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

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SC Court of Appeals

Appellate Case No. 2018-000332

Stephen G. Brock..Appellant

Town of Mt. Pleasant..Respondent

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Brock initiated a lawsuit on December 9, 2016, and an amended complaint on December 14, 2016, to challenge newly passed Ordinance 16082, which made changes to the zoning and land development sections of the Town of Mount Pleasant's Code of Ordinances. The defendant timely answered February 12, 2017. Defendant filed a motion for summary judgment on June 6, 2017, which was heard by the Honorable J.C. Nicholson, Jr., on September 20, 2017. Judge Nicholson granted summary judgment in favor of the Town on November 8, 2017. Plaintiff filed a motion to alter or amend on December 18, 2017, which was denied on February 9, 2018. The Appellant filed his notice of appeal within 30 days on February 26, 2018.

FACTS

The Town of Mount Pleasant Planning Staff determined that the process of reviewing certain zoning and subdivision and land planning matters could be improved. A series of amendments were prepared with respect to Land Development regulations found in Chapter 155 of the Mount Pleasant Code of Ordinances, and also to the Zoning Code, which is located in Chapter 156 of the Mount Pleasant Code of Ordinances. Generally speaking, land development regulations involve requirements for plats, subdivisions, streets, sewers, and storm water drainage whereas zoning ordinances involve allowable land uses, setbacks, variances, and conditional uses.

Because state law sets forth different procedural requirements to make changes in the zoning code versus the land development code, the Town set forth to satisfy the requirements of each via two separate paths.

State law requires a zoning change to go to the Planning Commission for recommended approval and a public hearing be held by the Planning Commission with

at least 15 days' notice of the date and time of the meeting published in the newspaper. In contrast, land development ordinance changes require 30 days' notice of a public hearing, do not specify the body that must conduct the public hearing, and do not require review by the Planning Commission.

On August 9, 2016, the Town published notice in the Post and Courier that a public hearing would be held on the zoning changes at a special meeting of the Planning Commission at 3:00 PM on Wednesday, August 24, 2016, (Newspaper Notice Aug 9, 2016).

On August 11, 2016, Town published notice in the Post and Courier of a public hearing on the Land Development ordinance amendments at 6:00 PM on September 13, 2016, (Newspaper Notice Aug 11, 2016) (R. p. 122-123).

On August 24, 2016, a public hearing was held as to the amendments to the zoning code. The public hearing was closed, and the Planning Commission, after a brief discussion, voted to recommend approval of the changes (Aug. 24 Minutes of Planning Commission) (R. p. 120-133)

On September 13, 2016, Town Council conducted its public hearing, as previously advertised, following public comments, including those by plaintiff Brock, Town Council voted unanimously to give first reading to the Ordinance, amending both the Land Development sections of the Town Code, as well as the Zoning sections of the Town Code (Sept. 13 Minutes of Council) (R. p. 153-157)

On October 11, 2016, Town Council gave final reading to Ordinance 16082, which made changes to the zoning code and land development code (Oct. 11, 2016 minutes) (R, p. 169, 170)

ARGUMENT

Appellant views the amendments to the Zoning Code and Land Development Code as a fundamental change taking power away from the Planning Commission and vesting it with the Planning Department. However, that was not the intent of the amendments. The amendments were meant to streamline and improve the process without taking any substantive authority away from the Planning Commission. A Mount Pleasant Planning Department staff comment summary describes the effect of the proposed amendments on pages 134 - 135 of the Record on Appeal. The major change is to require more materials to initially be submitted to the Planning Staff with the "Sketch Plan," so planning department staff may make a technical review[1] and require the applicant to make any necessary changes prior to the Planning Commission review. Previously, the technical review comments were being presented to the Planning Commission. This change was expected to give the Planning Commission a more complete and accurate application. In addition, in a number of places, the amendments changed the wording of the ordinance to make clear that a number of approval activities can be done by the Director of Planning or his or her designee.[2] By adding the "or his or her designee" language, some functions can be done even while the Director is out of the office on vacation, and other functions can be delegated to Planning Department staff. However, the amendments were not intended to take away from the Planning Commission the right to approve or disapprove applications. Following the staff review, the Applicant shall submit the Sketch Plan to the

[1] Technical review is generally the process of municipal staff checking an application to see if the application is complete and to determine whether it complies with various ordinances relative to zoning and development. There are a variety of requirements from setbacks, to tree preservation, to storm water requirements, to lot size which must be complied with in the absence of a variance.

