

JUL 22, 2024 09:45 AM

*Mandy Harrison*  
Mandy Harrison, Clerk  
McIntosh County, Georgia

**IN THE SUPERIOR COURT OF MCINTOSH COUNTY  
STATE OF GEORGIA**

**MCINTOSH COUNTY, GEORGIA,** )  
)  
**Petitioner/Plaintiff,** )  
)  
**v.** )  
)  
**JUDGE HAROLD WEBSTER, in his official** )  
**capacity as Probate Court Judge of McIntosh** )  
**County, Georgia** )  
)  
**Respondent/Defendant.** )  
)

**CIVIL ACTION FILE NO.:**

\_\_\_\_\_

**VERIFIED PETITION FOR WRIT OF PROHIBITION  
AND COMPLAINT FOR DECLARATORY RELIEF**

COMES NOW, MCINTOSH COUNTY, GEORGIA (“County” or “Petitioner”), and files this, its Verified Petition for Writ of Prohibition and Complaint for Declaratory Relief against Judge Harold Webster in his official capacity as Probate Court Judge of McIntosh County (“Judge Webster” or “Respondent”), pursuant to O.C.G.A. § 9-6-40, *et seq.*, with respect to petitions for a writ of prohibition, and pursuant to O.C.G.A. § 9-4-1, *et seq.*, with respect to declaratory relief, showing this Honorable Court as follows:

**INTRODUCTION**

1.

This case concerns a fundamental question concerning the nature and structure of local government in the State.

2.

On September 12, 2023, the Board of Commissioners of McIntosh County adopted an amendment to its zoning code that revised the regulations with respect to development on Sapelo Island (“September zoning decision”). A select group of citizens residing on the island, however,

are not happy with that decision. After initially failing to successfully appeal the September zoning decision in the Superior Court, and attempting to renew the action by refiling their claims, they now seek to repeal the decision through a petition and referendum process—a process they contend is authorized by Article IX, § II, ¶ I(b)(2) of the Georgia Constitution. However, that constitutional provision does not authorize such a referendum with respect to zoning decisions.

3.

In further pursuit of relief from the application of the County’s September zoning decision, on July 9, 2024, residents of Sapelo Island filed a petition captioned *In Re: Petition Pursuant to Georgia Constitution Article IX, Section II, Paragraph I(b)(2) for Special Election Concerning McIntosh County’s Amendment of The Zoning Ordinance for the Hog Hammock District of Sapelo Island* (“Referendum Petition”). A copy of the Referendum Petition is attached hereto as Exhibit “A” and incorporated by reference as if fully set forth herein.

4.

The Referendum Petition asks Judge Webster to determine that the Referendum Petition is valid, to issue a call for a special election for the purpose of submitting the County’s September zoning decision to the registered voters of McIntosh County for their approval or rejection (“referendum election”), to set a date for the referendum election and to cause notice of the referendum election to be published. The County is obligated to pay for all costs associated with the referendum election and to provide resources to facilitate the referendum election.

5.

Since the constitutional referendum provision authorizes no such procedure for the September zoning decision at issue, Judge Webster lacks the authority and jurisdiction to take the actions requested in the Referendum Petition. The referendum election requested by the

Referendum Petition would be illegal, and the results would be a nullity. In effect the County will have conducted a “straw vote,” for which it lacks authority to expend public funds.

6.

For this reason, the County files this action seeking intervention by the Superior Court of McIntosh County and other relief to settle the controversy.

### **BACKGROUND**

7.

This Court’s expedited intervention is necessary here. The potential misapplication of the petition and referendum process contained in Article IX, § II, ¶ I(b)(2) of the Georgia Constitution threatens the County and other local governments in this State. As explained below, the Constitution does not allow a referendum election to repeal zoning decisions of the Board of Commissioners, including the September zoning decision that is the subject of the Referendum Petition.

#### ***A. Legal Background***

8.

Under the Constitution of this State, the people have delegated their sovereign authority to public officers who act on behalf of the people. GA. CONST. Article I, § II, ¶ I. That sovereign authority, or “power,” is then divided into three branches of government: the legislative, the judicial, and the executive. GA. CONST. Article I, § II, ¶ III. As for the legislative power, the people have “vested” it in the General Assembly. GA. CONST. Article III, § I, ¶ I. And this vesting of power in the General Assembly has been consistently interpreted to mean that only the General Assembly “has the right to legislate and prescribe the laws of this State.” See *Long v. State*, 202 Ga. 235, 237 (1947).

9.

As a means of facilitating the exercise of its legislative power as well as its duty to govern, the General Assembly created local governments, like counties, and delegated onto such local governments limited aspects of its legislative power. See Troup County Elec. Membership Corp. v. Georgia Power Co., 229 Ga. 348, 352 (1972) (“Counties are subdivisions of the state government to which the state parcels its duty of governing the people.” (internal quotation omitted)).

10.

“Home Rule” is one such delegation of power to local governments. See Kemp v. City of Claxton, 269 Ga. 173, 176 (1998) (“Municipal home rule power is a delegation of the General Assembly’s legislative power to the municipalities.”). Delegations of legislative power have always been closely guarded, and their limits are circumscribed by the Constitution and general law. See, e.g., Long, 202 Ga. at 237; see also Kemp, 269 Ga. at 176 (“Municipal corporations are creations of the state, possessing only those powers that have been granted to them, and allocations of power from the state are strictly construed.”).

11.

The general “Home Rule” power of counties is contained in Article IX, § II, ¶ I of the Constitution (“Home Rule Paragraph”) and confers delegated legislative power. Bd. of Comm’rs of Miller County v. Callan, 290 Ga. 327, 328 (2012).

12.

