

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, Appellant,

v.

Town of Mount Pleasant, Respondent.

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

Table of Authorities ii
Statement of the Issue on Appeal iii
Statement of Case 1

ARGUMENTS

I. THE COURT ERRED IN FAILING TO FIND THAT THE TOWN VIOLATED FOIA WHEN IT TOOK ACTION ON MATTERS NOT PROPERLY NOTICED TO THE PUBLIC AND PRESS.

A. Listing Matter for Executive Session is Not Adequate Notice of Action.
B. Later Endorsement Does Not Excuse or Erase the FOIA Violations.
C. Exigent Circumstances Are Not Sufficient to Avoid FOIA Notice Provisions.
D. There Are Multiple Instances of Similar Acts of Action Without Notice

II. THE COURT ERRED IN HOLDING THE TOWN’S ANNOUNCEMENTS OF EXECUTIVE SESSION DID NOT VIOLATE FOIA’S SPECIFIC PURPOSE PROVISION

III. COURT ERRED IN REFUSING TO HOLD THE DESTRUCTION OF EMAILS AND OTHER INFORMATION VIOLATED PUBLIC RECORDS RETENTION ACT

IV. THE COURT ERRED IN FAILING TO AWARD ATTORNEY FEES AND COSTS NECESSARY IN THE BRINGING OF THIS ACTION

CONCLUSION

TABLE OF AUTHORITIES

Cases

Armstrong v. Executive Office of the President, 1 F.3d 1274 (DC Cir 1993)

Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991)

Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (1986)

Hinds County Board of Supervisors v. Common Cause of Mississippi,
551 So.2d 107 (Miss.1989)

Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012)

Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (1986)

Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000)

Reading Eagle Co. v. Council of City of Reading, 627 A.2d 305, 307 (Pa. Comm. 1993)

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006)

Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984)

Statutes

Section 30-4-70

Section 30-4-80

Section 30-4-100

Other

Robert’s Rules of Order

Arizona Open Meeting Law §§38.431.05

ISSUES ON APPEAL

1. Did the Court err in failing to find that the town violated FOIA when it took action on matters not properly noticed to the public and press?
2. Did the Court err in holding the town's announcements of executive session did not violate FOIA's specific purpose provision?
3. Did the Court err in refusing to hold the destruction of emails and other information violated South Carolina's Public Records Retention Act?
4. Did the Court err in limiting Appellant's award attorney fees and costs necessary in the bringing of this action?

STATEMENT OF THE CASE

This matter came to Court by way of a Complaint filed by Stephen Brock seeking remedies pursuant to FOIA and the PRRA. The Defendant timely filed an Answer. The matter subsequently went before the Circuit Court as a non-jury matter. A trial was held on January 24, 2011. From that trial an Order was entered was entered on August 22, 2011, by the Honorable J.C. Nicholson, Jr. The Appellant filed timely post trial motions seeking to alter or amend the judgment. A hearing was held on the post trial motions on January 17, 2012. A Supplemental Order was entered February 8, 2012. A Second Supplemental Order awarding attorney's fees and costs was entered on February 8, 2012. The Appellant timely filed notice of appeal. A portion of the transcript was inaudible and a Motion to Settle the Record was filed by Appellant and an Order settling the record was entered on February 1, 2013.

At trial the Appellant was represented by Thomas S. Tisdale . On appeal the Appellant is represented by Robert C. Childs, III, and J. Falkner Wilkes. The Respondent, was represented at trial by Francis Cantwell and is represented on appeal by David Guy Pagliarini..

STATEMENT OF FACTS

Appellant, Stephen Brock, holds a BA in Journalism from the University of South Carolina. Brock has been a resident of Mount Pleasant since 1972 and initiated this action in 2008 while on the Town Planning Commission. Brock was chairman of the first Shem Creek Management Committee and served on the Mt. Planning Commission from 2005 through 2009. Brock was in broadcasting for thirty years, the last fifteen of which he was the president and general manager of a local television station in Mt. Pleasant. Brock's observations while on the Commission led him to take this action with regard to FOIA issues. 128-129.

Six essential issues were raised below in the case. First, proper use of agendas for meetings and whether the Town is entitled to amend an agenda at will and act on matters not noticed on the meeting agenda. Second, the Town's pattern of conducting executive sessions without announcing specific purpose; (also calls attention to Quality Towing). Third, the Town's pattern of having committee meetings with non-committee members present and participating constituting a meeting; Fourth, does communication by e-mail among on matters of public business among Council members constitutes a meeting; Fifth, electronic communication is a public document and the town's rules and the public records act, with extensive guidelines, says that public documents cannot be destroyed without a retention policy which the town does not have; e-mail was used for public business and deleted. Sixth, injunctive relief and attorneys fees as allowed under FOIA 9-13.

The Town took the position that e-mails among Council members are not necessarily public records but that as of the time of trial, all e-mails that went through the town system were being preserved indefinitely. The Town further claimed that Council goes into executive session

after announcing its purpose and that it may vote on any item addressed in executive session even if it was not on the meeting's posted agenda for action. 19-27. In deposition, the Town Administrator (Burdette) admitted that the Town may not vote on matters not on the agenda. Depo. Burdette, p. 18-19.

Section 30.34 - Mt. Pleasant Town Council Rules of Order - was admitted and the authority of Roberts Rules of Order established as being applicable. 37. Roberts Rules of Order sets forth the permissible purpose for special meetings as well as the applicable rules. 46.

The Mount Pleasant Town Council has twelve regular meetings a year, one each month. 43. Town council also has special meetings, more some months than others. 43. During the period of time that the present case covers, a special meeting was held prior to every council meeting. Brock testified that he had read and studied the minutes of all the regular and special Council meetings. 44

S.C. Code Section 30-4-80 requires agenda for special meetings and the purpose of a noticed special meeting must be established in advance and may not be changed 49 The Town's Rules of Order place executive sessions inside regular meetings, but are more often executive sessions are held at special meetings. 44. This practice is at odds with the applicable Rules of Order. Pl. Ex. 39, 30.29(A)(6). The Town had a practice of setting special meetings which were held immediately prior to regularly scheduled meetings. The "overriding purpose" of these special meetings was for executive sessions prior to the opening of regular meetings. The Court's Order encouraged the Town to "abandon this procedure in the future" finding that the conduct of Town Council "fails to comply with the spirit of FOIA". Order, Page 13, August 22, 2011.

Brock testified that the harm from adding matters to a posted agenda during a meeting is

that under the Town's practice, the public can't know in advance what is to be addressed at any particular meeting 50. Appellant also testified that from his experience, in addition to hindering the public's direct involvement, the Town's practice affected the local news from timely reporting the Council's upcoming actions as the news department relied on published agendas and other announcements to plan daily news coverage. Order to Settle.

