

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vivian Atkins, Robert P. Frick and Kay Hollis, in their official capacities as members of the Town Council of the Town of Chapin, Appellants,

v.

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, and the Town of Chapin, Defendants,

Of whom James R. Wilson, Jr. and Gregg White are Respondents.

Appellate Case No. 2014-000829

Appeal From Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5388
Heard January 5, 2016 – Filed March 9, 2016

AFFIRMED IN PART AND REVERSED IN PART

Spencer Andrew Syrett, of Columbia, for Appellants.

Matthew Todd Carroll, of Womble Carlyle Sandridge & Rice, LLP, of Columbia, for Respondents.

GEATHERS, J.: In this declaratory judgment action, Appellants, Vivian Atkins, Robert Frick, and Kay Hollis, a majority of members of Chapin Town Council,

seek review of the circuit court's order granting the motion of Respondents, James Wilson, Jr. (the Mayor) and Gregg White, another Council member, to invalidate actions taken by Appellants at two special Council meetings. Appellants also initially challenged the circuit court's order denying their motion for a preliminary injunction and dismissing their complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. However, at oral arguments, Appellants advised the court they wished to waive their assignments of error as to this particular order. Therefore, we summarily affirm this order without further discussion. As to the circuit court's order invalidating the actions taken by Appellants at the two special meetings, we reverse.

FACTS/PROCEDURAL HISTORY

In November 2013, the voters of the Town of Chapin elected a new mayor and a new council member, Respondent White. The Mayor's term of office began on January 7, 2014. According to Appellant Atkins, before the Mayor was sworn in, he announced that he had hired Karen Owens to serve as "Director of Communication and Economic Development" although Council had not voted to create the position or make it a part of the Town's budget.¹ The Mayor also (1) refused to honor a retainer agreement between the Town and an attorney for the Town's utility department, (2) signed a contract to hire Nicole Howland as Town Attorney without first submitting the contract to Council for approval, (3) refused to place several items on the agendas for Council meetings despite requests from certain Council members, and (4) refused to schedule a special meeting at Atkins' request.

Accordingly, on February 26, 2014, Appellants filed a complaint invoking the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10 to -140 (2005), and seeking a judgment declaring section 2.206(b) of the Chapin Town Code unenforceable to the extent it grants the Mayor control over the agendas for council meetings. Section 2.206 states,

- a. Matters to be considered by the Mayor and Council at a regular meeting shall be placed on a written agenda and publicly posted at least twenty-four (24) hours prior to the meeting. Matters not on the agenda

¹ At a subsequent Council meeting, Council voted to create the position but did not discuss compensation.

may be considered upon request of a member unless a majority of Council objects.

....

b. The agenda shall be approved by the Mayor, prior to distribution. It shall be prepared under the supervision of the Clerk/Treasurer.

The complaint also sought a preliminary injunction requiring the Mayor to "place on the agenda of the next Council meeting . . . any item requested by any member of Council." Appellants filed a separate motion for a preliminary injunction, seeking an order requiring the Mayor "to place any item requested by any member of Council on the agenda of the next occurring Council meeting after the request, without any delay." At the motions hearing, Appellants explained that the Freedom of Information Act (FOIA) prohibited them from exercising their power under section 2.206(a) to amend the agenda during the meeting. *See Lambries v. Saluda Cty. Council (Lambries I)*, 398 S.C. 501, 506, 728 S.E.2d 488, 491 (Ct. App. 2012) ("[T]he purpose of FOIA is best served by prohibiting public bodies governed by FOIA from amending their agendas during meetings."), *rev'd (Lambries II)*, 409 S.C. 1, 760 S.E.2d 785 (2014), *superseded in part by* 2015 Act No. 70.²

On March 18, 2014, the circuit court issued an order denying Appellants' request for a preliminary injunction and granting Respondents' motion to dismiss. In addressing the motion for a preliminary injunction, the circuit court stated, "the Mayor must sign off on the agenda prior to its distribution to Council, and there is