These delegated powers enable the county governing authority to adopt legislative enactments unaided by the General Assembly. *Id.* The county governing authority may adopt legislation relating to its “property, affairs, and local government,” so long as no provision has been made by “general law” and the legislation is not “inconsistent” with the Constitution or any

“local law” applicable to the county. GA. CONST. Article IX, § II, ¶ I(a); Bd. of Comm’rs of Miller County, 290 Ga. at 328–29.

13.

In addition, counties are able to amend the local Acts establishing their authority through a resolution or ordinance duly adopted at two regular meetings of the county governing authority. GA. CONST. Article IX, § II, ¶ I(b)(1); Bd. of Comm’rs of Miller County, 290 Ga. at 329.

14.

In addition to the governing authority’s ability to amend local Acts, decisions and acts of a county governing authority pursuant to its general Home Rule Powers pursuant to GA. CONST. Article IX, § II, ¶ I(a) and I(b)(1), may be amended or repealed through a petition and referendum process. GA. CONST. Article IX, § II, ¶ I(b)(2) (“Referendum Clause”). This process is what is at issue in this case.

15.

The petition and referendum process allows a county’s citizens to amend or repeal decisions of the county by filing a petition (containing a requisite number of signatures) with the judge of the probate court calling for a referendum election on the proposed repeal. The judge then determines the “validity” of such petition within 60 days of its filing and, if found valid, “it shall be his duty to call for an election for the purpose of submitting” the proposed “amendment or repeal.” GA. CONST. Article IX, § II, ¶ I(b)(2). The subsection further specifies that the referendum election shall be held between 60 and 90 days after the filing of the petition.

16.

The county shall bear the expense of the referendum election, and it shall be the duty of the probate judge to hold and conduct such referendum election. To that end, the probate court is

obligated “to canvass the returns and declare and certify the result of the election” to the county, and then “certify the result thereof to the Secretary of State.” GA. CONST. Article IX, § II, ¶ I(b)(2).

17.

Critically, though, no “amendment ... shall be valid if inconsistent with any provision of this Constitution or if provision has been made thereafter by general law.” GA. CONST. Article IX, § II, ¶ I(b)(2).

18.

Relevant to this particular case, the General Assembly has provided by general law for procedures by which zoning decisions must be made. This general law is typically referred to as the Zoning Procedures Law, O.C.G.A. § 36-66-1, et seq.

**i. Referendum Clause Only Has Applicability to Acts Taken pursuant to Home Rule Powers granted in GA. CONST Article IX, § II, ¶1 (a) and (b)**

19.

Separate and apart from the Home Rule powers of Paragraph 1, the Constitution delegates the power of planning and zoning to cities and counties. GA. CONST Art IX, § II, ¶ IV (“Paragraph IV”) (“The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. The authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.”).

20.

Although the petition and referendum process in Paragraph 1(b)(2) was the subject of the Supreme Court’s decision in *Camden County v. Sweatt*, 315 Ga. 498 (2023), the underlying subject matter sought to be reversed in *Camden* using the petition and referendum process was the adoption

of a resolution pursuant to the general Home Rule powers granted pursuant to Paragraph I(a) rather than the exercise of zoning authority pursuant to Paragraph IV.

21.

The Referendum Clause declares that it is limited to amending or repealing: (i) ordinances, resolutions, or regulations adopted under GA. CONST Article IX, § II, ¶ I(a); or (ii) amendments to local acts under GA. CONST Article IX, § II, ¶ I(b). See GA. CONST Article IX, § II, ¶ I(b)(2) (“Amendments to or repeals of such local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the judge of the probate court of the county”).

22.

The Home Rule Paragraph is manifestly clear that the constitutional authorizations in ¶ I(a) and I(b) are grants of sovereign county power. But, the Home Rule Paragraph is constrained by the General Assembly’s overriding ability to preempt. GA. CONST Article IX, § II, ¶ I(a), (“This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to broaden, limit, or otherwise regulate the exercise thereof.”). When exercising power derived from the Home Rule Paragraph, then, a county government does so knowing that the General Assembly may preempt the county by a general or local law.

23.

The Referendum Clause expressly declares that it is likewise constrained by the General Assembly’s ability to preempt. GA. CONST Article IX, § II, ¶ I(b)(2) (“No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law); see also GA. CONST Article IX, § II, ¶ I(c) (“The power granted counties in subparagraphs (a) and (b) above shall not be construed to extend to the following matters or any

other matters which the General Assembly by general law has preempted or may thereafter preempt...”). When exercising power derived from the Home Rule Paragraph, then, a county and the citizens of a county do so knowing that the General Assembly may preempt it by general or local law.

24.

The power of zoning, on the other hand, is granted in GA. CONST Article IX, § II, ¶ IV, for which the General Assembly has no authority to preempt. The General Assembly cannot, as a matter of constitutional fiat, exercise the power of zoning and cannot preempt a county’s substantive zoning enactments. The General Assembly may establish procedural rules regarding *how* the zoning power is exercised – but the General Assembly has no substantive zoning power. (*Cobb County Bd. Of Com’rs v. Poss*, 257 Ga. 393 (1987) (“[A]s a matter of state constitutional law, the power to zone is specifically vested in local governing authorities, subject to the General Assembly’s authority to enact procedures regulating the exercise of such power.”))

25.

This fundamental distinction between the Home Rule Paragraph and the zoning power leads to one inevitable conclusion. The Referendum Clause is a viable method of amending or repealing an expression of county power exercised using subparagraphs (a) or (b)(1) of the Home Rule Paragraph. However, it is, both facially and legally, not applicable to amend or repeal an expression of county zoning power under GA. CONST Article IX, § II, ¶ IV.

**ii. The Referendum Clause May Not Be Used to Overcome an Act of the General Assembly**

26.

Subparagraph (a) of the Home Rule Paragraph provides that a county government may not act on matters to which the General Assembly has spoken, stating:



*The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government **for which no provision has been made by general law** and which is not inconsistent with this Constitution or any local law applicable thereto.*

(Emphasis added.)

27.

The Referendum Clause contains a similar express limitation, stating that “[n]o amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.” GA. CONST Article IX, § II, ¶ I(b)(2).

28.

Relevant to the Referendum Petition, the General Assembly has *made procedural provision* for the repeal of a zoning ordinance, which is precisely what the Referendum Petition seeks. In particular, O.C.G.A. § 36-66-1, et seq., the Zoning Procedures Law (“ZPL”), states that a zoning decision means “final legislative action by a local government which results in (A) the adoption **or repeal** of a zoning ordinance.” O.C.G.A. § 36-66-3(4) (emphasis added). The Referendum Petition seeks to have the September zoning decision repealed.

29.

Contrary to the General Assembly’s expressly prescribed process in the ZPL, however, the Referendum Petition seeks to undertake “repeal” of the September zoning decision via a procedure involving soliciting signatures, Probate Court review of those signatures, and a referendum election. This process is facially inconsistent with the procedures established by the General Assembly for considering and rendering zoning decisions. The ZPL mandates that a zoning decision, including the “repeal of a zoning ordinance”, must be the product of:

- (i) a public hearing provided by the local government,
- (ii) a legal notice of that hearing posted between 15 to 45 days in advance, and,

(iii) signage in some situations.

O.C.G.A. § 36-66-4.

30.

Moreover, the General Assembly (again, via general law) makes clear in the text of the ZPL that it seeks to “*recogniz[e] and confirm[e] the authority of local governments to exercise zoning power within their respective territorial boundaries...*” (O.C.G.A. § 36-66-2, emphasis added).

31.

Finally, county governments would be substantially impaired if the petition and referendum process applied to all zoning decisions of the county. In McIntosh County, the signatures of 20% of registered voters are necessary to trigger a referendum election under Paragraph I(b)(2). *See* GA. CONST. Article IX, § II, ¶ I(b)(2). Thus, a bare minority of registered voters could trigger a referendum election for all of McIntosh County simply to repeal any mundane land use measure the Board of Commissioners had adopted under its zoning power.

32.

As a practical and logical matter, the petition and referendum process cannot be interpreted to allow amendments or repeals of zoning decisions because, where there is a successful referendum election, the probate court is required to certify the result thereof to the Secretary of State. GA. CONST. Article IX, § II, ¶ I(b)(2) (“It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of subparagraph (g) of this Paragraph.”). The Secretary of State is then required to ensure that every single such certification across the state is published annually. GA. CONST. Article IX, § II, ¶ I(g).

33.

To interpret the petition and referendum process to allow for amendments or repeals of decisions pursuant to the zoning power, the Secretary of State would be required to publish every mundane zoning decision amended or repealed via the petition and referendum process. That would be an absurdity. The Constitution of this State cannot be interpreted to result in absurdities.

**B. Factual Background**

34.

On September 12, 2023, the Board of Commissioners of McIntosh County (“Board”) voted to amend the Zoning Ordinance of McIntosh County, Georgia (“Zoning Ordinance”) by revising Section 219 of the Zoning Ordinance (“Section 219”) with respect to restrictions on development on Sapelo Island.

35.

The County’s Zoning Ordinance, and amendments thereto, are adopted pursuant to the County’s exercise of the zoning powers granted pursuant to Article IX, § II, ¶ IV of the Georgia Constitution. Thus, they cannot be amended or repealed by the petition and referendum process contained in Article IX, § II, ¶ I(b)(2). Only amendments to, or repeals of, powers granted pursuant to Article IX, § II, ¶ 1 can be pursued under the petition and referendum process.

36.

On July 9, 2024, Barbara Bailey, Christopher Bailey and Stanley Walker, and others (the “Interested Citizens”) filed the Referendum Petition in the Probate Court of McIntosh County seeking a referendum election that would repeal the zoning decision of the Board of Commissioners amending Section 219. The Referendum Petition was docketed under the caption *In Re: Petition Pursuant to Georgia Constitution Article IX, Section ii, Paragraph I(b)(2) for*

Special Election Concerning McIntosh County's Amendment of the Zoning ordinance for the Hog Hammock District of Sapelo Island, bearing case number 2024-75.

### **PARTIES AND JURISDICTION**

37.

Petitioner McIntosh County, Georgia is a political subdivision of the State of Georgia duly established by Act of the General Assembly. It is a body corporate with the capacity to sue in its own name. Because GA. CONST. Article IX, § II, ¶ I(b)(2) specifies that the County shall bear the expense of any referendum election held pursuant to the Referendum Petition, the County will suffer injury, including monetary harm, if a referendum election is called as requested in the Referendum Petition, and as a result of the uncertainties now cast upon its regulations on development on Sapelo Island.

38.

Respondent the Honorable Harold Webster, in his official capacity as Judge of the Probate Court of McIntosh County, Georgia, is responsible for calling, administering, canvassing, and certifying the referendum election petitioned for in accordance with Article IX, § II, ¶ I(b)(2) of the Georgia Constitution. Judge Webster possesses all those other powers and incidents of power described therein and as entrusted to him as a probate court judge of this state. Such powers include a residual power to “[p]erform duties relating to elections” in accordance with Article IX, § II, ¶ I(b)(2). *Cf.* O.C.G.A. § 15-9-30(b)(2) (granting jurisdiction to probate court “unless otherwise provided by law” to perform). Judge Webster does not have subject matter jurisdiction to consider a petition for a referendum election with respect to a decision of the McIntosh County Board of

Commissioners exercising its zoning powers pursuant to Article IX, § II, ¶ IV of the Georgia Constitution.

39.

This Court has jurisdiction over the persons and subject matter, and venue is proper in McIntosh County.

40.

Sovereign immunity is not implicated in the present action as the County and Judge Webster, in his official capacity, stand on equal footing. *Camden*, 315 Ga. 498, fn. 12 (“sovereign immunity does not apply to lawsuits between political subdivisions of the State because “[n]either entity retains a superior authority over the other that would prevent it from being hailed into a court of law by the other.” [...] Likewise, the County is not sovereign over Judge Sweatt, who was sued in his official capacity, nor is Judge Sweatt sovereign over the County. Rather, they stand on equal footing for purposes of sovereign immunity in this case because “a suit against a county officer in [his] official capacity is a suit against the county itself.”)

### **COUNT I: WRIT OF PROHIBITION**

41.

The County incorporates and re-alleges paragraphs 1 through 40 above as if fully set forth herein.

42.

The Superior Courts of the State of Georgia possess the powers of law and equity, including the issuance of extraordinary writs. O.C.G.A. § 9-6-40 provides for the extraordinary writ of prohibition, stating:

The writ of prohibition is the counterpart of *mandamus*, to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction where no

other legal remedy or relief is given. The granting or refusal thereof is governed by the same principles of right, necessity, and justice as apply to *mandamus*; provided, however, that no writ of prohibition to compel the removal of a judge shall issue where no motion to recuse has been filed, if such motion is available, or where a motion to recuse has been denied after assignment to a separate judge for hearing.

With the exception of the Governor, the writ also lies against “all other executive and military officers when acting as a judicial or quasi-judicial tribunal.” O.C.G.A. § 9-6-42.

43.

The writ of prohibition serves an important function insofar as it is meant “to prevent a tribunal possessing judicial powers from exercising jurisdiction over matters not within its cognizance, or from exceeding its jurisdiction in matters of which it has cognizance.” *Stokes v. Edwards*, 272 Ga. 98, 98 (2000) (emphasis added, quotation omitted).

44.

The writ of prohibition petitioned for herein properly lies against the Honorable Judge Webster because he is acting in his official capacity as Probate Court Judge of McIntosh County under Article IX, § II, ¶ I(b)(2) of the Georgia Constitution and O.C.G.A. § § 15-9-30(b)(2). The writ of prohibition is the counterpart of mandamus, and therefore the prohibition claim must be brought against Judge Webster in his official capacity. *City of College Park v. Clayton County*, 306 Ga.301 (2019) (mandamus is by definition a claim against officials in their official capacities.).

45.

O.C.G.A. § 9-11-41 specifies that the “writ of prohibition may be granted at any time, on proper showing made.” As described herein, a proper showing has been made because Judge Webster lacks authority and jurisdiction to call for a referendum election pursuant to the Referendum Petition.

46.

Although the Supreme Court of Georgia and the Court of Appeals of Georgia have concurrent jurisdiction over the writ of prohibition, the Supreme Court has previously held that, absent extraordinary circumstances, the writ of prohibition ordinarily must be filed in the superior court and *then* proceed on appeal for appellate review. See Carey Canada, Inc. v. Head, 252 Ga. 23, 24 (1984) (“[W]e hold that a petition for a writ of prohibition may be filed in the appropriate superior court, and the final decision may be appealed to the supreme court for review.”). Out of an abundance of caution, the County has filed in this Court for initial review of Judge Webster’s exercise of authority and jurisdiction.

47.

Although Article IX, § II, ¶ I(b)(2) entrusts the power over the petition and referendum process to Judge Webster, it does not authorize a referendum procedure with respect to the underlying September zoning decision that is the subject of the Referendum Petition. As described herein, that procedure violates the Constitution and laws of the State of Georgia because the September zoning decision that is sought to be repealed in the Referendum Petition was an exercise of zoning powers under Paragraph IV. Therefore, Judge Webster would be acting beyond his jurisdiction were he to sanction the Referendum Petition and/or call for and give notice of a referendum election as requested therein. A writ of prohibition against Judge Webster prohibiting him from exercising authority with respect to the Referendum Petition is proper.

48.

Furthermore, the County lacks an adequate remedy at law because Article IX, § II, ¶ I(b)(2) is the exclusive procedure for the petition and referendum process, and the Referendum Clause

does not provide for any participation, objection or appeal of a probate court's exercise of authority under that clause. *Camden*, 315 Ga. at 506.

49.

The County therefore prays for a writ of prohibition to issue ordering Judge Webster to refrain from:

- (a) Exercising jurisdiction over the Referendum Petition;
- (b) Determining that the Referendum Petition is valid;
- (c) Calling or providing notice of a referendum election pursuant to the Referendum Petition;
- (d) Canvassing the returns and declaring the results of any referendum election pursuant to the Referendum Petition;
- (e) Certifying the results of any referendum election pursuant to the Referendum Petition to the Secretary of State; and
- (f) Failing to issue an order declaring the Referendum Petition invalid.

## **COUNT II: DECLARATORY JUDGMENT**

50.

The County incorporates and re-alleges paragraphs 1 through 49 above as if fully set forth herein.

51.

The Superior Courts of the State of Georgia possess the powers of declaratory relief. O.C.G.A. § 9-4-2(a) provides that,

In cases of actual controversy, the respective Superior Courts of this state and the Georgia State-wide Business Court shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.



52.

In addition to the powers granted in O.C.G.A. § 9-4-2(a), O.C.G.A. § 9-4-2(b) extends an even broader grant of declaratory relief to the Superior Courts. That Code section provides that,

In addition to the cases specified in subsection (a) of this Code section, the respective Superior Courts of this state and the Georgia State-wide Business Court shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for the declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

53.