[2] State law expressly authorizes procedures by which designated staff may approve submissions (S.C. Code § 6-29-1150).

Planning Commission. See Ordinance Amendments § 155.020. No vested rights are conferred until the Sketch Plans are approve by the Planning Commission. Town Ordinance § 155.020(5)(c). Certain changes were made to increase the tree mitigation required for trees removed by development, and the process was improved. The Appellant challenges the process by which Ordinance 16082 was enacted.

I. THE AMENDMENTS SUFFICIENTLY COMPLIED WITH THE PROCESS.

The Appellant correctly notes Mount Pleasant ordinances---which follow State Code § 6-29-760---provide that changes to the zoning regulations, zoning map, or the governing authority of the Planning Commission shall first be submitted to the Planning Commission for a public hearing, review and recommendation. Town Ordinance § 155.031. State law provides the Planning Commission shall have the time prescribed in the ordinance, which may not be more than 30 days, to submit its "report and recommendation" as to the proposed change. S. C. Code § 6-29-760. State law further provides if no report is submitted within the period prescribed by ordinance, which cannot be more than 30 days, the Planning Commission is deemed to have been approved. Id. Town of Mount Pleasant ordinances track state law and provide the Planning Commission 30 days to submit its "report and recommendation" to Town Council, and that failure to act within 30 days constitutes approval. Mount Pleasant Town Ordinance § 155.031.

Appellant wants to read state statute and Town of Mount Pleasant ordinances to require the Planning Commission to prepare a formal written report and written recommendations to submit to the Town Council. In response, the Town would argue: 1) no law or ordinance requires a written report; 2) a written report is neither the standard practice, nor a reasonable expectation; 3) if a written report is required, the failure to

submit one within 30 days would be an automatic approval rendering moot Appellant's argument; and 4) substantial compliance is sufficient and occurred here.

The Appellant envisions a written report. However, neither Town ordinance, nor state law use the word "written" when discussing the word report. The word "report" does not itself imply something in writing. A report is variously defined and care must be used to find the proper context, but a report can clearly be a written or verbal process. The Oxford dictionary online defines a report as "a spoken or written account of something that one has observed, heard, done or investigated."[3] It has also been defined as "to give a description of something or information about something to someone"[4] as in the sentence, "We called the insurance company to report the theft." Also, in the parlance of government, it is not uncommon for the word "report" to be used to describe returning a proposed law to the legislative body for action, such as when a committee reports out a bill to the full body. In the present case, prior to the vote, Mount Pleasant Planning Commission member Ms. Smith stated, "These changes should mean that the applicant will be more diligent in having a better and complete project submittal," (R. p. 133.) And another Planning Commission member, Mr. McNeill, stated, "If a bond reduction is allowed, there might be less of an incentive to complete the mitigation," (R. p. 133). The decision of the Planning Commission to approve was unanimous. (R. p. 133)

Of course, if a written report is required by law and was not done in this case, then the request was deemed approved without a report after 30 days. Plaintiff cannot have it both ways. In this case, Town Council gave final reading to the Ordinance amendment on October 11, 2016, more than 30 days after consideration and approval to the Planning

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[3] Oxford Dictionaries online. https://Oxforddictionaries.com
[4] Cambridge Dictionary online. https://dictionary.cambridge.org/us/

Commission. So, the absence of a written report does not make any difference. However, it would be a bad ruling to require written reports from planning commissions for several reasons.

If the Court were to declare the present zoning amendments invalid because of the absence of a written report, or if it simply declared that a written report was required, it would set up an absurd paradox in this case and many others in Mount Pleasant and across the state. State law and Town Ordinance treat the failure to act as an approval. Because planning commissions would be hard-pressed to have a written decision in 30 days, there would be many situations where the vote of the planning commission was against the project or change; but it would have to be treated as a favorable recommendation due to the absence of a written report if the law requires written reports. Certainly such an absurd result was not intended by the Legislature. There are a multitude of reasons why a written report within 30 days would likely not be completed.

Planning commissions are comprised of citizen volunteers. In addition to the burden on volunteers to prepare written reports, planning commissions in South Carolina typically meet once per month on a specified day of the month referenced by the week and day---i.e. the third Tuesday of every month. Even if one citizen member of the Planning Commission was tasked to prepare some kind of written report by the next meeting, the matter would frequently not come back before the Planning Commission for a vote for more than thirty days depending on how the days of the week fall in the month. If a change needed to be made, it would certainly not be prepared within 30 days. And this assumes that the members of the commission all acted of one mind. Frequently, members of a body vote the same way for different reasons, which are all perfectly valid.

Instead, it is more reasonable to believe that a vote of the Planning Commission would be a sufficient report and recommendation. The Appellant makes the argument that City Council could have sent the matter back for further analysis. On this point, the Town agrees. Brock made that same suggestion to Town Council at its meeting. However, Town Council did not vote to send the matter back. Town Council voted to give first reading to the changes, and at its next meeting gave final reading to the changes.

Plaintiff argues the amendment process was also insufficient because Town Ordinance sets forth the criteria to be used in evaluating a zoning change and Appellant presumes from the lack of a written report that the Planning Commission did not consider the criteria set forth. However, the burden is not on the Town to show that the Commission did consider these criteria, it is the burden of the Appellant who is challenging the ordinance to negate the presumption of validity. McMaster v. Columbia Bd of Zoning Appeals, 395 S.C. 499, 719 S.E.2d 660 (2011). Second, unless an ordinance or statute specifically requires a decision maker to make an express finding as to each criteria, it is generally understood specific findings as to each subpart are not required and it is presumed the decisions maker did utilize the correct criteria.[5] Third, the list of considerations specified in Town Ordinance § 156.031(C)(1-7) are generally applicable to a change of zoning on a particular property and do not fit well to an ordinance requesting only procedural changes anyway.

The appellant also argues Town Ordinance § 156.031 (D) "Declaration of Policy" creates another set of standards, and the Planning Commission must make written findings as to those as well. But the ordinance does not specify findings must be made

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[5] Compare National Corp. v. South Carolina Dep't of Health and Environmental Control, 298 S.C. 373, 380 S.E. 2d 841 (1989) discussing former DHEC regulation 61-15, Section 501 "the Department shall not grant a Certificate of Need . . . unless . . (b) the Department makes each of the following findings in writing . . ."

by the Planning Commission on those specific criteria. Once again, if the statute or ordinance does not require specific findings as to a certain criteria, then the body is generally presumed to have followed the criteria and specific findings are not required. Second, those are policy principles, not criteria to invalidate zoning changes. And those policy statements are also more applicable to a change in zoning as to a particular property than a change in the procedures of the Planning Commission and staff. However, even if this court were to conclude a procedural zoning change of this type has to fit within one of the reasons to change the zoning expressed in the "Declaration of Policy" of Town Ordinance § 156.031(D), the present amendments would fit well as a change necessary to implement the comprehensive plan, and the amendments would also fit nicely as any changes necessary to recognize "changes in technology . . . or manner of doing business." The zoning code changes being challenged will help streamline applications and improve the quality of submissions to the Planning Commission and should allow the Planning Commission to focus on bigger picture issues of compliance with the Comprehensive Plan as opposed to technical issues. Streamlining and efficiency are constituent with changes in the manner of doing business.