Between July 1, 2007 and June 30, 2008 there were approximately 10 meetings, in addition to those above, at which agendas were improperly amended and matters added without proper notice to the public. 71-72. Of those, eight or nine amendments were made at the Special Meetings, one or two at the Regular Meetings.¹ 73. During his testimony at trial, the Town Administrator, Burdette, admitted that Council had in the past gone into executive session without properly announcing the purpose of the executive session. 273, 277. Burdette stated that amendments to agendas similar to the amendment made regarding the Shem Creek matter are not done "as a matter of course." 291, l. 25. Burdette admitted that the public would have no way of knowing in advance what would be considered under an amended agenda. 292. Burdette admitted that due to the lack of notice in the agenda, members of the public, whether for or against the appropriation of six million dollars to purchase of the OK Tire property, would have no advance notice unless they were already present. 293.

AUGUST 14, 2007 - Pl. Ex. 8.

On August 14, 2007 the only noticed event on the agenda for the Special Meeting was "Executive Session". 107. The announcement for the executive session was "discussion of legal

¹There were twenty-two Special Meetings during the period encompassed by the Complaint in this case.

and contractual matters associated with property acquisition which is related to recreation leisure services associated with the Shem Creek in other areas, (2) SCE&G right-of-way and (3) legal advice regarding pending cases.” Pl. Ex. 8. The Town attorney stated the cases involved drainage issues and street repair issues in two subdivisions. Pl. Ex. 8 The Town Administrator added that staff would also like to suggest that Council add to the executive session agenda “discussion with legal counsel in reference to legal representation regarding possible pending legal cases”. The town attorney stated that this would only be legal advice. Pl. Ex. 8.

Upon reconvening from Executive Session, Council made several motions: “(1) to direct the Town Attorney to negotiate a piece of property as discussed in executive session; (2) to direct legal counsel to proceed with legal and contractual matters in reference to property acquisition and right-of -way as discussed in executive session; (3) to authorize legal counsel to proceed as discussed in executive session pertaining to Dunes West Boulevard , Old Park and proceed with litigation; (4) to authorize approval of payment for individual attorneys for Town Council members relative to current activities related to their official positions saving and excepting any court finding of type of illegal activity and additionally the fee statement for these attorneys to be received and reviewed by the town attorney and the town administrator through the normal process.” All motions passed. No information other than the executive session agenda and the executive session announcement was available to the public 110-111. There was never any prior notice that Council would take action or any matter after the executive session. Pl. Ex. 8.

OCTOBER 9, 2007 - Pl. Ex. 7 & 26

On October 9, 2007, the Town held a Special Meeting immediately prior to a regularly

scheduled monthly meeting. Announcements for executive session were: (1) legal matters pertaining to the Buist lawsuit; (2) contractual matters pertaining to property acquisition in the vicinity of Town Hall; (3) legal and contractual matters concerning Shem Creek property; (4) a proposed economic development project, and; (5) some personnel matters pertaining to an employee grievance and (5) appointments to Boards and Commissions. Pl. Ex.7.

Upon reconvening to open session, a motion was made to with regard to the Shem Creek property to “authorize the Town Attorney to make a final offer and if not accepted to pursue formal legal action as discussed in executive session.” The motion passed. Two documents related to the “final offer” were presented at trial: (1) Council letter to administrative services requesting funds in the amount of \$2,285,000 dollars for the OK Tire property and; (2) a check dated October 5th payable to the Charleston County Clerk of Court of two million two hundred and eighty-five thousand dollars. 117; Pl. Ex. 26. At the time the letter was written and the check issued (October 5th), there was nothing in Town Council minutes that this action was even being considered for this October meeting. 117-118. The property purchase seen in the December 5th Meeting was being decided without public notice as early as this meeting.

The Town's Rules of Order provide that citizens may speak at all Council meetings on matters on the agenda; Pl. Ex. 39 §30.29 (E)(7); §30.35 (B)(2) In deposition, the Town Administrator testified that there is always a public comment period before every Council meeting that anyone could speak if they wished. P.22 Depo Burdette, Pg. ____ . Agendas for the special meetings on November 13, November 16, August 14, and October 9 did not schedule public comment periods. Pl. Ex. 7; 16; 18; 22.

NOVEMBER 13, 2008 - Pl. Ex. 22

On November 13th there was a Special Meeting scheduled immediately prior to the regularly scheduled, monthly meeting of Town Council. 65 The posted agenda showed only: "Executive Session (1)Legal and contractual matters pertaining to properties near Shem Creek and (2) Personnel Matters - Appointments to Boards and Commissions (3 committees listed for for appointments)." Two additions were made to the executive session agenda - "Item C - Legal advice pertaining to Ordinance 07060, pertaining to the comprehensive plan; and "Item B - Legal advice pertaining to an opinion from the Attorney General concerning the planning commission." 66, l. 1-5 Pl. Ex. 22.

Council came out of Executive Session during the November 13, 2007, Special Meeting, and made two motions: (1) a motion to direct the Town Attorney to move forward to and obtain the property on Shem Creek. 66-67. (2) a motion to authorize the mayor and members of Council to retain individual attorneys for all lawsuits "now and in the future " paid for by the Town. 66-67; Pl. Ex. 22. Neither action was on the meeting agenda.. The second motion was even not added to or announced for the executive session. Pl. Ex. 22 67- 68.

NOVEMBER 16, 2008 PL. EX 16

The published agenda for the Special Town Meeting held on November 16, 2007, shows only a single entry: "Executive Session - Legal advice for OK Tire (Shem Creek) property litigation." 62, 113; Pl. Ex. 16. In addition that single entry, during the meeting, the Town Administrator asked the Council to amend for executive session to include "personnel matters pertaining to the Clerk of Council" and "personnel matters relating to boards and commissions". 62- 63.

The announcement for the executive session did not disclose with specificity that the Town was considering whether to accept a settlement offer on the OKTire/Shem Creek property, or raising the pay and altering the other requirements for the Town Clerk's position. The public was not informed of the nature of the offer on the OK Tire/Shem Creek matter.¹¹³ After returning to open session, Council took unnoticed formal actions. Pl. Ex. 16 A motion was made and approved to “reject the offer tendered in reference to the OKTire litigation”. Pl. Ex. 16, at page 2. Another motion was made to adjust the position requirements and compensation of the Clerk of Council “as discussed in executive session”. Testimony of the Town Administrator revealed that the Clerk of Council had apparently tendered her resignation and that the Town intended to change the pay and requirements for that position. 297.

The Town Administrator testified that he didn't think the public was entitled to know that the Clerk of Council had resigned or that the Town intended to change the requirements and pay for the position. 304-305 The meeting agenda for November 16th contained no notice that the Council would consider personnel matters at the meeting or, that it intended to vote on any matter discussed in executive session. 63. All motions passed.

The issue of Shem Creek property was listed in the executive session agenda for the November 16th Special Meeting only as “legal advice”. Pl. Ex. 16. There was no statement in the required announcement of specific purpose that Council was considering a settlement offer. 112-113; Pl. Ex. 16 at p. 2. The public was not informed of the nature of the settlement offer in regard to the Shem Creek property or that formal action was intended subsequent to the executive session. 113; Pl. Ex. 16. Yet after returning from executive session Council voted “reject the offer tendered in reference to the OK Tire property litigation.” 113; Pl. Ex. 16.

DECEMBER 5, 2007 Pl. Ex. 2

The December 5, 2007 Special Town Council Meeting had a posted agenda. 50; Pl. Ex. 2. The December 5th meeting that was held in lieu of the Council's December 11 regular meeting which was cancelled during the December 5th special meeting. 142. Council provided a full agenda for the December 5th special meeting just as it did with a regular meeting. 142, l. 23-25; Pl. Ex. 2 & 6.

The OK Tire/Shem Creek issue involved a proposed project to develop condominiums on the site of the former OK Tire Store near Shem Creek. The project included the construction of docks on Shem Creek for each Condominium. 52. The property proposed for development was owned by local attorney Mark Mason. The Town tried to purchase the property after Mason announced plans for development shortly after the area's annexation by the Town; 52. When Mason would not sell, the Town filed a condemnation action. Mason responded with a counterclaim against the Town, Town Council and Council members as individuals; 55. Thereafter, secret settlement negotiations between Town Council and Mason began sometime in October 2007, and were ongoing at the time of the December 5, 2007 Special Town Council Meeting. P. Ex. 25; 26.

The Town provided no public notice that the Town had received a settlement offer from Mason or that during the December 5th special meeting that it would consider taking formal action on an agreement to settle litigation and purchase the property for six million dollars. 55-58; Pl. Ex. 2; 3; 17; 16 ; 22; 3; 51. During the meeting the executive session agenda was

amended during the meeting "to receive legal advice pertaining to the OK Tire Store litigation.² 54 Pl. Ex.3 The announcement prior to executive session indicated only "Legal advice regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties." 53 Pl. Ex. 3 Without any prior notice of potential formal action Council returned from executive session and voted to approve a settlement and authorized the Mayor to sign the settlement agreement 54 Pl. Ex.3 A separate motion was made adjusting the Town's budget to transfer \$3 million into "the water access acquisition project" with funding to come from "various TIF projects".³ The motion did not clearly state the purpose of the funds appropriated although it later became clear that it related to the purchase of the OK Tire/Shem Creek property.⁵⁵ The minutes of the December 5th special meeting did not reflect the contents of the settlement agreement referred to in the first motion and the purchase land was not mentioned in either motion.⁵⁶ The Town disclaimed the existence of an emergency on December 5, 2007. Depo. Burdette, p. 15-18.

Mason executed the agreement on December 5, 2007. 218; Pl. Ex. 1. The agreement was executed by the Mayor on December 6th. 218. On December 6th Town Administrator, Burdette, sent an email to Mark Mason stating: "We are pleased to have settled the matter...Would you and Mr. Smith [plaintiff's partner] consider coming over to Town Hall for a ceremonial signing...". Pl. Ex. 4. The same day, Mason responded:... "Philip [Smith] and I are

²Throughout minutes, agenda and testimony the property that was the subject of the December 5 meeting of Mt. Pleasant Town Council is referred to as OK Tire and/or Shem Creek property and OK Tire/Shem Creek property.

³TIFF: tax increment financing fund used for redevelopment projects.

also glad to have settled the matter”. Pl. Ex.4 221; Pl. Ex. 4. Burdette emailed the Town Council members: “He [Mason] asked that we consider a ceremony after closing on December 18...” P. Ex. 5. The public had no prior notice of the Town’s decision to purchase the OK Tire/Shem Creek property for \$6 million. 55. On December 7th, the local newspaper ran an article on the purchase. 55.

Although the Town claimed that Mason’s ultimatum forced its action on December 5, Mason was never asked for an extension of time in regard to the Council’s consideration of the settlement agreement. Mason testified that had he been asked, he would have consented to additional time to secure a sound agreement. 220. Mason was not asked for additional time and, he believed that when the Town had taken whatever necessary procedural steps in advance of the Mayor’s execution of the agreement. 219. After it was signed by the Mayor, Mason assumed that it was in final form and binding. 218-219. Ratification was never mentioned. 219 Mason’s basis for the suit against the Town included fraud and deceit and a FOIA violation 224.

On December 7th, upon learning of the vote to purchase the property a reporter for the local newspaper wrote the Town Administrator stating: “I can’t know and the public can’t know what’s happening at meetings when agendas are amended during the meeting”. P. Ex. 9 Brock, as former president and general manager of a television station, testified to the importance of the Town’s agenda in the coverage of daily news. Order to Settle the Record, December 5, 2012.

DECEMBER 17TH Def. Ex. 3.

During the December 5th, 2007 Special Meeting, Town Council cancelled its regular monthly meeting scheduled for December 11. Pl.Ex.4. As of December 5th, no further regular/any at all Town Council meetings were scheduled for the remainder of the year. P. Ex 19.

A regular meeting of Council was scheduled for December 11th but was cancelled during the December 5th meeting. 142. The agenda for December 17th indicated the purpose of the meeting was to “confirm settlement agreement”. Def. Ex. 3. An email notifying Council Members of the purpose for the upcoming December 17th meeting stated: “to confirm your previous action advance notice and avoiding problems with title insurance on the Shem Creek property”.

PL.EX.38 - PLTF0051. At the December 17th special meeting Council voted again to approve the settlement and purchase of the property. Def Ex 3.

The Charleston County Parks & Recreation Commission subsequently obtained an as-is appraisal for the Shem Creek property on October 31, 2008 (10 months following purchase). The property was appraised at only \$3 million dollars. 75-76 Pl. Ex. 27. The appraisal gives the market value of three million dollars for the property, eleven months after Town Council voted to obtain it for six million dollars in public funds. 76 Pl. Ex. 27

E-MAIL RECORDS

The Town Administrator testified Council members exchange e-mails on public business and that prior to the present litigation, there was no prohibition for deletion of e-mail on public business among Council members. 312-313. The 2010 Town policy represents the first implementation of any e-mail guidelines for the Town. 313. Town Administrator, Burdette admitted that the Town's 2010 e-mail relates only to town computers. 313. Burdette testified that the Town accepts the policies of the South Carolina Department of Archives and History and maintain its records and complies with that state regulation. (Depo Burdette, p.53, l. 12-14; Ct. Ex. 1; 2; 3; Def Ex. 1; 2; 3).

ARGUMENT

I. THE COURT ERRED IN FAILING TO FIND THAT THE TOWN VIOLATED FOIA WHEN IT TOOK ACTION ON MATTERS NOT PROPERLY NOTICED TO THE PUBLIC AND PRESS.