² *Lambries I* was issued on June 13, 2012, and *Lambries II* was issued on June 18, 2014. In the present action, Appellants filed their complaint on February 26, 2014. The order dismissing the complaint was dated March 18, 2014, and filed the following day. Therefore, *Lambries II* did not affect the present case at the time of the motions hearing. Further, in 2015 Act No. 70, the legislature superseded the primary holdings of *Lambries II*, i.e., that FOIA does not require an agenda to be issued for a regularly scheduled meeting and, thus, FOIA does not prohibit public bodies from amending an agenda for a regularly scheduled meeting. Act No. 70, which became effective on June 8, 2015, amended section 30-4-80(a) of the South Carolina Code (2007) to prohibit the amendment of a posted meeting agenda during the meeting without a finding of exigent circumstances and a two-thirds vote of the members present.

no requirement that the Mayor place items on the agenda that he believes do not merit Council's consideration." In addressing Respondents' motion to dismiss, the circuit court stated, "Ordinance § 2.206(b) grants Mayor Wilson the authority and discretion to approve and, inherently, to deny any item requested to be on the agenda for a Council meeting."

The circuit court addressed the complaint's assertion that if section 2.206 grants the Mayor complete control over the agenda, this provision violates the state and federal constitutions. Despite Appellants' FOIA argument, the circuit court stated that section 2.206(a) allows matters not on the agenda to be considered upon request of a member unless a majority of members object. The circuit court also stated that Council's ability to amend the agenda during the meeting acted "as a safeguard against autocratic mayoral action that may otherwise rise to a constitutional depr[i]vation of basic rights." On April 8, 2014, the circuit court denied Appellants' motion to reconsider pursuant to Rule 59(e), SCRCF. Appellants filed and served a Notice of Appeal of the circuit court's orders on April 22, 2014.

In the meantime, on April 5, 2014, Atkins carried to Appellant Robert Frick's home a prepared notice calling for a special meeting of Council on April 10, 2014, to amend section 2.206(b) of the Chapin Town Code to require the Mayor to place on a meeting agenda any item requested by a member of Council.³ Atkins discussed the notice with Frick, who agreed to call for a special meeting and signed the notice. On April 6, 2014, Atkins took the notice to Appellant Kay Hollis's home and discussed the notice with her. Hollis also agreed to calling a special meeting and signed the notice.

On April 7, 2014, Atkins took the notice to the Town Clerk and asked her to post the notice at Town Hall and on the Town's website and to notify the news media.⁴ On this same day, Respondents filed a "Motion to Enforce Order and to Enjoin Contrary Conduct" with the circuit court. In this motion, Respondents alleged that Appellants were "disregarding the [circuit court's] March 18th Order

³ Section 2.202(3) of the Chapin Town Code gives a majority of Council members the authority to call special meetings. Section 2.202 states, "Special meetings may be held: 1. whenever called by the Mayor in cases of emergency, or; 2. when, in the judgment of the Mayor, the good of the municipality requires it, or; 3. by a majority of the members of Council."

⁴ Atkins repeated the same procedure for another special meeting conducted on April 17, 2014.

with respect to the Mayor's authority to approve or reject agenda items under Ordinance § 2.206(b)." Respondents sought "an order enforcing the [circuit court's] prior ruling and enjoining [Appellants] from taking any action contrary to that ruling, including going forward with the improperly-noticed [special] meeting." On April 8, 2014, the circuit court's presiding judge sent a letter to the parties advising them of his availability for a hearing and stating his opinion that any actions taken by Appellants "in contravention of the [circuit court's] March 18, 2014 Order . . . could be illegal and of no force and effect."

Neither the Mayor nor White attended the April 10 and 17, 2014 special meetings. Therefore, Atkins presided over these meetings in her capacity as Mayor pro tempore. At the April 10 meeting, a first reading was given to the proposed amendment to section 2.206(b).⁵ Additional business was conducted at this meeting, although the record does not indicate the subject of this additional business, only that it was included in the published agenda.

On April 14, 2014, Respondents filed a "Motion for Civil Contempt," seeking an order "holding [Appellants] in civil contempt of court and . . . invalidating any actions that [Appellants] purportedly took at any meeting that they attempted to convene in contravention of [the circuit court's] rulings." Subsequently, Council conducted a second reading of the amendment to section 2.206(b) at the April 17 meeting. Again, additional business was conducted at the April 17 meeting, although the record does not indicate the subject of this additional business, only that it was included in the published agenda.

On April 25, 2014, the circuit court conducted a hearing on Respondents' motion to enforce the March 18, 2014 order and motion for contempt. On May 5, 2014, the circuit court issued an order denying the motion for contempt but invalidating the actions taken at the April 10 and 17, 2014 special meetings on the ground that Appellants did not present agendas for these meetings to the Mayor for his approval. Appellants filed and served a Notice of Appeal on May 23, 2014, and the Clerk of this court later consolidated the appeal with the previous appeal of the circuit court's March 18, 2014 order.

On March 23, 2015, Respondents filed a motion to dismiss this appeal on the ground that Appellants did not appeal the circuit court's "declarations and rulings as they relate to the Town of Chapin," who was a defendant before the

⁵ Counsel for Appellants later discovered a scrivener's error in the amendment that limited it to "called" meetings.

circuit court, and, therefore, "those rulings are the law of the case with respect to the Town." On May 29, 2015, Chief Judge Few issued an order stating, in pertinent part,

Respondents have not convinced this court that the omission of the Town as a Respondent affects this appeal *other than on a substantive basis as to the merits*. Because Respondents seek dismissal on a substantive basis, which is inappropriate at this stage of the appeal, the motion is denied. *This court will consider the merits of this appeal once briefing is complete and the appeal has been assigned to a panel.*

(emphases added). Notably, Respondents did not amend their appellate brief to list this issue as an additional sustaining ground or to otherwise argue this issue.

LAW/ANALYSIS

Motion to Dismiss

In their motion to dismiss this appeal, Respondents argue the law-of-the-case doctrine renders the circuit court's rulings conclusive as to the Town due to Appellants' failure to designate the Town as a respondent on appeal. Respondents also argue the judgments below apply equally to all defendants and, therefore, Appellants "cannot seek an inconsistent decision from this Court." Respondents cite *United States v. Aramony* for the following proposition: "[W]hen a rule of law has been decided adversely to one or more codefendants, the [law-of-the-case] doctrine precludes all other codefendants from relitigating the legal issue." 166 F.3d 655, 661 (4th Cir. 1999).

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). In other words, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). While the doctrine has been referenced

as discretionary,⁶ it is recognized that principles "of authority . . . do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002).

Here, we do not construe Appellants' formulation of the case caption as a failure to appeal the circuit court's orders as they relate to the Town, especially given the confusion created by the Mayor's refusal to add to a meeting agenda the topic of appointing a town attorney. Appellants have properly perfected their appeal of the circuit court's orders as to all defendants in the case and to hold otherwise would be unreasonably harsh, especially given the view by some jurisdictions that the law-of-the-case doctrine is discretionary. *See supra* n. 6. We conclude application of the law-of-the-case doctrine is inappropriate in this case. Therefore, we deny Respondents' motion to dismiss this appeal.

Merits

Appellants contend the circuit court erred in invalidating the actions taken by Council at the April 10 and 17, 2014 special meetings, arguing the requirement of section 2.206(b) of the Chapin Town Code that the Mayor approve meeting agendas does not apply to section 2.202 governing special meetings.⁷ We agree.

⁶ *See S. Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922) ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res adjudicata. One directs discretion: the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."); *Slowinski v. Valley Nat'l Bank*, 624 A.2d 85, 89 (N.J. Super. App. Div. 1993) ("Law of the case' . . . operates as a discretionary rule of practice and not one of law."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("So long as the same case remains alive, there is power to alter or revoke earlier rulings."); 5 C.J.S. *Appeal and Error* § 991 (2007) ("The doctrine is discretionary rather than mandatory. Nonetheless, it should be disregarded only upon a showing of good cause for failure timely to request reconsideration of the original appellate decision, and only as a matter of grace rather than right." (footnotes omitted)).

⁷ Section 2.202 states, "Special meetings may be held: 1. whenever called by the Mayor in cases of emergency, or; 2. when, in the judgment of the Mayor, the good of the municipality requires it, or; 3. by a majority of the members of Council."

The standard of review for the circuit court's May 5, 2014 order is determined "by the nature of the underlying issue." *See Kinard v. Richardson*, 407 S.C. 247, 256, 754 S.E.2d 888, 893 (Ct. App. 2014) ("Declaratory judgments in and of themselves are neither legal nor equitable. The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." (quoting *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003))).⁸ Here, Respondents were seeking, and were granted, an invalidation of Appellants' actions at the two special meetings; such a remedy can be characterized as injunctive relief. *See Bus. License Opposition*

⁸ We note Respondents did not correctly invoke the circuit court's authority to rule under the Uniform Declaratory Judgments Act (the Act). While the circuit court's March 18, 2014 order merely granted Respondents' motion to **dismiss** Appellants' declaratory judgment action, Respondents' memorandum supporting their motions emphasized the order's statement that the Mayor must sign off on the agenda prior to its distribution to Council and characterized that statement as a "declaration." The circuit court then stated in its May 5, 2014 order that it had previously "declared" that agendas for council meetings had to be approved by the Mayor prior to the agenda's distribution. Again, we emphasize the circuit court's March 18 order **dismissed** the declaratory judgment action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, which allows for dismissal of a case for "failure to state facts sufficient to constitute a cause of action." Therefore, the circuit court incorrectly invoked section 15-53-120 of the South Carolina Code (2005), which states that further relief based on a declaratory judgment may be granted whenever necessary or proper, in support of its "declaratory ruling."

In any event, we construe Respondents' motion to enforce the March 18 order as a new action seeking declaratory relief under the Act, specifically section 15-53-30 of the South Carolina Code (2005), which allows any person "whose rights, status or other legal relations are affected by" a municipal ordinance to have determined "any question of construction" arising under the ordinance and "obtain a declaration of rights, status or other legal relations thereunder." *See* S.C. Code Ann. § 15-53-130 (2005) (requiring courts to construe and administer the provisions of the Act liberally). We also interpret the circuit court's May 5, 2014 order as an original declaratory judgment issued under the authority of section 15-53-20 of the South Carolina Code (2005), which gives courts of record the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed" and confers on such declarations "the force and effect of a final judgment or decree."

Comm. v. Sumter Cty., 311 S.C. 24, 27-28, 426 S.E.2d 745, 747-48 (1992) (noting FOIA authorizes injunctive relief and characterizing invalidation of an ordinance as injunctive relief). "An order granting or denying an injunction is reviewed for [an] abuse of discretion." *Lambries II*, 409 S.C. at 7, 760 S.E.2d at 788, *superseded on other grounds by* 2015 Act No. 70.

However, Respondents based their motion on their interpretation of section 2.202(3) of the Chapin Town Code, which authorizes a majority of the members of Council to call a special meeting. Because this is a question of law, this court need not give deference to the circuit court's interpretation of the disputed provision. *Cf. id.* at 8, 760 S.E.2d at 788 ("[W]hile an injunction is equitable and subject to the trial court's discretion, where the decision turns on statutory interpretation[,] . . . this presents a question of law. As a result, [the appellate court] need not give deference to the trial court's interpretation. If, based on this [c]ourt's assessment, the trial court committed an error of law in its interpretation of [a statute], that would constitute an abuse of discretion by the trial court.").

As to the merits of the circuit court's order, not only does section 2.202(3) of the Chapin Town Code authorize a majority of the members of Council to call a special meeting, but section 5-7-250(a) of the South Carolina Code (2004) also authorizes a majority of council members to call a special meeting. Section 5-7-250(a) states, "The council, after public notice[,] shall meet regularly at least once in every month at such times and places as the council may prescribe by rule. *Special meetings* may be held *on the call of* the mayor or of *a majority of the members.*" (emphases added). Section 2.202 of the Chapin Town Code states, "Special meetings may be held: 1. whenever called by the Mayor in cases of emergency, or; 2. when, in the judgment of the Mayor, the good of the municipality requires it, or; 3. by a majority of the members of Council."