Changes to land development ordinances do not require review by the Planning Commission at all per South Carolina Code § 6-29-1130. Therefore, the existence of a written report, or the lack thereof, is irrelevant to the changes made to the land development ordinances. Appellant makes the argument planning commissions are well-equipped to oversee the administration of land development regulations which do relate to land use. However, the South Carolina Legislature chose to have a separate set of statutes applicable to land development ordinances. See S.C. Code § 6-29-1110 et. seq.

And those ordinances do not reference any role of the Planning Commission as part of the process of amending land development ordinances. S.C. Code § 6-29-1130(B).

Even if the Court determined that a written report was technically required for either zoning changes or land development regulation changes, the doctrine of substantial compliance should apply. Lathem v. Greenville, 256 S.C. 586, 183 S.E.2d 455 (1971); Lovelle v. Thorton, 234 S.C. 21, 106 S.E.2d 531 (1959).

II. AMENDMENTS TO THE ZONING CODE AND LAND DEVELOPMENT CODE WERE ENACTED CONSITENT WITH PRINCIPLES OF DUE PROCESS AND MEANINGFUL NOTICE.

Appellant argues the notices of public hearings in this case were inadequate because they lacked a detailed description of the amendments. But the statutes and ordinances do not require any detailed description of the proposed changes to be included in the notice of public hearing. In recognition of the weakness in his argument, Appellant concedes it was "arguably . . not necessary . . to include any description of the amendment," but he contends because the Town chose to describe the amendments, it accepted an obligation to be open and forthcoming (App. Brief p. 17-18). First, the Appellant does not cite any authority for this principle. Second, Town takes the position the notice of public hearing were not only legally sufficient, they were also fair. They basically referenced the section of the ordinance that was to be changed and contained a few words of description of the changes.

As the zoning code changes, the public hearing notice was published in the newspaper on August 9, 2016, and states:

> *PUBLIC HEARING TOWN OF MOUNT PLEASANT PLANNING COMMISSION*
> *"The Planning Commission will hold a special meeting at 3 pm on Wednesday, August 24, 2016, Council Chambers, Mount Pleasant Municipal Complex 100 Ann Edwards Lane, to consider public*

> *hearing items #1 and #2 listed below . . . . Documents relating to the same are available for public inspection at the office of the Department of Planning and Development (temporarily located at 1255 Sweetgrass Basket Parkway) during normal business hours from 8:00 AM to 4:30 PM.*
>
> . . .
>
> *2. Proposal to amend Zoning Code Sections 156.007, 156.049, 156.054, 156.224, 156.305, 156.318 and 156.319 by adding new definitions; adding requirements pertaining to a new Preliminary Staff Review requirement for Sketch Plans, Preliminary Plats, Impact Assessments, and Planned Development Districts; and other modifications as needed for consistency with the aforementioned amendments. Town Council will hold the required public hearing for the associated modifications to the Land Development Regulations.* (R. p. 122-123 (small print and larger print excerpt))

As to the Land Development Regulation amendments, the public hearing notice was published in the newspaper August 11, 2016, and states:

> The Mount Pleasant Town Council will conduct a public hearing on September 13, 2016, at 6:00 PM, pursuant to the applicable South Carolina State Statutes and Mount Pleasant Code of Ordinances, in Council Chambers, at the Mount Pleasant Municipal Complex, 100 Ann Edwards Lane, Mount Pleasant, SC regarding a proposal to amend the Town of Mount Pleasant Code of Ordinances, Chapter 155, Land Development Regulations, as follows: addition of definitions to Section 155.004, modifications to the submittal process for Sketch Plans described in §§ 155.021 and 155.022, modifications to the submittal process for Preliminary Plats described in §§ 155.023; modifications to §§ 155.024, 155.025, 155.026, ND 155.027 concerning Final Plat submittals; other minor modifications to §§ 155.005, 155.020, 155.028, 155.029, 155.044, 155.048, 155.049, 155.050, 155.051, 155.052, 155.053, 155.072, 155.073, 155.086, 155.999, Appendix A, and Appendix B; and other modifications as needed for consistency with the aforementioned amendments. (R. p. 139, 142 (small print, larger print excerpt))

As can be seen, these notices give sufficient notice to the public that there will be a public hearing at a specific time and place to discuss changes to certain sections of the Zoning and Land Development ordinances. That is all that is required by statute. As to

Land Development ordinance changes, South Carolina Code § 6-29-1130 (B) requires newspaper publication of a notice at least 30 days in advance of the time and place of a public hearing. The hearing notice was published on August 11, 2016, for a public hearing on September 13, 2016. As to the Zoning code amendments, South Carolina Code § 6-29-760 (A) requires a notice of public hearing to be published at least fifteen days before a public hearing. The hearing notice was published August 9, 2016, for a meeting on August 24, 2016. Neither statute requires publication of the text of the statute, a short summary of the changes, or an analysis of the changes. It would be quite strange (and expensive) to publish any summary or analysis of the proposed changes in the newspaper notice.

At the summary judgment hearing, Respondent also seemingly conceded the notice was not technically deficient, but he believed that in conjunction with other arguments, the totality was problematic. After the Judge noted there is no statute that requires publication of layman's description of what changes are under consideration, Mr. Brock stated, "I'm not bringing action to say the notice should be thrown out or that the notice or any part of that (sic). It's not great, and, by itself, it's really a minimum. If you tack it on to every other violation of the process, all the way through and including the vote of counsel, you have a thwarted process. . . ." (Hearing Transcript, R. p. 59-60).

Appellant also does not understand or choses to misinterpret Respondent's counsel's comments to Judge Nicholson regarding the information that was available. In response to a discussion in the hearing about whether a citizen would have access to the ordinance or know what is being considered from reading the notice, counsel for the Town simply noted there is more information available online than there ever was ten or twenty years ago. Counsel pointed out that the Planning Commission agenda contained

hyperlinks to the text of the ordinance and a staff description of the amendment's purpose (Transcript, R. p. 62-63). That agenda and the hyperlinks are referenced in the agenda can be found at page 127 of the record on appeal (Planning Commission Agenda p. 5 of 5). However, the Town is not arguing that this information substitutes for the 15 and 30 day newspaper notice of the time and date of the public hearing. Counsel was simply making the observation that so much more is available online in the present day than was available in years past. But it is for the Legislature to decide when internet use has become so prevalent that the notice statutes should be changed to require publication in the newspaper of a hyperlink or website where the text of an amendment or other materials can be found. There is no such requirement now.

Finally, the Appellant was aware of the changes and spoke out against the changes. He does not have standing or grounds to claim the notice was insufficient.

III. MOUNT PLEASANT DID NOT FAIL TO CONFORM TO ITS RULES OF ORDER.

A. Response to Initiation of the Ordinance by a Committee of Council.

First, there is no factual basis in the record to support the plaintiff's position that the ordinance was initiated by a committee of council. This Ordinance was initiated by the Planning Department as is expressly authorized by § 30.51 of the Code of Ordinances. It was reviewed by the Planning and Development Committee of City Council which suggested the ordinance be given the appropriate public hearings. The Planning Committee's decision to have public hearings is different from a committee of Town Council originating the ordinance.

Second, even if there is some evidence the ordinance was initiated by the Planning and Development Committee of City Council, that committee is comprised of four City

Council members who each have the authority to introduce ordinances under § 30.51 of the Code of Ordinances of Mount Pleasant.

Third, there is no jurisprudence your undersigned counsel has located anywhere in the country which has overturned an ordinance based on who proposed the ordinance. Laws restricting introduction of bills to members of the body or certain other limited groups of persons typically serve the purpose of preventing a member of the public or a special interest group from demanding a matter on an agenda. However, if something is put on the agenda, it is not only presumed to be by a person with authority, it would be for the body to reject the proposal if improperly submitted. An ordinance that receives the proper number of votes at a properly noticed public meeting passes and becomes the law without regard to who proposed the idea. Rules relating to who may put matters on the agenda or who may propose legislation are typically internal rules that the members of the body may raise to get the right to have matters brought to the entire body. They are not rules for non-members to assert to undo otherwise validly enacted ordinances.

B. The Appellant's Argument Regarding Special Meetings Is Not Correct.

The plaintiff makes the argument a "special meeting" of a public body should only be able to consider those matters which urgently require action before the next regular meeting. Appellant then argues a special meeting should not have been used by the Planning Commission for this matter and further complains the time of the special meeting at 3:00 PM was inconvenient for citizens, and that better public participation could be had at a regular meeting.

The plaintiff quotes some version of Robert's Rules of Order stating special meeting is one called to hear important matters that urgently require action before the next regular meeting. However, that sentence does not appear in the most current

version---Roberts Rules of Order, Newly Revised, 11th Edition (2011). The 11th Edition states at section 9, "A special meeting (or called meeting) is a separate session of a society held at a time different from that of any regular meeting, and convened only to consider one or more items of business specified in the call of the meeting. . . The reason for special meetings is to deal with matters that may rise between regular meetings and that require action by the society before the next regular meeting, or to dedicate an entire session to one or more particular matters" § 9, Particular Types of Business Meetings. Thus, while a special meeting may have to be convened to hear an urgent matter, a special meeting may also be used to address one or more non-emergency matters, including a situation where more time may be necessary to address one or more particular items.

Under Robert's Rules of Order, Newly Revised, 11th Edition, under Chapter XVI entitled Boards and Committees states, "The authority by which a board is constituted commonly prescribes the times at which it shall hold regular meetings, and the procedure by which special meetings of the board can be called; or the board can establish such provisions to the extent it has authority to adopt its own rules § 49, Boards.

Under the Bylaws of the Town of Mount Pleasant Planning Commission, § 1, "Special meetings may be called by the chairman on 24 hours' notice, posted and delivered to all members and the press." https://www.tompsc.com/159/Planning-Commission. There is no contention this was not properly followed.

As to the plaintiff's point that a special meeting at 3:00 PM is inconvenient to the public, there is no evidence to suggest that anyone who wanted to be at the meeting was unable to attend due to the time and date of the meeting. No matter what time a meeting is called, some people may find that time more or less convenient. Persons who have

family obligations or who work an evening shift may find a 3:00 PM time more convenient. Certainly local developers and land planning companies may have suggestions or opinions about changes in procedures for submissions to the Planning Commission, and those persons may find a 3:00 PM meeting time more convenient because it is during "normal business hours." Public participation is good, but public participation is only one factor to take into consideration. The judiciary should not attempt to determine what times of the day are good (or good enough) to have public meetings. Local officials, working in conjunction with the chairman, are in the best position to assess the schedules of the voting members, the time necessary to conduct the meeting, the number of persons who might attend, the types of persons who might be interested in attending, local weather and traffic conditions, and previously scheduled local events to name only a few factors. If a public body begins scheduling meetings at times that are too inconvenient, there are always local elected officials to whom complaints can be made.

CONCLUSION

Ordinance 16082 which made changes to the zoning and land development sections of the Mount Pleasant Code of Ordinances was properly enacted with proper public notices of hearings. There are no defects in the process which would justify an order invalidating the ordinance.

[SIGNATURE ON NEXT PAGE]

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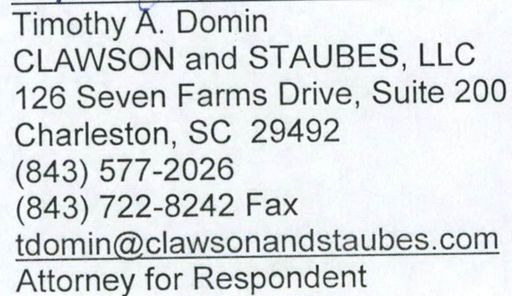
CERTIFICATE OF COUNSEL

I certify that Respondent's Final Brief complies with Rule 211 (b)(2).



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