Standard of Review

Statutory interpretation is a question of law. Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App. 2007). This court may decide matters of law with no particular deference to the circuit court. Pressley v. REA Constr. Co., 374 S.C. 283, 28788, 648 S.E.2d 301, 303 (Ct.App. 2007); Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012); Bellamy v. Brown., 305 S.C. 291, 408 S.E.2d 219 (1991)

Issues Presented

The Town of Mount Pleasant has a practice of taking formal action on matters that are not noticed by the required, posted meeting agenda. Following noticed executive sessions, Town Council routinely takes action on matters noticed and/or added to an executive session agenda for “legal advice” or “discussion”. The Town has held that executive session notice is permission to act on any matter from an executive session without a posted agenda providing notice to the public that any formal actions will be taken during the a meeting. Under examination the Town Administrator addressed the practice.

Q. Is that routine operating procedure

A. If there is an executive session, I would say that probably half the time there's an action following the executive session.

Q. So, fifty percent of the time -- what you're testifying to is that fifty percent of the time, probably, in the Town of Mt. Pleasant the Town Council acts on

matters that are discussed in executive Council (sic) without any notice to the public whatsoever that action is going to be taken.

- A. Well, I think it is implied that when you go into executive session that there's going to be action taken, so I think there some reason to believe that some action may be taken. 303-304.

By its express terms, FOIA requires the posting of an agenda for meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting.

FOIA Section 30-4-80.

The trial court held that Appellant failed by a preponderance of the evidence to establish a single FOIA violation at meetings of December 5, November 13 and November 16, 2007. With regard to a December 5 Special Meeting of Town Council (Count I - Amended Complaint), Council voted to approve an agreement to settle litigation and purchase property for \$6 million dollars without notice. At a subsequent meeting on December 17, with notice, Town Council voted a second time to approve the same agreement. The Court found that the second vote ratified the first vote taken without notice. Although the impetus for the second vote was an apparent FOIA violation, the Court found that ratification excused any violation. Additionally, it proposed that "exigent circumstances" allowed matters to be added to agendas for votes during meetings. The December 5 vote by Council was not added to the meeting agenda. Instead, a motion was made and the matter approved following an executive session for "legal advice" on the matter.

During meetings on November 13 and November 16, 2007, (Count III - Amended Complaint) Town Council violated the notice provisions of FOIA when it voted on matters not on the posted meeting agenda, again, following executive sessions for which matters were announced for “discussion” or “legal advice”.

In addition to the meetings cited in the Amended Complaint, Appellant testified at trial to ten additional meetings at which matters were voted on without any notice to the public by posted agenda. Two of those meetings, August 14, 2007, and October 9, 2007, were admitted to evidence to demonstrate a pattern of conduct.

A. Unnoticed Actions December 5, November 13 and November 16, 2007 Violated the Agenda Notice Provision of Section 30-4-80 of FOIA.

The posted agenda for the December 5th Special Meeting of Mt. Pleasant Town Council contained no reference to the ongoing OK Tire Store/Shem Creek, which was added to the Executive Session agenda for “legal advice pertaining to the OK Tire litigation”. There was no notice by posted agenda that any formal action was contemplated in this matter. Following the executive session, the meeting agenda contained only “appointments to boards and commissions”. The minutes reflect that Town Council convened its executive session at 9:25PM. The OK Tire matter was announced for the Executive Session as “legal advice on settlement of legal issues and purchase of property” - substantively different from the amendment to the executive session agenda earlier in the meeting.

By the time Council reconvened in open session at 10:03PM, Plaintiff and the press had left the Council meeting understanding from the meeting agenda that the executive session was the last business of the evening, other than appointments to boards and commission. When the

open session reconvened, without notice, two motions were made on the OK Tire matter. While the Order states “Town Council adopted a motion to settle the OK Tire litigation which included spending \$6 million in public funds to purchase the property”, this is an error. The executive session agenda (as amended) does not mention purchase of property. There was no mention that purchase of the OK property was a condition of the settlement. Two motions were made. The first was to accept a settlement agreement on the OK Tire litigation. The second motion appropriated \$6 million for an unspecified purpose. The property was appraised several months later by the Charleston County Parks and Recreation Commission at \$3 million dollars.

The press frustration over the unnoticed action was expressed in an email from a reporter at the local newspaper to the Town Administrator; “I can't know and the public can't know what is happening at meetings when agendas are amended during the meeting”. Pl. Ex. 9.

Despite finding that the Council took formal action without meeting FOIA's 24 hour notice requirement, the trial court declined to find a FOIA violation. It did so based on two grounds: (1) the alleged existence of exigent circumstances; and (2) that the FOIA violation was somehow erased when the vote on the settlement agreement, including the purchase of real estate, was ratified/endorsed/affirmed on December 17th. Neither of these grounds are supported by law or fact. The Town admitted at trial and in deposition that no emergency existed on December 5. “And the meeting we're talking about on December 5, '07, was not an emergency meeting was it?” “No, sir.” P.16 L18-22 Deposition, Robert M. Burdette

Absent agenda notice, the public could not have known the intention of Town Council to settle litigation and spend \$6 million for the property.

In addition to the December 5th meeting, meetings on November 13 and November 16,

2007, exhibited the same pattern on the part of the Town voting on matters from executive sessions noticed and/or announced for discussion or legal advice.

On November 13, 2008, Town Council held a Special Town Council meeting immediately prior to a regularly scheduled meeting. The single matter on the agenda for the Special meeting was "Executive Session". P. Ex. 22. Upon reconvening in open session, a motion was made and approved to authorize the Mayor and members of Council "to obtain their individual attorneys for all lawsuits now and in the future...".

A second motion directed the Town Attorney "to move forward with discussions as discussed in executive session for a piece of property near Shem Creek". The "discussions" may or may not have referred to an unnoticed action from October for a nearly three million dollar offer on the former site of the OK Tire store on Shem Creek and an accompanying authorization for legal action if the offer was rejected. As with the December 5 meeting, Council took formal action without meeting FOIA's requirement for posted agenda to provide notice to the public of actions to be taken. The Court in this instance, did not hold that the circumstances constituted an emergency, nor did it cite "exigent circumstances". There was no later ratification and no agenda notice to the public or press that these actions or would be considered for formal action in violation of S.C. Code Section 30-4-80.

On November 16, 2007, the agenda provides Executive Session and Adjournment as the order of business. Upon reconvening to open session, Council voted on three matters without required notice. The meeting agenda did not notice that the Council would vote on anything. Council voted to raise the salary of the Clerk of Council, reject a settlement offer on the OK Tire property, and write a letter to the Chairman the Planning Commission suggesting he resign. The

lower court did not apply the exigent circumstances finding to this meeting or any Council meeting other than December 5, instead issuing a broader ruling in the Order for the Motion for Reconsideration (Order - January 17, 2012) The lower court found that FOIA does not preclude formal action without notice:

Plaintiff argues the Order on the merits did not address the issue of whether a matter may be added to an agenda for executive session may be acted upon by public body upon reconvening to open session. To the extent this issue was not addressed in the previous Order, I find that FOIA does not preclude such action.

The votes taken without notice constituted violations of the 24 hour notice provisions under S.C. Code Section 30-4-80.

B. Liability of a Public Body for Violations of FOIA is Not Excused By Subsequent Actions to Resolve Actions Undertaken During Those Meetings.

Ruling on the December 5 meeting, the trial Court further erred by holding that a FOIA violation was excused or somehow erased simply because the Council took “the same action on the same matter” at its December 17 special meeting which “ratified any defective action on the issue which occurred at the earlier (December 5) meeting when agenda was not timely posted” confirming the absence of notice. As a basis for this holding, the trial court relied on Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986). This was erroneous for two reasons. First, it misconstrues the holding of Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986) Second, the 1987 FOIA amendment eliminated ratification from FOIA entirely.

Multimedia interpreted the ratification provision of Section 30-4-70(a)(1), Code of Laws of South Carolina, 1976, as it existed prior to the 1987 amendments, as it provided that “[a]ny formal action taken in executive session shall thereafter be ratified in public session prior

to such action becoming effective.” Section 30-4-70(a)(5), Code of Laws of South Carolina, 1976.. Multimedia held only that where a formal action was taken in executive session, such action would be valid if subsequently ratified in open session pursuant to Section 30-4-70(a)(5). Subsequent to Multimedia, however, the ratification provisions relied on in Multimedia were removed from FOIA.

Cases from Arizona were cited in Multimedia and Herald with reference to “ratification”. The Arizona Open Meeting Law (OML) §§38.431.05 has since been amended providing a detailed process for ratification of only a “prior action”, not an OML violation.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for the sanctions under the open meeting law such as civil penalties and attorney's fees.

(Section 7.11.2, Arizona Agency Handbook)

The trial court’s reliance on Multimedia and Herald and the cases underlying those decisions for any theory of ratification to erase the FOIA violation in this case was therefore in error. Order Page 5, Footnote 18

In this instance, the “action” (the settlement agreement and purchase of property) was signed, sealed and delivered on December 6. While a potential defect in the agreement (as opposed to the FOIA violation) from unnoticed action may have been “cured” by a vote at a properly noticed meeting, allowing a public body to expunge a FOIA violation by this means would fatally weaken FOIA. Public bodies could violate FOIA at will, then schedule a later meeting to erase the violations.

With regard to the meetings of November 13, November 16, August 14, and October 9, no later "ratification" was undertaken.

C. The December 5th Action Failed to Qualify as a Recognized Exception to FOIA's Notice Requirement Pursuant to Section 30-4-80.

By its express terms, FOIA requires the posting of an agenda for special meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but *not later than twenty-four hours before the meeting*. The notice must include the agenda, date, time, and place of the meeting.

Section 30-4-80. *Emphasis added.*

Although an emergency meeting is an exception to FOIA's 24 hour notice rule, it is the only exception to the rule. The Town Administrator admitted, and the record shows, that the December 5th meeting was not an emergency meeting. T pp. 295-297; pp. 16-18 Depo. Burdette. As a result, the December 5th meeting did not qualify as exempt from FOIA's notice requirement and therefore constituted a violation under Section 30-4-80..

In its order the trial court did not expressly hold that the meeting was exempt from notice provisions of Section-4-80 as an emergency meeting. Instead, it created a completely new rule to exempt the Town's notice from FOIA's notice requirements by holding that: "exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business". For this proposition the trial court cited to Herald. Unfortunately, Herald does not address this issue, nor does Herald support such a rule. To the contrary, the very recent case of Lambries held that "to allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement in section 30-4-80." Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012). The trial court's order has misconstrued Herald and created a rule contrary to the spirit of FOIA

and this Court's holding in Lambries.

In addition to the trial court's error in its application of law, the record in this case fails to support the court's ruling that matters can be added to meeting agendas for the proper and expeditious conduct of public business as a basis for exemption from FOIA's notice requirements. A review of the record makes clear that no emergency existed on December 5th. In fact, the record shows that the Town had apparently been considering various settlement offers involving Mason for months. On more than one occasion Council took formal action on the OK Tire/Shem Creek matter without the matter being on the agenda for action. The December 5th actions relating to Mason were only a continuation of the Town's pattern of conduct, rather than any emergency justifying a notice violation. The lack of any emergency is apparent upon review of the minutes of that meeting.

The agenda and minutes of the December 5th meeting show a substantial number of matters addressed at that meeting. After the local band played and high school coaches made announcements the meeting recessed for thirty minutes. Ironically, the meeting reconvened with an announcement by Town Attorney Young that the Town was in compliance with FOIA. Despite having a six million dollar contract in hand that supposedly demanded emergency action, Council went on to conduct routine business for two hours without any announcement of the pending matter or that they would be taking emergency action that night.

It was not until the end of the meeting at 9:30 p.m. that the OK Tire/Shem Creek matter was first mentioned. And even then it was only mentioned as one of the purposes for an executive session. When the open session reconvened after 10:00 p.m. two motions were made and approved relating to the OK Tire/Shem Creek matter. Clearly, had this been an emergency

warranting the suspension of FOIA's notice provisions, the existence of the emergency and potential action would have been announced at the beginning of the meeting and the agenda amended to include an emergency action.

FOIA's notice provision provides that notice be given as soon as practical. In this case, even if an emergency existed, the Town still violated the notice provision by making no announcement during the meeting of the supposed emergency or that emergency action would be taken at the meeting. Had it done so, at least the press and public that was in attendance would have been alerted two hours prior to the action. By the time Council reconvened in open session at 10:03PM, the Appellant and the press had left the Council meeting with the belief that other than appointments to board and commissions, the executive session would be the last business of the evening. This belief was reasonable in light of the published agenda and the limited scope of an executive session.

The December 5th meeting is especially egregious as it resulted in the expenditure of six million dollars of public funds by the Town in a blatant violation of FOIA's notice provision. The facts relating to the history of the OK Tire/Shem Creek matter seen in other meetings shows that the OK Tire/Shem Creek matter escaped public scrutiny and input as a result of the Town's repeated FOIA violations.

The trial court's ruling that exigent circumstances exempted the Town from the notice requirement are therefore without factual support as well as contrary to the law. Here, the trial court's ruling frustrates the overriding purpose of FOIA to provide the citizens of Mount Pleasant with advance notice of potential actions by the Town's Council.

D. There Are Multiple Instances of Similar Acts of Action Without Notice

To illustrate pattern, Plaintiff introduced evidence of two meetings in addition to those of December 5, November 13, and November 16, 2007, which demonstrated a pattern of taking formal action on matters noticed for executive session and/or added to executive session agendas but not noticed on the meeting agenda for action as required by FOIA Section 30-4-80.

The posted agenda for the August 14, 2007 Town Council Special Meeting, which immediately preceded a regularly scheduled meeting, contained a single item of business - Executive Session. The agenda contains no notice to the public or press that any action would be taken. Pl. Ex. 8. The Minutes of the Special Meeting show that despite the absence of notice, Council voted to further negotiations on a "piece of property", to proceed with legal and contractual matters in reference to an undisclosed property acquisition and right of way, and authorized payment for individual attorneys for all council members. All of the actions at the August 14th Special Meeting constituted violations of FOIA's notice provisions.

Similarly, the October 9th Special Town Council Meeting resulted in numerous actions without any prior notice. Most notable was an offer for the OK Tire Property. Pl. Ex. 7. The minutes do not disclose that Council is appropriating \$2,285,000 for the purchase - learned by the public some time after the meeting. The motion for the unnoticed "legal action" action authorizes the town attorney to institute an unspecified action in the event the offer is not accepted. All matters were voted on without notice by posted agenda.

E. Appellant was Entitled to a Finding that a Violation occurred.

The clear and unmistakable intent of FOIA is expressed in the purpose outlined in Section 30-4-15:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

§ 30-4-15. *Findings and purpose*

The standard of “liberal construction” urged for FOIA is not necessary to recognize the violations of the notice provisions of FOIA in the meetings cited in the Amended Complaint or the two meetings allowed in evidence to demonstrate a pattern of taking action on matters without notice.

As this Court recently held:

[t]o allow an amendment of the agenda regarding substantive public matters undercuts the purpose of the notice requirement in section 30-4-80. A narrow construction of FOIA may support the position that so long as regularly scheduled meetings are open to the public, they are conducted in compliance with FOIA. However, such a construction would be inconsonant with the agenda notice requirement for regularly scheduled meetings and would go against the instruction that FOIA is to be liberally construed. *See N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) (stating FOIA is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the legislature); *Evening Post Publ'g Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005) (holding FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012).

In a 2009 opinion of the Attorney General of South Carolina posed circumstances that parallel events in this case:

...interpreting section 30-4-80(a) to permit last minute changes to agendas gives public bodies the ability to post agendas with only non-controversial items and later amend those agendas to include more controversial matters without notice to the public. Accordingly, we believe this reading would deny the public some of

the protection FOIA seeks to afford.

Op. S.C. Atty. Gen., 2009 WL 1968596.

FOIA was enacted to prevent the government from acting in secret. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156; 547 S.E.2d 862 (2001). In this case Council's failure to provide notice of action items allowed it to act without public scrutiny, input, inquiry, objection, comment, or knowledge is - for all practical purposes, in secret and precisely what FOIA was created to prevent.

Due to the magnitude, regularity, and nature, the FOIA violations at issue are substantial and can simply not be minimized. There is no ambiguity in the 24 hour notice requirement of FOIA and, aside from emergencies, no exceptions. As a consequence, there is simply no legal or factual basis to find that the Council was in compliance with FOIA. The trial court erred in failing to find or otherwise excusing or erasing, FOIA violations where lawful and proper notice was not provided.

Here the Appellant was entitled to a finding that the Town repeatedly violated the notice provisions of FOIA Section 30-4-80.

II. THE COURT ERRED IN HOLDING THE TOWN'S ANNOUNCEMENTS OF EXECUTIVE SESSION DID NOT VIOLATE FOIA'S SPECIFIC PURPOSE PROVISION. (Count III of Amended Complaint)

Mount Pleasant Town Council repeatedly violated FOIA by failing to properly announce the specific purpose for executive sessions. Despite evidence of the Town's repeated violations, the trial court refused to find any violation. In doing so the trial court, relying on Herald

Publishing which predates the “specific purpose” amendment to FOIA, erroneously applied a lesser standard in its review. (Order, FN 21).

Prior to each executive session Council must announce the specific purpose for the executive session:

(b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section.

S.C. Code Section 30-4-70(6)(b).

During the 2007-2008 period covered by this action, the Town of Mount Pleasant held only 12 regular meetings, but 22 special meetings, most of which were solely for the purpose of conducting an executive session. A review of the minutes from those meetings, and specifically the unnoticed votes that followed the executive sessions, reveal that the Town routinely either made no mention at all of matters to be discussed in executive session or, gave so little detail that the specific purpose of the session could not be known or divined. Despite clear and undisputable evidence of this practice, the trial court failed to find a FOIA violation.

In reaching its decision the trial court gave an analysis of the purpose requirement under Multimedia and Herald. Both Multimedia and Herald predate the 1987 “specific purpose” amendment of FOIA and the more recent case of Quality Towing. The trial court’s analysis failed to even mention Quality Towing, which addressed the same notice requirements at issue in the present case under the new law. Quality Towing specifically addresses executive session announcements post Herald and Multimedia. Quality also addressed the same type of generalized

statements seen in the present case. Quality Towing is therefore controlling.

In Quality this Court reviewed an announcement for executive session and found that a generalized statement of purpose was insufficient to meet FOIA's specific purpose test. In Quality the purpose for the executive session was:

“C. Towing — Contractual Recommendation”.

With very little discussion this Court in Quality held that the above language clearly failed to meet the requirements of FIOA:

“FOIA is clear in its mandate that the ‘specific purpose’ of the session ‘shall be announced.’ Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private.”

Quality Towing.

Under Quality, announcements of the general nature of the matter were simply found insufficient in light of the “specific purpose” requirement under S.C. Code Section 30-4-70. Here, the Town's practice of making such generalized statements cannot be distinguished from that seen in Quality Towing.

On November 13, 2007, the posted agenda for the executive session immediately prior to a regular meeting showed executive session items: (1) “legal and contractual matters pertaining to properties near Shem Creek” and (2) “to discuss personnel matters pertaining to appointments to Boards and Commission”. The announcement for executive session added: (3) “legal advice pertaining to Ordinance 07060 pertaining to the comprehensive plan” and (4) “legal advice pertaining to an opinion form the Attorney General concerning the Planning Commission”.

When the Council came out of Executive Session in the November 13, 2007, Special Meeting, it authorized the Town Attorney to move forward pertaining to a piece of property on

Shem Creek. 66-67; Pl. Ex. 22. On its face, Council's generalized announcement failed to provide the specific purpose for this action, whether it was to discuss settlement negotiations or the appropriation of additional funds.

More importantly, the motion for members of Council to "obtain their individual attorneys for all lawsuits now and in the future with all fee statements reviewed by the Town Attorney" cannot be specifically tied to any announcement for the executive session, yet it was clearly discussed. It was the second occasion on which Council apparently discussed obtaining private counsel for each Council member (see also August 14) without it being included in the announcement for executive session. 67. In this instance, Town Council voted for an open-ended expenditure that would not be again voted on.

The Court imputed a "clear description" standard in finding that the Town had met FOIA's standard for executive session announcements. There is nothing in these two announcements for executive session on November 13th that provides a clear description, much less meets the "specific purpose" standard of FOIA.

Similarly, on November 16, 2007, a Special Meeting was convened for executive session only. The only matter in the agenda for the executive session was "Legal advice pertaining to OK Tire property litigation". During the hearing two additional matters were added to the executive session: "Personnel matters related to Boards and Commissions" and "Personnel matters related to the Clerk of Council". 62-63.

Following the executive session, a motion followed "to adjust the position requirements and compensation of the Clerk of Council" 112; Pl. Ex. 16. Reviewing the motion and vote from the minutes it is clear that the generalized announcement of "Personnel matters related to the

Clerk of Council” failed to reveal specifically that the adjustment of the position requirements and compensation for the Council clerk position were the specific purpose for the session.

The failure of the Town to be specific in its announcement was clearly not an oversight.

According to testimony of the Town Administrator during trial:

Q. ...don't you agree, Mr. Burdette, that if in this particular case...it [the announcement of for the executive session] said that Town Council will discuss the matter of the resignation of the Clerk of Council and that we will appoint a new clerk of court (sic), would that not give the public information to which it was entitled?

A. “I do not believe that they're entitled to information in that way”.

T. 304-305.

A second motion was also made to “reject the offer that was tendered in reference to Shem Creek property and the OK Tire Store property litigation”. The announced purpose of the executive session was only: “legal advice pertaining to the OK Tire property”. From the motion made it is clear that the actual purpose of the session was not just legal advice, but discussion of whether to accept a settlement offer. There was simply no way from the executive session announcement for the public to know that the specific purpose of the session was to discuss a settlement offer Council had received on the OK Tire/Shem Creek matter. This type generalized announcement is precisely what has been held insufficient under Quality Towing.

On December 5th Council announced the purpose for executive session was for “Legal advice regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties. Pl. Ex. 3, page 23 of 24. Immediately after reconvening from executive session Council voted on a motion “to approve a settlement agreement as discussed in

executive session pertaining to the OK Tire Store property condemnation lawsuits and authorize the Mayor to execute the agreement". A second motion was made "to transfer an additional \$3 million in the water access property acquisition project for a total project budget of \$6 million". ...". P. Ex. 3, page 24 of 24.

In light of the motions, it is clear that the actual purpose of the executive session was to discuss the acceptance of a settlement offer which included the expenditure of \$6 million dollars. From Council's announcement the public could not possibly know that Town Council was discussing a \$6 million dollar expenditure.

On August 14, 2007, a Special Meeting of Town Council was scheduled immediately prior to the regular meeting. The only agenda item was executive session. The announcement for executive session included "discussion with legal counsel in reference to legal representation regarding possible pending cases". A review of the minutes finds a motion to provide payment for private counsel for each member of council, which is a precursor to the November 13th meeting which added "now and in the future." Pl. Ex. 8.

Also in the announcement for August 14th were "discussion of legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with Shem Creek and other areas," "personnel matters regarding the Town Administrator, Legal Counsel and Board & Commissions as well as appointments to Boards and Commissions." None of which are particularly revealing as to what specifically was to be discussed.

Additionally, a review of the minutes and motions for unannounced actions at this meeting includes a motion with regard to Shem Creek, to make a final offer and if not accepted

to proceed with formal legal action if not accepted. The offer was \$2,285,000 and the formal legal action turned out to be condemnation of the property which lead to the OK Tire litigation of December 5. This example alone establishes clearly the deficiency of the Town's announcements for executive session. There is, however, the motion to "to respond to the request for legal fees not to be found among the announcements for executive session.

On October 9, 2007, the executive session announcement included: (1) "legal matters pertaining to the Buist lawsuit", (2) "contractual matters pertaining to property acquisition in the vicinity of Town Hall" (2) "legal and contractual matters concerning Shem Creek property", (3) "a proposed project near Six Mile Road and US 17 (3) an economic development prospect" and (4) "some personnel matters pertaining to a employee grievance", and (5) appointments to Boards and Commissions. Again, none of the foregoing reveal specifically what was to be discussed.

Following the executive session, a review of the minutes of the meeting reveals a vote authorizing the Town Attorney to make a final offer on the OK Tire/Shem Creek property and if not accepted to undertake formal legal action. There was no disclosure of anything more than legal advice on OK Tire/Shem Creek property. Additionally, Town Council voted "to respond to a request for legal fees as discussed in executive session". The matter of legal fees, clearly discussed in the executive session, was not included anywhere in the announcement for the executive session. This example alone establishes clearly the deficiency in the Town's announcements for executive session.

In upholding a lower court ruling in 1993, the Pennsylvania Commonwealth Court cited a Mississippi Supreme Court decision on executive sessions as the "best rationale" for requiring specificity. The Court enjoined a county board from holding executive sessions to discuss

litigation unless it was identified by court, style and number. The Mississippi Court held that specificity was essential:

The reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say "personnel matters" or "litigation" tells nothing. The reasons stated must be of sufficient specificity to inform those present that there is, in reality, a specific, discrete matter or area which the board had determined should be discussed in executive session...When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.

Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107

(Miss.1989).

In light of FOIA's often stated purpose of preventing secret government action, the harm in the Town's practice is obvious. Based on the clear evidence in record, the trial court's failure to find the Town's practice a violation of the specific purpose requirement under S.C. Code Section 30-4-70, and the holding in Quality Towing, was in error.

III. COURT ERRED IN REFUSING TO HOLD THE DESTRUCTION OF EMAILS AND OTHER INFORMATION VIOLATED PUBLIC RECORDS RETENTION ACT.

The trial court in this case refused to rule that the Town was in a violation of the Public Records Retention Act (PRA) despite its admitted destruction of e-mail correspondence by Town Council members. The court refused to rule on "past actions" of Council, based on its finding that the law in this area is "ever developing" and, that the Town "does have a records retention policy."

In its analysis of the issue the Court mis-characterizes the allegation in Count IV of the Amended Complaint. Appellant in this case did not allege that the Town did not have an overall records retention policy. Appellant alleged specifically that the Town did not have a policy for the retention of e-mail records relating to Town business. During the course of the trial the Town Administrator admitted that no e-mail policy existed before 2010. In accord with evidence of the improper destruction of emails, yet contrary to the refusal to find a violation, the Court granted injunctive relief to prevent future occurrences of the destruction of emails. The Court simply erred in refusing to find that past destruction of emails constituted a violation of the PRA as alleged.⁴

The use of e-mail for discussion of public business was evident in a collection of e-mails to and among members of Council on a pending ordinance to limit the authority of the Mt. Pleasant Commercial Design Review Board as well as a proposed amendment to limit the time allowed the Planning Commission to consider matters before it. Destruction of e-mail was confirmed in the depositions of two members of Council and the Town Administrator. 311-313; Ct. Ex. Dep. Gary Santos P58L1 - P66L21; Dep. Joseph Bustos P14L25-P16L10.

The South Carolina Public Records Act, applicable at all times pertinent to this action, provides for the retention of public records as well as setting standards for the management and disposal of records. See S.C. Code Ann. Section 30-1-10 *et. seq.* The Public Records Act refers to FOIA for its definition of public records:

“Public record includes all books, papers, maps, photographs, cards, tapes, recordings,

⁴This error causes prejudice as attorney fees were determined based on the trial court’s determination of how many issues the Appellant prevailed on.

or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.”

S.C. Code § 30-4-20(c). The PRA also refers to FOIA’s relief provisions found in S.C. Code Section 30-4-100.

In 2005, by the South Carolina Department of Archives and History (SCDAH), published “E-Mail Management” - a detailed guide for the management, retention, and lawful destruction of e-mail correspondence and records advising on its importance:

[b]oth statute and case law make clear that e-mail must be included in your overall records management strategy...allowing e-mail to be managed by personal preference or routine systems back-ups and administrative procedures that treat all e-mail alike can result in serious legal, operational, and public relations risks.

The most cursory comparison of the Town Council's 2010 Resolution Adopting a Policy for Elected Officials Use of Town Computers and E-Mail Accounts, presented at trial as its e-mail policy, would find the Town's two-page policy non-compliant with SCDAH guidelines.

The “ever developing” theory presented by the Court to excuse the Town's violation of the Public Records Act is not supported by evidence, nor is it a reasonable excuse for the failure of the Town to enact the 2005 guidelines. The SCDAH e-mail management guidelines cite a 1993 federal case in support of the retention of e-mail as public records. (*Armstrong v. Executive Office of the President* , 1 F.3d 1274 [DC Cir 1993] In addition, FOIA's definition of a public record as “other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body” is long established.

At the time of the destruction of the emails at issue (2007-2008), the duty to protect

emails as public documents was well established. At trial, when questioned on whether he had read the 2005 e-mail management guidelines of the SCDAH, the Town Administrator testified, "Probably a long time ago. I couldn't possibly tell you what it says." It is apparent that the Town was aware of the requirement to protect and preserve the emails in question. It is equally apparent that they did not. The trial court clearly recognized the error of the Town's ways, enjoining further destruction of emails. In light of the record and the Court's ruling, there is no basis for the trial court's refusal to find a FOIA violation in the destruction of those records.

IV. THE COURT ERRED IN FAILING TO AWARD ATTORNEY FEES AND COSTS NECESSARY IN THE BRINGING OF THIS ACTION.

In its determination of attorney's fees and costs pursuant to S.C. Code Section 30-4-100, the trial court erred in applying a good faith analysis, in failing to consider the chilling effect of a partial award of fees, in considering any remedial actions by the Town, and in misperceiving the beneficial results achieved by the Appellant in this case.

The Order offers "good faith" and the "absence of bad faith" on the part of the Town, and the finding that there was no intent to violate FOIA despite evidence to the contrary. Page 9.

The Court: The beneficial results as Mrs. Cantwell had said were partial, not complete, and the Court did not find any bad faith on the part of the city. Although the court did find some technical violations on the part of the city, the committee (referring to the finding for Plaintiff, Count I and VII) I think the council members were acting in good faith trying to stay abreast of what was taking place in the committees not necessarily intentionally violating FOIA.

T. 9, August 22.

It has been previously decided that good faith is not a consideration for award of fees.

Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) and further,

action by a public body taken after filing of a lawsuit to resolve the question, does not dismiss the offense. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). To the extent that the trial court considered what it found to be the good faith, or lack of bad faith, on the part of the Respondent or any remedial measures, it erred in the reduction of Appellant's attorney's fee award.

Additionally, in the present case the beneficial effect of this action far exceeds any minor issues which the Appellant did not prevail on. The trial court erred in failing to consider the overall benefit as the overriding factor in the determination of attorney's fees and costs:

...one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention. Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) *citing* (Heath v. City of Aiken, 203 S.C., 178, 182-183, 394 S.E. 2d 709-711 (1990)).

A major factor considered by the trial court in its determination of fees was its finding that Appellant prevailed on only two issues. Contrary to this finding the record shows that the Appellant prevailed on Counts II, V and VII of the Amended Complaint - meetings noticed as committee meetings with quorums of Council present and participating and, executive sessions at those committee meetings which quorums of Council attended. Each of those counts resulted in injunctive relief, Count V. As to Count III and IV, Destruction of Public Records, the Court refused to hold the Town accountable for past destruction of public records but, nevertheless, enjoined further destruction. Town Council's pattern of holding special meetings prior to regular meetings for the purpose of executive sessions, during which Council would take formal actions without notice, was brought to light, and the Court urged the Town to abandon the practice,

which it has as a result of the present action. Using the court's own analysis, but looking to the beneficial results achieved, the Appellant has won the overwhelming bulk of his allegations. As a result, his award should not be diminished simply because he did not prevail to the full extent on every single allegation in the complaint.

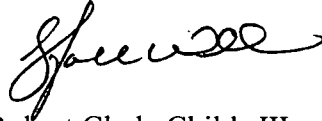
In pursuing relief from the Town's pattern of substantial FOIA violations the Appellant incurred fees of approximately \$118,000. The Court awarded the Appellant \$42,000 which was intended to cover the \$41,374.52 in fees that were outstanding at that time. (P. 9, Aug 22). This placed an ultimate burden on the Appellant of approximately \$76,000 to enforce FOIA in this case. Placing such a huge financial burden on a single citizen because he was not perceived to have won each and every allegation in the complaint will render FOIA absolutely useless, as it will have a chilling effect on the public's willingness to continue to safeguard and enforce compliance with FOIA. The major and overriding benefits of this case warrant a full award of fees and costs.

Appellant is further entitled to an increase in attorney's fees and costs based on any beneficial results of this appeal. To the extent that Appellant prevails on issues herein, he should be entitled to an increase in his award of fees and costs accordingly.

CONCLUSION

Based on the foregoing, the relevant portions of the lower court's decision should be reversed.

Respectfully submitted,



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June 7, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COMMON PLEAS COURT
Appellate Case No.: 2012-208787

J. C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No.: 2008CP1003308

Stephen George Brock, Appellant,

v.

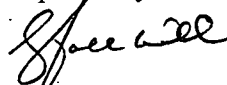
Town of Mount Pleasant, Respondent.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

The Appellant proposes that the following matter be included in the Record on Appeal:
Orders: Order; Supplemental Order; Second Supplemental Order; Order to Settle Record
Pleadings: Amended Complaint; Answer; Plaintiff's post trial motions; Defendant's Return to
Post Trial Motions; Plaintiff's attorney's fees affidavits;
Transcript Pages: Trial transcript pp. 1-335; pp. 7-76; 104-134; 141-274; 291-307; 310-332
August post trial motion hearing pp. 1-12; Jan 12, 2012 1-end.
Exhibits: . Ex. 1-9; 12, 14, 16, 18, 22, 25-28, 35, 38-40. Def Ex. 3;
Transcript pages depo: Santos 58-66; Bustos 14-16; Burdette 8-41; 50-84

I certify that the Designation contains no matter which is irrelevant to the appeal.

Respectfully submitted,



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June 7, 2013.

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SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Stephen George Brock, Appellant,

v.

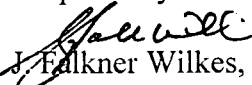
Town of Mount Pleasant, Respondent.

CERTIFICATE OF SERVICE

I certify that I have on the 7th day of June, 2013, served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record as follows:

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JUN 10 2013

SC COURT OF APPEALS