

SEP 25, 2024 04:42 PM

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

In The  
SUPERIOR COURT  
For The  
COUNTY OF McINTOSH, STATE OF GEORGIA

MCINTOSH COUNTY, GEORGIA,  
Petitioner/Plaintiff

-vs-

Civil Action SUV2024000079

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

Respondent/Defendant

and

BARBARA BAILEY, CHRISTOPHER BAILEY,  
And STANLEY WALKER,

Intervening Respondents

And

MCINTOSH COUNTY BOARD OF ELECTIONS

**FINAL ORDER GRANTING DECLARATORY JUDGMENT AND WRIT OF  
PROHIBITION**

The above-styled and numbered action coming on for hearing of Respondent's Motion to Dismiss as well as for hearing of the Petitioner's Petition for Mandamus, Petition for Writ of Prohibition, and Declaratory Judgment pursuant to the parties' agreement to decide the issues presented in an expedited manner, and the Court having heard arguments, read briefs, conducted its own legal research, and evidence presented, and considered all of the foregoing, the Court enters the following Findings



of Fact, Applicable Law and Conclusions and subsequent decisions thereon:

**FINDINGS OF FACT, APPLICABLE LAW, AND CONCLUSIONS**

-1-


On September 12, 2023, the McIntosh County Board of Commissioners revised the zoning ordinance for the Hog Hammock District of Sapelo Island by adopting the Amendment to the McIntosh County Code of Ordinance Appendix C Sec. 219-HH Hog Hammock District. This amendment, according to the evidence presented, increased the size of the residences allowed from 1400 square feet to 3000 square feet, and nothing else.

-2-

**Chronological Summary of Cases Involving the Action Described in Paragraph 1  
Which Predate the Filing of the Case Under Consideration**

-a-

On October 12, 2023, thirty (30) days after the adoption of the ordinance described in paragraph 1, certain residents of the Hog Hammock community filed their "Plaintiffs' Complaint for Writ of Mandamus, Declaratory Judgment, Injunctive Relief, and Equitable Relief, styled Georgette "Sharron" Grovner, Marvin "Kent" Grovner Sr., Lula B. Walker, Francine Bailey, Mary Bailey, Merden Hall, Florence Hall, Yvonne Grovner, and Ira Gene Grover, Sr. as Plaintiffs vs. McIntosh County Board of Commissioners, Kate Pontello Karwacki, David Stevens, Davis Poole, William E. Harrell, and Roger Lotson in their official capacities as defendants. The case was

A handwritten signature in black ink, appearing to be "Jmc".

assigned case number SUV2023000144 in the Superior Court of McIntosh County. This case was ultimately dismissed without prejudice by order of the Honorable D. Jay Stewart, Judge, McIntosh Superior Court, on March 11, 2024. This Court hereby takes judicial notice of all the filings in the record in that case.<sup>ii</sup>

-b-

On July 9, 2024, ninety (9) days after the dismissal of the lawsuit described in paragraph 2 (b) , Barbara Bailey, Christopher Bailey, and Stanley Walker, residents and electors of McIntosh County, Georgia, filed a Petition Pursuant to Georgia Constitution Article IX, Section II, Paragraph 1 (b) (2) For Special Election Concerning McIntosh County's Amendment of the Zoning Ordinance for The Hog Hammock District of Sapelo Island. This case was assigned case number #2024-75 in the Probate Court of McIntosh County, Georgia, and by Order dated the 23<sup>rd</sup> day of July, 2024, the Honorable Harold A. Webster, III, Judge of the Probate Court of McIntosh County approved the petition<sup>iii</sup> and ordered that the following question be submitted to the registered electors of McIntosh County for their 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?”** (Emphasis, the Probate Court's.)

-c-

On the 30<sup>th</sup> day of May, 2024, the named residents of Hog Hammock described in paragraph 2 (a) hereinabove filed their “Plaintiffs’ Verified Complaint for Declaratory



Judgment and Injunctive Relief" in the Superior Court of McIntosh County, such Petition being assigned number SUV2024000079, the entire file being judicially noticed by this Court. The allegations therein include that the Complaint is a renewal complaint curing the defects noted in Judge Stewart's Order described in paragraph 2 (a) hereinabove.

