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The State of South Carolina

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December 21, 1989

Thomas A. Babb, Esquire
Laurens County Attorney
Post Office Box 670
Laurens, South Carolina 29360

Dear Mr. Babb:

By your letter of October 24, 1989, you have advised that two petitions have been submitted to Laurens County Council with respect to holding referenda concerning proposed land use regulations under consideration by the Laurens County Planning Commission and ultimately Laurens County Council. You have inquired about the sufficiency or legality of these petitions and a proposed ordinance under state law. You have asked the following questions with regard thereto:

1. Are petitions to create an ordinance required to set forth the specific terms of the ordinance which is being proposed so that a person signing the petition may have the opportunity to know specifically what he or she is seeking to accomplish in signing the petition?

2. In the event that it is your opinion that the statutes do not require the petition to contain the specific language of the proposed ordinance, are the petitions submitted or either form of them sufficiently definite that Council must act upon the petitions and adopt some form of ordinance submitting the issues of "the proposed land use plan" to a referendum, assuming that a sufficient number of registered electors have signed the petitions?

3. Should the total valid signatures of the two forms of petition be added together or should the two forms of petition be considered separate petitions?

4. Upon the assumption that Council is required to act upon the petitions or either of them, must Council use the form submitted by the "Concerned Citizens," in particular proposition (b)?

After a review of each of the petitions, your specific questions will be addressed.

"Land Use (Zoning) Plan Referendum"

One of the petitions presented to Laurens County Council in August 1989 stated the following:

> WE, THE PEOPLE OF LAURENS COUNTY, PETITION THE LAURENS COUNTY COUNCIL TO HOLD A REFERENDUM ON THE LAND USE (ZONING) PLAN PROPOSED BY THE LAURENS COUNTY PLANNING COMMISSION. WHEREAS, WE, THE PROPERTY OWNERS AND TAX PAYERS OF LAURENS COUNTY, FEEL THE LAND USE (ZONING) PLAN WILL HAVE A GREAT INFLUENCE ON OUR PROPERTY RIGHTS AND TAXES, WE DESIRE A VOICE IN THIS MATTER BY A DIRECT VOTE OF THE PEOPLE THROUGH A REFERENDUM.
> [spaces for signatures followed these words.]
> IF YOU AGREE WITH THIS PETITION, SIGN IT AND HAVE YOUR FRIENDS SIGN IT.

No proposed ordinance was embodied in the petition.

Second Form of Petition

Another form of petition, presented to Laurens County Council with the foregoing petition, contained the following:

> We, the undersigned registered voters of Laurens County, South Carolina do petition the Laurens County Council to pass an ordinance requiring a referendum to be held on the issue of the Proposed Land Use Plan for said county. Incorporated in this petition is the entire proposal under consideration, including zoning, building codes and ordinances.
> [spaces for names and addresses followed.]
> If you are a registered voter and agree that you should be able to vote on this important issue, sign this petition (even if you have signed an earlier version) and ask your friends and neighbors to sign it. Fold so the proper address is showing and MAIL it on or before June 30, 1989.

Following the above was a box which set forth six alleged results when zoning regulations are established. No proposed ordinance was embodied in this petition, though the "entire proposal under consideration" was "incorporated."

Proposed Ordinance

A proposed ordinance was submitted to Laurens County Council along with the above petitions, though it was not embodied in either petition. The proposed ordinance would call for a special election with the following questions submitted to the electorate of Laurens County:

> (a) Shall the Laurens County Council pass an ordinance adopting the proposed land use plan now under consideration for Laurens County?
>
> (b) Should the Laurens County Council be required prior to the enactment of any ordinance establishing land use plans, zoning or building codes to request approval of such ordinance by referendum?

