meeting of the Commission at 5PM. Given the purpose of a special meeting, the meeting was clearly a violation of its published Rules of Order. No credible rationale has been offered for the scheduling.

As to the explanations of why 3 o'clock public hearing might be just as appropriate as a hearing 5 o'clock - the regularly scheduled time of planning commission meetings - Respondent suggests various hypothetical conditions, including convenience for local developers and land planning companies who might find 3 PM a more convenient time. Common sense answers the question whether 5pm is more convenient for the public at large than 3pm. Among those who could not attend would teachers and mothers of school-age children. Disregarded in the rationalization of 3pm convenience are those who work at an hourly wage. Respondent offers that "public participation is good," and "should be encouraged", but Respondent goes on to find that public participation is "only one factor to take into consideration". It is, in fact, the preeminent consideration for a "**public**" (emphasis added) hearing. Evidence of the value of public participation by Respondent Town of Mt. Pleasant is well-expressed by this case.

RESPONDENT MISCHARTERIZES THE PROCESS FOR INITIATION OF ORDINANCE AND APPLICABLE RULES OF ORDER

On the matter of the origin of the amendments, Respondent offers that even if there is some evidence that the ordinance was initiated by the Planning and Development Committee, that committee is comprised of four members of Council who have the authority to introduce ordinances. There is no question that any member of Council may introduce any matter to Council as explained in Appelant's Initial Brief. That fact has nothing to do with this case. Introduction of an any matter has a process in Town Council's Rules of Order and does not suggest that a committee (without a quorum) can perform any action reserved for Town Council.

Respondent further finds that there is no case law to support overturning an ordinance based on who proposed the ordinance. There is case law for overturning an ordinance adopted illegally.

> ...non-compliance with directory language creates a "voidable" transaction, noncompliance with mandatory provisions renders the transaction "*void ab initio*" (Fiskin v. HiAcres, Inc., 462 Pa. 309,341,A.2d 95 (1975);

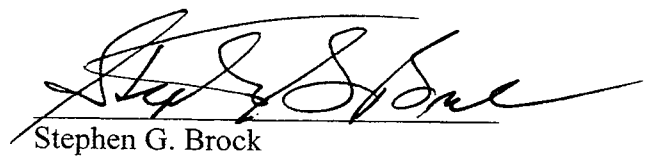
In a South Carolina Freedom of Information Act (FOIA), a vote on a business license ordinance was overturned when it was not approved in an open meeting. (Business License Opposition Comm. v. Sumter Co., 311 S.C. 24, S.E. 2d 24 (S.C. 1992). It is difficult to see any substantial difference in the FOIA case and this one. In both cases, ordinances were created outside lawful process.

As for the presumption that agenda item being presumed to have been placed on the agenda by someone with authority, it is unclear whose presumption this might be, but "someone with authority" is not always someone acting lawfully. Further, the premise that an approving vote at a noticed meeting can overcome failed, lawful processes leading to that vote is not an admirable standard for government at any level.

CONCLUSION

Based on the foregoing, the lower court's order should be reversed.

Respectfully submitted,



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November 3, 2018