Since the adoption of the September zoning decision amending Section 219, the County has applied the amended Section 219 to the County's enforcement of the Zoning Ordinance on Sapelo Island. As a result of the events described herein, however, uncertainty now exists with respect to the validity of the amendment to Section 219, the County's past application of the amended Section 219, and the County's ability to enforce the current or former language of Section 219 going forward.

54.

If the Referendum Petition were found to be applicable to zoning decisions of the County, the County would be charged with bearing the costs of a referendum election that itself violates the Constitution. Because a referendum election as requested in the Referendum Petition would be illegal, it would amount to a "straw vote," and straw votes have been determined to be illegal under Georgia law. *See, e.g., Op. Att'y Gen. 81-72* (concluding that municipality lacked authority to expend funds to conduct election that amounted to "straw vote"); *Op. Att'y Gen. U90-20* (unofficial) (concluding that county lacked authority to expend funds on election that amounted to

“straw vote”). (Copies of the Opinions of the Attorney General are included herein as Exhibit “B” for ease of reference.) Thus, the County is further uncertain as to whether it may lawfully spend funds to conduct the referendum election requested in the Referendum Petition.

55.

The injuries and uncertainties described above create an actual controversy or a case in which the ends of justice require a declaration as to the rights of the County.

56.

Sovereign immunity is inapplicable to such claim because sovereign immunity does not apply in suits as between coordinate government entities. *See City of College Park*, 306 Ga. at 313.

57.

The County therefore seeks a declaratory judgment declaring as follows:

- (a) That the Referendum Petition is invalid under Article IX, § II, ¶ I(b)(2);
- (b) That any action requested in the Referendum Petition is beyond the Probate Court’s jurisdiction and in violation of the Constitution;
- (c) That any referendum election requested in the Referendum Petition is unauthorized and in contravention of the Constitution;
- (d) That as a result, the County is not obligated to expend funds for an illegal election because it would violate Georgia law;
- (e) That as a result, the repeal of the September zoning decision amending Section 219 as might be effected by the requested referendum election would be invalid as “inconsistent” with the Constitution. *See Ga. Const. Article IX, § II, ¶ I(b)(2)* (“No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has

been made therefor by general law.”);

- (f) That as a result, the September zoning decision amending Section 219 would remain unaffected by any referendum election requested in the Referendum Petition and any further action taken by the Honorable Judge Webster including, but not limited to: determining that the Referendum Petition is valid, calling a referendum election pursuant to the Referendum Petition and giving notice of same, and certifying the results of any referendum election pursuant to the Referendum Petition.
- (g) That Judge Webster’s further exercise of jurisdiction over the Referendum Petition is in contravention to the writs petitioned for herein.

WHEREFORE, the County respectfully requests that this Honorable Court:

- (a) Schedule a hearing on this Verified Petition for a Writ of Prohibition and Complaint for Declaratory Relief in an emergency and/or expedited fashion, so as to resolve the issues herein expeditiously for the benefit of the Parties and the citizens of McIntosh County;
- (b) Enter an Order prohibiting Honorable Judge Webster from exercising jurisdiction over the Referendum Petition;
- (c) Enter an Order prohibiting Honorable Judge Webster from determining that the Referendum Petition is valid;
- (d) Enter an Order prohibiting Honorable Judge Webster from calling a referendum election pursuant to the Referendum Petition and giving notice of same;
- (e) Enter an Order prohibiting Honorable Judge Webster from certifying the

results of any referendum election pursuant to the Referendum Petition to the Secretary of State;

- (f) Enter an Order prohibiting Honorable Judge Webster from failing to issue an order declaring the Referendum Petition invalid.
- (g) Issue a declaratory judgment, declaring the Referendum Petition and any actions taken pursuant thereto to be void;
- (h) That, in the event the Court determines that the writ of prohibition should not issue or that a declaratory judgment should not be granted as prayed for herein, or both, the Court certify its order for immediate review to the appellate courts of this state;
- (i) That the Court issue such further relief that it deems equitable under the circumstances.

This 22<sup>nd</sup> day of July, 2024.

**JARRARD & DAVIS, LLP**

/s/ Ken E. Jarrard  
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IN THE SUPERIOR COURT OF MCINTOSH COUNTY  
STATE OF GEORGIA

MCINTOSH COUNTY, GEORGIA, )

Petitioner/Plaintiff, )

v. )

JUDGE HAROLD WEBSTER, in his official )  
capacity as Probate Court Judge of McIntosh )  
County, Georgia )

Respondent/Defendant. )

CIVIL ACTION FILE NO.:  
\_\_\_\_\_

VERIFICATION

Personally appeared before me Catherine Pontello Karwacki, Chairman, McIntosh County Board of Commissioners, who states, under oath, that she has read the VERIFIED PETITION FOR WRIT OF PROHIBITION AND COMPLAINT FOR DECLARATORY RELIEF in the above-referenced matter and, based on her personal knowledge, the facts not otherwise supported by affidavit and/or exhibits, are true and correct.

*Catherine Pontello Karwacki*

Catherine Pontello Karwacki  
Chairman  
McIntosh County Board of Commissioners

Sworn to and subscribed before me  
this 18 day of July, 2024.

*Marlena Edwards*  
Notary Public  
My commission expires \_\_\_\_\_



IN THE PROBATE COURT OF MCONTOSH COUNTY  
STATE OF GEORGIA

IN RE: PETITION PURSUANT TO GEORGIA )  
CONSTITUTION ARTICLE IX, SECTION II, )  
PARAGRAPH I (b) (2) FOR SPECIAL )  
ELECTION CONCERNING )  
MCINTOSH COUNTY'S AMENDMENT OF )  
THE ZONING ORDINANCE FOR )  
THE HOG HAMMOCK DISTRICT OF )  
SAPELO ISLAND )

Case No. 2024-75

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PROBATE COURT  
MAGISTRATE COURT  
MCINTOSH COUNTY, GA

COME NOW Petitioners Barbara Bailey, Christopher Bailey and Stanley Walker together with more than 2,300 additional McIntosh County electors registered to vote in the last general election held in McIntosh County, Georgia (hereinafter referred to as "Petitioners") and file this petition ("Petition") and in support thereof show the Court as follows:

1. Petitioners Barbara Bailey, Christopher Bailey and Stanley Walker are residents of McIntosh County, Georgia. Petitioners Barbara Bailey, Christopher Bailey and Stanley Walker are presently registered to vote in McIntosh County and are also electors who were registered to vote in the last general election held in McIntosh County, Georgia. Petitioners are joined in this Petition by more than 2,300 additional McIntosh County electors who were also registered to vote in the last general election held in McIntosh County, Georgia.

2. Petitioners seek a special election on the matter of the revised zoning ordinance for the Hog Hammock District of Sapelo Island by McIntosh County Board of Commissioners. More specifically, Petitioners seek a special election that will allow McIntosh County voters the opportunity to vote as to whether the Amendment to the McIntosh County Code of Ordinance Appendix C Sec. 219 - HH Hog Hammock District approved by the McIntosh County Board of Commissioners on September 12, 2023 (the "Zoning Change") should be repealed in accordance with Article IX, Section II, Paragraph I(b)(2) of the Georgia Constitution.

EXHIBIT A

3. Under the Georgia Constitution, Article IX, Section II, Paragraph I(b)(2), venue and jurisdiction is properly in this Court.

4. Attached hereto and made a part hereof are the more than 2,300 signatures of registered electors as of the last general election in McIntosh County who join in this Petition to this Court for the purpose of submitting the Zoning Change to the registered electors of McIntosh County for their approval or rejection, by submitting the following question to a special election for approval or rejection:

**"Shall the Action of the Board of Commissioners of McIntosh County, Georgia, amending the McIntosh County Code of Ordinances Appendix C Sec. 219 HH Hog Hammock District of the McIntosh County Zoning Ordinance be repealed?"**

5. This Petition is filed in the Probate Court pursuant to Article IX, Section II, Paragraph I(b)(2) of the Georgia Constitution which provides in pertinent part:

Amendments to or repeals of such local acts or ordinances, resolutions, or regulations . . . may be initiated by a petition filed with the judge of the probate court of the county containing, . . . in cases of a county with a population of more than 5,000 but no more than 50,000, at least 20 percent of the electors registered to vote in the last general election, which petition shall specifically set forth the exact language of the proposed amendment or repeal.

Ga. Const., Article IX, Section II, Paragraph I (b) (2)

6. O.C.G.A. § 21-2-235 provides in pertinent part:

In addition to the official list of electors, the Secretary of State shall also maintain an inactive list of electors. Notwithstanding any other provision of law to the contrary, the names of electors on the inactive list of electors shall not be counted in computing the number of ballots required for an election, the number of voting devices needed for a precinct, the number of electors required to divide or constitute a precinct, or the number of signatures needed on any petition.

O.C.G.A. § 21-2-235(a).



7. The number of active electors in McIntosh County in the last general election held in McIntosh County, Georgia, according to the Secretary of State, was 8,824. Pursuant to O.C.G.A. § 21-2-235, the number of signatures required to invoke the provisions of Article IX, Section II, Paragraph I of the Georgia Constitution and McIntosh County is 1,765 which represents 20% of the 8,824 active registered electors on the date of the last general election. The more than 2,300 signatures attached to and made a part of this Petition exceed the number of signatures of active registered electors needed to satisfy the threshold in Article IX, Section II, Paragraph I of the Georgia Constitution.

8. The petition, therefore, meets the requirements of Article IX, Section II, Paragraph I of the Georgia Constitution.

9. Petitioners request that the following question be put to electors at the special election called pursuant to Article IX, Section II, Paragraph I of the Georgia Constitution: **“Shall the Action of the Board of Commissioners of McIntosh County, Georgia, amending the McIntosh County Code of Ordinances Appendix C Sec. 219 HH Hog Hammock District of the McIntosh County Zoning Ordinance be repealed?”**

WHEREFORE, Petitioners hereby pray that this Court:

(A) Determine that this Petition is valid and that such determination be made within sixty (60) days of the date of filing of this Petition;

(B) Issue the call for a special election not less than ten (10) nor more than sixty (60) days after the filing date of this Petition for the purpose of submitting the Zoning Change to the registered voters of McIntosh County for their approval or rejection;

(C) Set the date of such election, not less than sixty (60) nor more than ninety (90) days after the filing date of this Petition;



(D) Cause a notice of the date of said election to be published in the official organ of McIntosh County, The Darien News, once a week for three weeks immediately preceding the date of the election; and

(E) Issue all other appropriate orders.

This 5<sup>th</sup> day of July, 2024.

ELLIS PAINTER



Dana F. Braun

Georgia Bar No. 078512

Philip Thompson

Georgia Bar No. 963572

*Counsel for Petitioners*

P.O. Box 9946  
Savannah, Georgia 31412  
(912) 233-9700

IN THE PROBATE COURT OF MCINTOSH COUNTY  
STATE OF GEORGIA

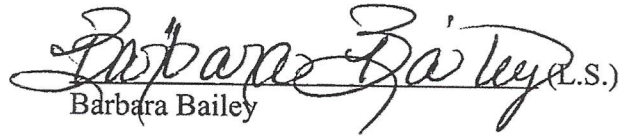
IN RE: PETITION PURSUANT TO GEORGIA )  
CONSTITUTION ARTICLE IX, SECTION II, )  
PARAGRAPH I (b) (2) FOR SPECIAL )  
ELECTION CONCERNING )  
MCINTOSH COUNTY COMMISSION )  
PASSAGE OF A REVISED ZONING )  
ORDINANCE FOR THE HOG HAMMOCK )  
DISTRICT OF SAPELO ISLAND )

Case No. \_\_\_\_\_

VERIFICATION


Personally appeared **Barbara Bailey**, and after having been duly sworn, states that the information and statements set forth in the attached Petition are true and correct to the best of her knowledge.

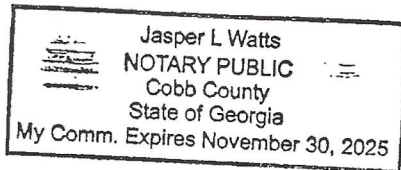
This 5<sup>th</sup> day of July, 2024.

  
Barbara Bailey

Sworn to and subscribed before me

this 5<sup>th</sup> day of July, 2024.

  
Notary Public



IN THE PROBATE COURT OF MCINTOSH COUNTY  
STATE OF GEORGIA

IN RE: PETITION PURSUANT TO GEORGIA )  
CONSTITUTION ARTICLE IX, SECTION II, )  
PARAGRAPH I (b) (2) FOR SPECIAL )  
ELECTION CONCERNING )  
MCINTOSH COUNTY COMMISSION )  
PASSAGE OF A REVISED ZONING )  
ORDINANCE FOR THE HOG HAMMOCK )  
DISTRICT OF SAPELO ISLAND )

Case No. \_\_\_\_\_

VERIFICATION

Personally appeared **Christopher Bailey**, and after having been duly sworn, states that the information and statements set forth in the attached Petition are true and correct to the best of his knowledge.

This 5<sup>th</sup> day of July, 2024.

Christopher Bailey (L.S.)  
Christopher Bailey

Sworn to and subscribed before me

this 5<sup>th</sup> day of July, 2024.

Jasper L. Watts  
Notary Public

Jasper L Watts  
NOTARY PUBLIC  
Cobb County  
State of Georgia  
My Comm. Expires November 30, 2025

IN THE PROBATE COURT OF MCINTOSH COUNTY  
STATE OF GEORGIA

IN RE: PETITION PURSUANT TO GEORGIA )  
CONSTITUTION ARTICLE IX, SECTION II, )  
PARAGRAPH I (b) (2) FOR SPECIAL )  
ELECTION CONCERNING )  
MCINTOSH COUNTY COMMISSION )  
PASSAGE OF A REVISED ZONING )  
ORDINANCE FOR THE HOG HAMMOCK )  
DISTRICT OF SAPELO ISLAND )

Case No. \_\_\_\_\_

VERIFICATION

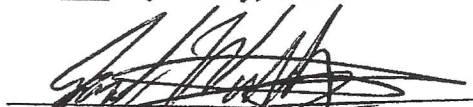
Personally appeared **Stanley Walker**, and after having been duly sworn, states that the information and statements set forth in the attached Petition are true and correct to the best of his knowledge.

This 6<sup>th</sup> day of July, 2024.

 (L.S.)  
Stanley Walker

Sworn to and subscribed before me

this 6<sup>th</sup> day of July, 2024.

  
\_\_\_\_\_  
Notary Public

Jasper L Watts  
NOTARY PUBLIC  
Cobb County  
State of Georgia  
My Comm. Expires November 30, 2025

1981 Ga. Op. Atty. Gen. 174 (Ga.A.G.), Ga. Op. Atty. Gen. No. 81-72, 1981 WL 36982

Office of the Attorney General

State of Georgia  
Opinion No. 81-72  
August 31, 1981

**\*1 A municipality may not expend municipal funds to hold a 'straw vote' on an issue of local importance absent a local law authorizing such referendum.**

To: Secretary of State

This is in response to your recent inquiry concerning whether a municipality may authorize by ordinance the expenditure of municipal funds to conduct a 'straw vote.' In particular, your letter referred to an earlier opinion of the Attorney General which concluded that in the absence of any statutory authority county officials are without authorization to expend county funds for a 'straw vote.' See Op. Atty Gen. 68-70 (unofficial). For the reasons set out below, it is my official opinion that a municipality is also precluded from spending municipal funds to conduct a 'straw vote' absent some statutory authority to do so.

Municipalities have a general power to provide for certain services by ordinance. The Georgia Constitution of 1976, Art. IX, Sec. IV, Par. II (Ga. Code Ann. § 2-6102) provides, in part:

'Each . . . municipality . . . shall have the authority to enact ordinances . . . in pursuance of this Paragraph and for the purpose of carrying out and effectuating the powers herein conferred upon such political subdivisions and in order to provide such services.'

It is clear that this constitutional authority to enact ordinances is limited in scope to those powers enumerated in the provision. The power to expend municipal funds for a 'straw vote' is not mentioned. Moreover, other limits on municipal authority appear. In *City of Midway v. Midway Nursing and Convalescent Center, Inc.*, 230 Ga. 77 (1973), the court stated two propositions which bear on the issue involved here. First, it said that 'it is elementary that the powers which a city government may lawfully exercise must be derived from its charter or the general laws of this state.' *Id.*, at p. 79. In addition, 'it is equally well settled that all municipal charters are strictly construed, and that powers which are not expressly, or by necessary implication, conferred upon the corporation cannot be exercised by it.' *Id.* Thus, unless the power to pass an ordinance authorizing funds to be spent on a 'straw vote' is traceable to either the municipal charter or the general laws of the state, then it is not a lawful power.

That the power to authorize an expenditure must be traceable to some statutory authority in order to be legitimate is supported by *Miller v. City of Cornelia*, 188 Ga. 674 (1939). There, the court stated that:

'A municipal corporation is without authority . . . [to] incur a liability . . . unless authorized by its charter or some general law of the State. Such a power is not conferred by a general welfare provision in the charter.' *Id.*, at p. 676.

Under this rationale, not only must there be statutory authority, but it must be specifically tailored to the liability sought to be incurred. See also, *City of Atlanta v. Anglin*, 209 Ga. 170 (1952); app. dismissed, 344 U.S. 870 (1952).

**\*2** Based on the foregoing, it is my official opinion that, absent statutory authority, a municipality may not authorize the expenditure of municipal funds for a 'straw vote' on a question of local importance.

Michael J. Bowers  
Attorney General

**EXHIBIT B**

1981 Ga. Op. Atty. Gen. 174 (Ga.A.G.), Ga. Op. Atty. Gen. No. 81-72, 1981 WL 36982

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1990 Ga. Op. Atty. Gen. 130 (Ga.A.G.), Ga. Op. Atty. Gen. No. U90-20, 1990 WL 487249

\*1 Office of the Attorney General

State of Georgia  
Unofficial Opinion No. U90-20  
September 4, 1990

**RE: Public funds may not be expended for the purpose of conducting a straw poll or public opinion referendum absent statutory authority.**

Mr. William T. Bartles  
County Attorney  
Butts County  
206 East Third Street  
P.O. Box 399  
Jackson, Georgia 30233-0399

Dear Mr. Bartles:

You have requested an unofficial opinion of the Attorney General on the issue of whether Butts County may present a referendum to the voters of Butts County to determine whether a county owned, operated and maintained landfill should be established. You have informed me that local legislation creating the Butts County Board of Commissioners contains no express authorization for the expenditure of county funds for the purpose of conducting straw polls.

In Op. Atty Gen. 68-70 it was opined that a county board of commissioners would not be authorized to spend county funds to conduct an election in the nature of a "straw vote" or public opinion poll, absent statutory authority. Similarly in Op. Atty Gen. 81-72 it was opined that municipal corporations are without authority to make such expenditures absent legislative authority contained in the general laws of this State or in the charter of the municipal corporation involved.

In *Cotton States Mutual Insurance Co. v. DeKalb County*, 251 Ga. 309 (1983), the Supreme Court reiterated the well established principle that counties possess only those powers which have been expressly or impliedly granted to them by the Constitution or the General Assembly. *Id.* at 310. Moreover, in *Mobley v. Polk County*, 242 Ga. 798, (1979), the Supreme Court stated the following applicable principles:

Neither the counties of this State nor their officers can do any act, make any contract, nor incur any liability not authorized by some legislative act applicable thereto. *Bowers v. Hank*, 152 Ga. 659 (1) (111 S.E. 38) (1921). *McCrorry Co. v. Bd. of Commrs. of Fulton County*, 177 Ga. 242 (170 S.E. 18) (1933); *DeKalb County v. Atlanta Gas Light Co.*, 228 Ga. 215 (2) (186 S.E.2d 732) (1972). If there is reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative. *Beazley v. DeKalb County*, 210 Ga. 41 (77 S.E.2d 740) (1953); *City of Doraville v. Southern R. Co.*, 227 Ga. 504(1) (181 S.E.2d 346) (1971). The powers of county commissioners are strictly limited by law, and they can do nothing except under the authority of law. *Warren v. Walton*, 231 Ga. 495 (202 S.E.2d 405) (1973).

*Mobley v. Polk County*, 242 Ga. at 801-802. In addition, Art. IX, Sec. IV, Para. II of the Constitution of Georgia, 1983 provides, "The governing authority of any county or municipality, or combination thereof may expend public funds to perform any public service or public function as authorized by this Constitution or by law or to perform any other service or function as authorized by this Constitution or by general law." It is evident, therefore, that the expenditure of county funds must be authorized by some legislative act or constitutional provision.

\*2 The fact that the proposed straw vote would take place at the same time as the general election in November does not lead to the conclusion that the vote would be authorized. While a combination public opinion poll and general election might not readily permit identification of the distinct expenditure necessitated by the straw poll itself, it is clear that some county expense would be incurred in placing the question on the ballot and in the actual count of the vote. Such an expenditure, as indicated above, would not be authorized absent some statutory basis.

Furthermore, even if the public opinion referendum is presented to the voters of Butts County, in the absence of statutory authority, it is clear that the result of such a referendum would be non-binding on the county commissioners who are vested with the discretion to determine the manner in which to provide services for “garbage and solid waste collection and disposal.” Art. IX, Sec. II, Para. III of the Constitution of Georgia of 1983. Not only would the referendum itself be ultra vires, the delegation of this discretion to the public would also be unauthorized. See generally *Button Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. 818 (1987) (“Delegation of legislative discretion in zoning matters would ... be an unconstitutional act”). *Id.* at 819.

In summary, it is my unofficial opinion that the expenditure of public funds for a county wide “straw vote” or public opinion referendum, absent some statutory or constitutional premise, is prohibited. While combining any such public opinion poll with a general election may make identification of the public funds used for the straw poll difficult, the fact that some expenditure would be necessary in placing the matter upon the ballot and in processing the vote would render the straw poll ultra vires. Finally, if the county authority should nevertheless proceed to conduct the proposed referendum, it is clear that such referendum would be non-binding since it is beyond the authority of the governing authority to delegate its legislative responsibility in making decisions relative to waste disposal.

I trust the foregoing has been responsive to your inquiry. Of course should you have any further questions or comments concerning this matter, please do not hesitate to contact me.

Yours very truly,

MICHAEL E. HOBBS  
Senior Assistant Attorney General

1990 Ga. Op. Atty. Gen. 130 (Ga.A.G.), Ga. Op. Atty. Gen. No. U90-20, 1990 WL 487249