Question 1

The initiative and referendum process by which electors of a county may propose an ordinance to be adopted by their county council, is provided for by Section 4-9-1210 et seq. of the South Carolina Code of Laws (1976). In particular, Section 4-9-1210 provides the following:

> The qualified electors of any county may propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes, and adopt or reject such ordinance at the polls. Any initiated ordinance may be submitted to the council by a petition signed by qualified electors of the county equal in number to at least fifteen percent of the qualified electors of the county.

Your first question is whether the petition presented to council must set forth the proposed ordinance in its entirety. We concur with your conclusion that such is necessary.

Reference must be made to Section 4-9-1230 which, in relevant part, provides:

> If the council shall fail to pass an ordinance proposed by initiative petition or shall pass it in a form substantially different from that set forth in the petition..., the adoption ...of the ordinance concerned shall be submitted to the electors... .[Emphasis added.]

Giving these words their plain and ordinary meanings, Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980), applying such terms literally as there is no ambiguity, Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977), and construing Sections 4-9-1210 and 4-9-1230 together as they are part of the same legislative enactment and are thus in pari materia, Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928), the ordinance is required to be set forth in the petition. If the ordinance is not set forth in the petition, there is no practical way to determine whether the form of an ordinance subsequently adopted by the council differs substantially "from that set forth in the petition."

Generally law is in accord with this conclusion. An ordinance must be reduced to writing before it may be acted upon by a legislative body. St. Louis Southwestern Ry. Co. v. Naples Independent School District, 30 S.W.2d 703 (Tex.Civ.App. 1930); American Construction Co. v. Seelig, 104 Tex. 16, 133 S.W. 429 (1911); Vance v. Town of Pleasanton, 261 S.W. 457 (Tex.Civ.App. 1924); State ex rel. Davis v. Bd. of Commissioners of Newton County, 74 N.E. 1091 (Ind. 1905); State v. Township Committee of Ridgewood, 50 N.J.L. 514, 14 A. 598 (1888). In proposing an ordinance by the initiative and referendum process, the ordinance must be reduced to writing and attached to or made a part of the petition somehow, as stated in Buohl v. Bd. of Commissioners of City of Beverly, 89 N.J.L. 378, 98 A. 270, 270-271 (1916):

> The papers petition for the passage of an ordinance entitled "An ordinance to establish an excise department in the city of Beverly." No copy of the proposed ordinance is attached, nor is there anything to show that any ordinance was called to the attention of the petitioners. So far as appears, the petition would be complied with by the passage of any ordinance, no matter what its contents might be, if only it was entitled as set forth in the petition. The fact that with the four papers constituting the petition there was handed to the clerk a fifth paper containing a draft of an ordinance is immaterial. It is not shown that each petitioner saw and read that draft, or that it was the proposed ordinance each petitioned for. The Legislature was careful to say that the ordinance petitioned for should either be passed without alteration or submitted to the people without alteration. The scheme of the act seems to require that the ordinance without alteration be recommended by the petitioners. This can only be done, as far as we can

> see, by showing that each petitioner knew the contents of the proposed ordinance and petitioned for that very ordinance without alteration. Perhaps a prima facie case would be made by attaching a copy of the proposed ordinance to each paper. ...

See also Palmer v. Benson, 91 P. 579 (Or. 1907) and Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

Here, as in Buohl, a proposed ordinance was handed in to Laurens County Council with papers comprising the petition for referendum. The language of the proposed ordinance does not appear in the body of the petition. One petition references the "proposal under consideration" by Laurens County Council, which proposal has not yet been adopted by council and conceivably could change one or more times after an individual signed the petition or as it is being considered by council. There appears to be no indication that a signer would have known exactly what he was propounding by his signature or that he had actual notice of the terms of any proposed ordinance. For these reasons, the petitions would not meet the requirements of Section 4-9-1210 in that no specific ordinance has been proposed thereby.