The circuit court concluded section 2.206(b) of the Chapin Town Code, requiring the Mayor's approval of the agenda for regularly scheduled meetings, applies to special meetings called under section 2.202. We disagree. Section 2.202 is silent on the question of an agenda for special meetings. There is no express requirement for the Mayor to approve the agenda for a special meeting as there is for regularly scheduled meetings in section 2.206. If Council, when it adopted the Chapin Town Code, had intended to require the Mayor to approve the agenda for a special meeting, it could have included language to that effect in section 2.202, as it did in section 2.206. *See Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("[W]hen interpreting an ordinance, legislative intent must prevail if it can be reasonably

discovered in the language used."); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute."); *State v. Leopard*, 349 S.C. 467, 472-73, 563 S.E.2d 342, 345 (Ct. App. 2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883-84 (Ct. App. 2001)); cf. *Taylor v. S.C. Dep't of Motor Vehicles*, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009) ("If the Legislature had intended the lack of written notice (or any other factor) to be a fatal defect, it could have said so in the statute."); *Leopard*, 349 S.C. at 472-73, 563 S.E.2d at 345 (construing a statutory definition and stating, "The last clause of the definition does contain a cohabiting requirement. The fact that it is included in one phrase but not in the other implies it should not be read into the other"); *State v. Zulfer*, 345 S.C. 258, 262-63, 547 S.E.2d 885, 887 (Ct. App. 2001) ("[H]ad the legislature intended that a prior record of out-of-state convictions for burglary or housebreaking could not be used for purposes of enhancement, it could easily have limited the statute to only South Carolina offenses.").

Further, the authority to call a special meeting necessarily implies authority over the meeting's purpose(s), which must be designated in the agenda included in the public notice of the meeting and must be the only item(s) in the agenda. See *Lambries II*, 409 S.C. at 13-14, 760 S.E.2d at 791 (emphasizing FOIA's requirement that public notice for a special meeting must include the meeting's agenda); *id.* at 15, 760 S.E.2d at 792 ("[A] 'special' meeting is a meeting called for a special purpose and at which nothing can be done beyond *the objects specified for the call.*" (emphasis added)); *id.* at 16, 760 S.E.2d at 792 ("Since *the permissible topics for a special meeting are restricted to the 'objects of the call,'* it is reasonable to infer that our General Assembly has purposefully chosen to mandate that an agenda be prepared for this type of meeting" (emphasis added)).

To interpret section 5-7-250(a) and section 2.202(3) of the Chapin Town Code otherwise would render these provisions a nullity. If the Mayor can disapprove an agenda for a special meeting called by a majority of Council members—an agenda that must be limited to the purpose(s) for calling the special meeting, *Lambries*, 409 S.C. at 15, 760 S.E.2d at 792—the special meeting will be left without a reason to proceed, effectively stripping the majority of its authority to call the meeting. We decline to infer such an intent on the part of Council when

it adopted the Chapin Town Code. *See Somers*, 319 S.C. at 67, 459 S.E.2d at 843 ("[W]hen interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used."); *id.* at 68, 459 S.E.2d at 843 ("An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); *id.* ("In construing ordinances, the terms used must be taken in their ordinary and popular meaning.").

Likewise, we decline to infer such an intent on the part of the legislature when it enacted section 5-7-250(a). *See State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000))); *id.* ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992))); *id.* at 351, 688 S.E.2d at 575 ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something."); *Johnson*, 396 S.C. at 188, 720 S.E.2d at 520 ("In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute.").

Based on the foregoing, Appellants acted within their authority under section 5-7-250(a) and section 2.202(3) of the Chapin Town Code when they called the two special meetings and published meeting agendas limited to the meetings' purposes without first presenting the agendas to the Mayor. The circuit court's invalidation of Council's actions at these two meetings on the ground that the agendas were not approved by the Mayor was based on an error of law and, thus, constituted an abuse of discretion.

CONCLUSION

Accordingly, we affirm the circuit court's March 18, 2014 order denying Appellants' motion for a preliminary injunction and dismissing their complaint. We reverse the circuit court's May 5, 2014 order invalidating Council's actions at the April 10 and 17, 2014 special meetings.

AFFIRMED IN PART and REVERSED IN PART.

SHORT and MCDONALD, JJ., concur.