-3-

On the 22<sup>nd</sup> day of July, 2024, Petitioners herein filed in the Superior Court of McIntosh County their original Verified Petition for Writ of Prohibition and Complaint for Declaratory Relief styled McIntosh County, Georgia Petitioner/Plaintiff vs. Judge Harold Webster, in his official capacity as Probate Judge of McIntosh County, Georgia. The case was assigned case number SUV202400079. iv

-4-

The action taken by the county commission which is the subject matter of this case is an amendment to the zoning ordinance as stated in paragraph 1 hereinabove.

-5-

**Art. 9, Sec. II is captioned HOME RULE FOR COUNTIES AND MUNICIPALITIES.** Under that article and section, **Paragraph I** is captioned: **Home rule for counties.** **Paragraph I** is divided into subparagraphs (a) through (g).



**Subparagraph I (a)** reads in pertinent part: “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 acts for which no provision has been made by general law and which is not inconsistent with this Constitution or local law applicable thereto.”

**Subparagraph I (b)** reads in pertinent part: “Except as provided in subparagraph (c), a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority by following *either* of the procedures hereinafter set forth:

(1) Such local acts may be amended or repealed by a resolution or ordinance duly adopted at two regular consecutive meetings of the county governing authority . . . [N]o amendment or repeal hereunder shall be valid to change or repeal an amendment adopted pursuant to a referendum as provided in (2) of this subparagraph . . . “

(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 . . . In the event the judge of the probate court determines that such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment to the registered electors

A handwritten signature in black ink, appearing to be 'Jme', is located in the bottom right area of the page.

of the county for their approval or rejection.”

-8-

**Paragraph IV of Section II is entitled “Planning and Zoning”** and reads in pertinent part as follows: “The governing authority of each county . . . may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing the procedures for the exercise of such power.”

-9-

In **Camden County v. Sweat 315 Ga 498 (2023)** the Georgia Supreme Court addressed the referendum provision’s application to an option contract to purchase land entered into by the county to acquire land for a proposed commercial rocket launch facility, commonly, at least among the locals, called the “spaceport”. In that case, “there is no dispute that subparagraph (a) [of **Ga. Const. of 1983, Art. IX, Sec. II, Par. 1 (a)**] authorized the Board to pass the Resolutions approving the Option Agreement and its extensions, which relate to property and the affairs of the County.” **Camden County v. Sweat** at p 508. There is obviously no other Constitutional provision that could arguably have enabled the county in that case to enter into such a contract.

-10-

On the other hand, there is dispute as to whether the zoning ordinance



amendment in this case was adopted pursuant to **Ga. Const. of 1983, Art. IX, Sec. II, Par. 1 (a)** or whether it was adopted pursuant to **Ga. Const. of 1983, Art. IX, Sec. II, Par. 4.** <sup>v</sup>

-11-

Rules of construction of Constitutional provisions must be followed in deciding interpreting **Ga. Const. of 1983, Art. IX, Sec. II, Par. 4** and **Ga. Const. of 1983, Art. IX, Sec. II, Par. 1 (a)** and the relationship between the two provisions. The Supreme Court in **Camden** enumerated the following utilized in that case:

“ ‘Constitutional text is interpreted “according to the original public meaning of its text,’ for which we consider the text ‘plain and ordinary meaning’.  
<sup>vi</sup> . . . In other words, we look ‘for the meaning the people understood a provision to have at the time they enacted it.’ “ <sup>vii</sup> . . . “And although the text is always our starting point . . . (and often our ending point, as well), the broader context in which that text was enacted may also be a critical consideration.’ “<sup>viii</sup> . . .  
“Moreover, constitutional interpretation differs from statutory interpretation in that ‘our objective focus is even more important when we interpret the Constitution. Unlike ordinary legislation, the people\_\_not merely elected legislators\_\_are the ‘makers’ of the Georgia Constitution.” <sup>ix</sup>

“In addition, ‘it is a basic rule of construction that a . . . constitutional [provision] should be construed to make all parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the



[drafters] intended that any part would be without meaning.”<sup>x</sup> “This Court must construe the Georgia Constitution to make its parts harmonize and to give sensible meaning to each of them.”<sup>xi</sup> And it is well settled that in interpreting statutory text ‘courts generally should avoid a construction that makes some language mere surplusage.’<sup>xii</sup> “This ‘canon of statutory construction applies with at least equal force in the constitutional context.’<sup>xiii</sup> ‘Established rules of constitutional construction prohibit us from any interpretation that would render a word superfluous or meaningless.” **Camden County v. Sweat 315 Ga at page 509.**

Also, in **State v. SASS Grp., LLC, 315 Ga 893, (897), (2023)**, the Georgia Supreme Court noted “In considering the meaning of a statute, we consider, ‘not only the language of the clause in question, but also its broader legal and historical context, which are the primary determinates of a text’s meaning.”

-12-

With reference to **Subparagraph I (b)(2)**, the following is stated in **Camden County v. Sweat** at page 518-520, Bethel, Justice, concurring *dubitante*:

“ . . . Georgia appears to have chosen to allow for petition and referendum challenges to virtually every decision of local governments. This would constitute a giant leap toward what nears a direct democracy model for local government. . . . ***To say that the constitutional Home Rule Paragraph has drafting problems is kind.*** The structure of subparagraph (b) also adds to my

 8



doubt about our resolution of the question before us. It is quite confounding that the initial text of subparagraph (b) indicates that the subparagraph will provide for the methods of amending or repealing 'the local acts applicable to its governing authority' only to have the provisions of (b) (2) provide for the ability to amend or repeal a much broader and materially different set of actions by local government. . . . [T]he next chapter in this story could be challenging. . . . [W]hile getting 10-25% of registered voters (depending on population) should not be described as "easy", it will undoubtedly prove more realistic for those who are concerned about matters relating to local alcohol ordinances, **zoning ordinances and decisions**, taxation rates, and budgeting decisions than it might be to collect sufficient signatures to challenge the structural "governing authority" questions otherwise found in subparagraph (b). . . . [T]he interpretation the Court reaches is not beyond critique. Indeed, the confusing nature of the operative language might afford many readings." (Emphases added.)

-13-

With respect to the zoning power of counties, **Paragraph IV of Section II** is included in the Georgia Constitution under the Home Rule Section and the Home Rule for Counties Paragraph, and its inclusion there could potentially lead to the interpretation that as meaning that zoning ordinances are passed with the general legislative grant approved by the people in **Subparagraph I (a)**.



On the other hand, it must be remembered that Constitutional zoning power existed long before the legislature and ultimately the people approved of even the idea of home rule. In *Johnston v. Hicks* 225 Ga 576 (1969), the Georgia Supreme Court traces the history of the county's authority to exercise zoning powers. "Prior to 1928, . . . the county authorities had no power to enact zoning laws or ordinances." *Id*, at 580. Then, in 1928, the 1877 Georgia Constitution was amended to give the legislature to grant counties over a certain population the authority to enact zoning laws. In 1937, the Constitution was again amended to give the legislature the authority to extend zoning power to counties over 1000 in population. *Id*, at 578-579.

Applying the rules of construction found in paragraph 11 and considering the history of the constitutional zoning power grants above in paragraph 14, this Court determines that, at the time of adopting the Constitution of 1983, the people of Georgia knew that the counties of Georgia had possessed the Constitutional power of zoning for decades prior to the adoption of the Home Rule provisions in 1966, and therefore, it is readily apparent that constitutional Home Rule never gave the counties the power to enact zoning laws that the counties didn't already have.<sup>xiv</sup>

If all ordinances passed by a county were subject to a referendum by the



electorate, than the General Assembly in drafting **Par. I (b) (2)**, and the General Assembly in passing the proposed constitutional amendment and the people of Georgia in ratifying it would not have deemed it necessary to limit the referendum remedy to only “such local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a).” The only logical and reasonable conclusion is that there are ordinances, resolutions, or regulations that are not adopted pursuant in that subparagraph **Par. I (b) (1)**.

Similarly, if zoning ordinances were included in subparagraph **Par. I (b) (1)**, then the General Assembly and the people would not have deemed it necessary to include **Par. IV Zoning**. This Court is prohibited from making **Par. IV Zoning** “mere surplusage” by its construction of that paragraph.<sup>xv</sup>

-17-

Nowhere in Intervening Respondents’ 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 did the Intervening Respondents even mention the condition necessary for the Probate Court’s jurisdiction of such Petition as found in Paragraph (b) that the zoning ordinance amendment complained of was adopted pursuant to subparagraph (b) (1), apparently assuming that *ALL* ordinances are adopted pursuant to subparagraph (b) (1).<sup>xvi</sup>

A handwritten signature in black ink, appearing to be "Jm" followed by a flourish and the number "11".

-18-

Likewise, the Probate Court's Order does not include a finding that the zoning ordinance at issue was adopted pursuant to subparagraph (b) (1), which finding this Court determines to be a vital part of that Court's determination of the "validity" of the Petition before it.

-19-


There obviously has been no determination by the Probate Court that the ordinance was adopted pursuant to **Par. IV**, as opposed to **Par. II** and, therefore, the Probate Court did not properly assess the "validity" of the petition.

-20-

The Probate Court had no authority to order a **Par. I, (b) (2)** special election since the ordinance at issue was adopted pursuant to **Par. IV Zoning** rather than **Par. I, (b) (1)**.

-21-

"A writ of prohibition is available to restrain courts from exceeding their jurisdiction when no other legal remedy is available." **Sacco v. State Court of Dekalb Cnty. 272 Ga 214, 214 (2009)**. "The purpose of a writ of prohibition is to prevent a

 12

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.”

**Ray v. Jolles 280 Ga 452, 453 (2006.)** “A writ of prohibition is intended to remedy issues that cannot be addressed on appeal, or in the ordinary course of judicial proceedings.” **Gordon v. Whitwell 708, 709 (2004).**

-22-


Under the Probate Court’s order for the special election, McIntosh County has to spend thousands of dollars to finance such election. According to the Board of Elections, staffing the polls on election day alone will incur \$20,000 or more, and, during early voting already underway, additional substantial costs have already been incurred.

-23-

McIntosh County has the duty to avoid wasting public funds and must be afforded some remedy to challenge the decision to hold an election ordered erroneously through **Ga. Const. Art. 9, Sec.II, Par. I (b) (2).**<sup>xvii</sup>

-24-

McIntosh County is not a party to the Probate Court proceedings, nor did it have the ability to intervene in that case to make a defense to the petition. Accordingly, the County has no right to appeal the Probate Court order setting the election, nor can it be challenged through ordinary proceedings. **Camden County** , supra at pages 504-506.

 13


Respondent Probate Judge Webster has delegated his duties to hold the special election at issue to the McIntosh County Board of Elections.<sup>xviii</sup>

**WHEREFORE**, the Court grants a Declaratory Judgment and Writ of Prohibition as follows:

**DECLARATORY JUDGMENT**

It is hereby **ORDERED AND ADJUDGED** as follows:

- (a) The action requested in the Referendum Petition is beyond the Probate Court's jurisdiction and in violation of the Georgia Constitution;
- (b) The referendum election requested in the Referendum Petition is not authorized and in contravention of the Constitution;
- (c) The Order setting the referendum is and was *void ab initio* and exceeded any subject matter jurisdiction of the Probate Court;
- (d) McIntosh County is not obligated to expend funds for the illegal election currently underway and scheduled for October 1, 2024 because such expenditures would violate Georgia law;
- (e) As a result, the Board of Elections is not permitted to hold the referendum election henceforth;
- (f) As a result, the September zoning amendment would remain unaffected by the holding of the referendum election and any further action taken by the

 14

Honorable Judge Webster in certifying the results thereof;

- (g) As a result, Judge Webster's further exercise of jurisdiction over the referendum and the Board of Elections exercise of such duties as delegated to the Board by Judge Webster are in contravention of the law.

**WRIT OF PROHIBITION**

**IT IS FURTHER ORDERED AND ADJUDGED AS FOLLOWS:**

- (a) That the McIntosh County Board of Elections *instanter* cease and desist opening and staffing the polls for early voting and from opening and staffing the polling places for the October 1 referendum ordered by the Probate Judge;
- (b) That the McIntosh County *instanter* cease and desist any operations and conducting in any way the referendum ordered by the Probate Court with regard to the referendum called for the repealing of the Sapelo Island September 2023 zoning ordinance amendment;
- (c) That Probate Judge *instanter* cease and desist performing any actions or exercising any jurisdiction under **Art. 9, Sec. 1, Par. I (b) (2)**.

**SO ORDERED AND ADJUDGED** this 25<sup>th</sup> day of September, 2024.

  
\_\_\_\_\_  
**GARY C. McCORVEY**  
**SENIOR JUDGE, SUPERIOR COURTS**

**STATE OF GEORGIA  
PRESIDING BY DESIGNATION AS  
JUDGE,  
McINTOSH SUPERIOR COURT**

- 
- <sup>i</sup> This history is included to illustrate some of the relatively small county's population.. "Small" referring to population, not land area.
- <sup>ii</sup> The petition contains *inter alia* allegations which purportedly trace the history of the Hog Hammock district.
- <sup>iii</sup> The Court notes that the Petition in the Probate Court alleges that there are ". . . more than 2,300 signatures" of active registered voters supporting the petition and that there were 8,824 active registered voters as of the date of the last general election. Query: What is the population of Sapelo Island in general and the population of Hog Hammock in particular?
- <sup>iv</sup> The undersigned Senior Judge was assigned to preside in this case because of the prohibition against Superior Court Judges presiding over cases in which another judicial officer in their circuit is a party.
- <sup>v</sup> The Court notes that a copy of this ordinance is not in the record, nor was there any testimony as to any matter concerning the wording of the ordinance which might lend some guidance with respect to this issue.
- <sup>vi</sup> Citation and punctuation omitted by cited case.
- <sup>vii</sup> Citation omitted by this court.
- <sup>viii</sup> Citation omitted by this court.
- <sup>ix</sup> Citations omitted by this court.
- <sup>x</sup> Citation omitted by this court.
- <sup>xi</sup> Citation omitted.
- <sup>xii</sup> Citation omitted by this court.
- <sup>xiii</sup> Citation omitted by cited case.
- <sup>xiv</sup> "Tin Man", a song by the duo America: "Oz never did give nothing to the Tin Man that he didn't already have." This Court respectfully submits that R. Perry Sentell, longtime recognized expert on Georgia local government law, if faced with the matter before this Court could not have resisted the insertion of this paraphrased song lyric, consistently with his humor injected in analyzing other cases in his annual review of local government law as well as his published books.
- <sup>xv</sup> Eminent domain, another power of counties which existed prior to the Home Rule provision also has its own paragraph.
- <sup>xvi</sup> Cf. Camden County v. Sweat *supra* at page 518-520 Bethel, Justice, concurring dubitante: "Georgia appears to have chosen to allow for petition and referendum challenges to virtually every decision of local governments. . . [getting 10-25% of registered voters (depending on population) to sign a petition to force a referendum should not be described as "easy." It will undoubtedly prove more realistic for those who are concerned about . . . zoning ordinances and decisions and taxation rates." Such "suggestion" that zoning ordinances in this concurrence is obviously *dicta* and played no part in the majority's or the concurrences' decision and opinion.
- <sup>xvii</sup> The Court does not grant any relief requested under the County's petition for Writ of Mandamus.
- <sup>xviii</sup> McIntosh County complains that the Probate Judge cannot delegate his duties imposed by the referendum process at issue. This Court determines that such delegation is not only permissible, but most likely preferred, when considering the way elections in Georgia today are managed by the county election boards.

A handwritten signature in black ink, appearing to read "J. Mc", is located at the bottom right of the page.