In considering the initiative and referendum process vis a vis adoption of zoning or land use regulations, other concerns emerge, as well. The procedure specified by statute to be followed in adoption of land use or zoning regulations do not provide for a referendum such as that contemplated by the petitioners, nor is there any authorization within the applicable statutes for a county council to vary the statutory requirements. See Sections 6-7-730 and 6-7-530 through 6-7-560; see too Section 6-9-10 et seq. as to adoption of building codes by reference to standard building codes. While Section 4-9-1210 appears to permit the proposal of any referendum except one appropriating money or authorizing the levy of taxes, general laws must be taken into account and cannot be set aside by the initiative and referendum process unless permitted by the general law in question; thus, some limits to the process are implicit.

Section 4-9-30 of the Code grants various powers to be exercised by county councils "within the authority granted by the Constitution and subject to the general law of this State... ." A county council is obligated to follow general laws and lacks authority to amend general laws of this State. Thus, an ordinance adopted by a county council which is repugnant to or inconsistent with the Constitution or general laws of this State would be considered void. Cf., Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928); Ops.Atty.Gen. dated December 1, 1986; August 22, 1975;

October 9, 1986; and June 28, 1978. Thus, adoption of an ordinance, whether by initiative and referendum or otherwise, which would vary the general statutory requirements would most probably result in a void ordinance.

One further concern must be addressed. There is a split of authority as to the question of whether adoption of zoning ordinances is a proper subject for the initiative and referendum processes. The two sides of the issue are well-researched in Annot., 72 A.L.R. 3d 991 and Annot., 72 A.L.R. 3d 1030. Many jurisdictions follow the "California" rule as enunciated in San Diego Building Contractors Assn. v. City Council of San Diego, 13 Cal. 3d 205, 529 P.2d 570 (1975), that zoning ordinances could be adopted through the initiative and referendum process. On the other hand, in West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974), it was held that rezoning is an administrative act and as such is not a proper subject for a referendum. In Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (1987), the Court of Appeals declared that South Carolina follows the majority rule that rezoning is a legislative act; the initiative and referendum process and its applicability to zoning was not at issue, however. Thus, an argument can be made that zoning may not be an appropriate subject for the initiative and referendum process.

To summarize the foregoing, it is the opinion of this Office that a petition submitted pursuant to Section 4-9-1210 to initiate the initiative and referendum process must set forth the proposed ordinance within the petition. In addition, any proposed ordinance which would vary the terms of the state Constitution or general law would be void unless such variance should be authorized in the constitutional or statutory provision under consideration.

Question 2

Because we conclude in the first question that the petition must set forth the ordinance being proposed, it is unnecessary to address the second question.

Question 3

Whether the total valid signatures of the two forms of petition should be added together to determine whether the requisite number of signatures has been obtained would be a matter of policy, rather than a legal question. You advised that copies of both petitions were submitted together to Laurens County Council, and both contain references to holding a referendum concerning land use or zoning. It would be preferable that a single proposal be presented on a petition following the same format on each page to remove any doubt that a single proposal is being presented. If Laurens County Council can determine that a single proposal was meant to be presented

by the two forms of the petition, it would be up to that body to decide how to count the signatures. Due to the response to your first question, this issue may be moot, however.

To be of assistance in the future, I am enclosing opinions of this Office dated August 21, 1980 and November 5, 1981, as to format of a petition requesting a referendum. As noted in the opinion of August 21, 1980, because the petitions have already been submitted to council, "the standard to follow would be one of reasonableness. Using this standard it would generally not be reasonable to count signatures on a piece of paper that does not reflect the signatures were for the proposition submitted."

Question 4

Due to the answer to your first question, it is unnecessary to respond further to this question. As noted therein, an ordinance which purports to modify general law, absent authority to make such modifications, would be void. See authorities cited supra.

Section 4-9-30(16) of the Code permits a county council to hold advisory referenda. If Laurens County Council wished to hold an advisory referendum on issues relative to land use or zoning, such would be permissible. Requiring a favorable referendum prior to adoption of land use plans, zoning, or building codes would contravene the requirements of general law and thus would be void.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions