THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Upon Certiorari to the South Carolina Court of Appeals

---

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge



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Case No. 2008-CP-41-0004
Appellate Case No. 2012-212790

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Dennis N. Lambries,

Respondent,

v.

Saluda County Council;
T. Hardee Horne, Chairman;
William "Billie" Pugh, Councilman;
Steve Teer, Councilman;
Jacob Schumpert, Councilman; and
James Frank Daniel, Sr., Councilman,

Petitioners

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# BRIEF OF PETITIONER

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases:

Statutes:



Rules of Court:

## QUESTION PRESENTED

Did the Court of Appeals err in reversing the lower court and interpreting the South Carolina Freedom of Information Act as prohibiting public bodies governed by the Act from amending the agenda of a regularly scheduled meeting?

## STATEMENT OF THE CASE

Respondent, Dennis N. Lambries (hereafter, "Lambries"), brought this action in 2009 in the Saluda County Circuit Court against the petitioners – the Saluda County Council; its chairman, T. Hardee Horne; and its other members, William "Billie" Pugh, Steve Teer, Jacob Schumpert, and James Frank Daniel, Jr. App. pp. 16-31. The complaint alleged that the Saluda County Council (hereafter, "Council") had amended the agenda of its regularly scheduled meeting on December 8, 2009, without notice and without exigent circumstances. App. p. 18, ¶ 11; p. 19, ¶ 16. It further alleged that Council passed a resolution that had not been on the agenda for this meeting, allegedly in violation of the South Carolina Freedom of Information Act. App. p. 18, ¶ 12; p. 19, ¶ 16. The complaint sought, among other relief, a preliminary and permanent injunction "to prevent any further amendments of the Agenda . . . . " App. p. 20, ¶ 24.

Petitioners filed an answer and counterclaim, to which Lambries filed an answer. App. pp. 32-35, 37-38.

The Honorable William P. Keesley conducted a hearing on June 5, 2009. Judge Keesley denied the request for a preliminary injunction in an order filed July 13, 2009. App. pp. 3-9. Lambries sought rehearing, which Judge Keesley denied by order filed August 12, 2010. App. pp. 11-12.

Lambries appealed these orders. App. pp. 60-61. In a published opinion filed June 13, 2012, the South Carolina Court of Appeals reversed, holding that an agenda cannot be amended without violating the Freedom of Information Act. App. 87-92. One member of the appellate panel filed a dissenting opinion. App. pp. 92-94. Petitioners sought rehearing. App. pp. 95-101. By order filed July 25, 2012, the Court of Appeals denied the petition for rehearing. App. 102-03.

Petitioners sought a writ of certiorari to the Court of Appeals, which the Supreme Court granted by order dated October 18, 2013.

## ARGUMENT

The Court of Appeals Erred in Reversing the Lower Court and Interpreting the Freedom of Information Act to Prohibit Public Bodies from Amending their Agendas During their Meetings.

A. Factual Background and Ruling of the Trial Court.

The complaint challenged Council's actions at a regularly scheduled meeting held December 8, 2008. At that meeting, a motion was made and seconded to amend the agenda to take up a resolution. The motion passed unanimously. The resolution also passed unanimously. App. p. 4 (trial court order, "Facts"). The complaint sought an injunction prohibiting amendment of agenda at any meetings of Council, including regularly scheduled meetings.

The trial court interpreted the language of the relevant provision of the FOIA. It held that, based on the clear language of S.C. Code Ann. § 30-4-80, agenda are not required for regularly scheduled meetings. The court held this statute does not prohibit a public body from amending its published agenda. App. p. 7. The court further found that the amendment complained of was done in open session, in full public view, and did not

violate the FOIA or its purpose "to allow the public access to public information and for the activities of public bodies to be in open session and not behind closed doors." App. pp. 7-8.

The trial court also recognized the power of a county council to determine its own rules and order of business under S.C. Code Ann. § 4-9-110 and found Council has enacted rules that allow agenda to be amended. App. pp. 5, 8. The court found the amendment of the agenda at issue was performed in open session and in accordance with Council's rules of order as codified in the county's ordinances. App. p. 8. The court further found these ordinances are public and that the public is charged with knowledge of them. App. p. 8. Lambries did not appeal these findings, and they are the law of the case. *See Cabiness v. Town of James Island*, 393 S.C. 176, 183 n.2, 712 S.E.2d 416, 420 n.2 (2011). The court found the amendment to be proper and not in violation of the FOIA. App. p. 8.

In addition to the other grounds on which petitioners objected to Lambries' request for an injunction, petitioners argued the injunction should be denied on the basis of unclean hands. Lambries had previously served on Council, including a period as its chairman. Evidence presented at the hearing established that Lambries personally participated in meetings at which Council amended its agenda and conducted business not listed on the previously posted agenda. The trial court found the minutes clearly showed Lambries took part in the amendment of agenda as chairman of Council. App. p. 6. However, the unclean hands argument did not serve as the basis for the court's denial of injunctive relief. App. p. 8.

B. Standard of Review.

As an initial matter, the Court of Appeals applied the wrong standard of review, finding that it could decide the issue presented in this case "with no particular deference to the circuit court." App. p. 88. As the dissenting opinion correctly noted, the decision to grant or deny an injunction is within the discretion of the trial court, and an order denying an injunction is reviewed for abuse of discretion. *See Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 510, 725 S.E.2d 681, 683 (2012); *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); App. p. 94. The Freedom of Information Act (hereafter, "FOIA") does not expressly prohibit amendment of a previously published agenda but is instead *silent* on that subject. Where the statute is silent on the question whether a public body may amend its agenda for a regularly scheduled meeting, this Court should find the lower court did not abuse its discretion in denying a temporary injunction prohibiting such amendments.

C. Argument and Authorities.

On an issue of first impression, a two-judge majority of the Court of Appeals interpreted the FOIA in a manner in conflict with Council's official published procedures allowing amendment of agendas of regularly scheduled meetings. The majority also interpreted the FOIA in a manner in conflict with the long-standing practice of Council and other public bodies throughout the state. The majority's decision expands the scope of the FOIA and imposes a new agenda requirement and a new prohibition against amendment of published agenda not contained in the FOIA itself. Both the agenda requirement and the amendment prohibition are contrary to the plain language of the FOIA. In keeping with the view of the dissenting judge in the Court of Appeals, this

Court should reverse the decision of the majority and find the trial court did not abuse its discretion in denying an injunction against future amendment of published agendas.

The relevant statute provides as follows:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board 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. This requirement does not apply to emergency meetings of public bodies.

S.C. Code Ann. § 30-4-80. In this section of the FOIA, the General Assembly created and addressed three separate and distinct classes of meetings: "regularly scheduled meetings"; "called, special, or rescheduled meetings"; and "emergency meetings." The statute sets out *different* notice requirements with respect to each of these classes of meetings.

The first, second, and third sentences of Section 30-4-80(a) apply to "regularly scheduled meetings." For such meetings, Council must give written notice of the meetings at the beginning of each calendar year and the notice "must include the dates, times, and places of such meetings." *See* S.C. Code Ann. § 30-4-80(a). This notice requirement does *not* include a requirement of an agenda. Indeed, the next sentence of the statute makes clear that the posting of an agenda is *optional*: "Agenda, *if any*, for regularly scheduled meetings must be posted . . . at least twenty-four hours prior to such meetings." *See id.* (emphasis added).

The fourth, fifth, and sixth sentences of Section 30-4-80(a) apply to "called, special, or rescheduled meetings." For such meetings, the General Assembly established a different notice requirement, which expressly includes an agenda requirement: "The notice must include *the agenda*, date, time, and place of the meeting." *See id.* (emphasis added).

Finally, the seventh sentence of Section 30-4-80(a) applies to "emergency meetings." For such meetings, the General Assembly made an exception to the notice requirement, imposing no notice requirement whatsoever. *See id.*

The trial court correctly noted the principle that, in interpreting a statute, courts must give words their plain meaning and words or groups of words cannot be added or taken away. *See Hartford Accident & Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979). The Court of Appeals majority's interpretation of Section 30-4-80(a) does not give the phrase "if any" its plain and ordinary meaning. The clear meaning of this language is that agenda are discretionary, not mandatory, for regularly scheduled meetings. Because an agenda is not even required for such meetings, it cannot be an FOIA violation to amend an agenda that was published at Council's discretion.

In rejecting the plain meaning of the phrase "if any," the Court of Appeals majority invoked the purpose of the FOIA. In so doing, however, the majority expanded the stated purpose of the FOIA, expressed in another section:

> 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*. Toward this end, *provisions of this chapter must be construed so as to make it possible for citizens*, or their representatives, *to learn and report fully the activities of their public officials at a minimum*

*cost or delay to the persons seeking access to public documents or meetings*.

*See* S.C. Code Ann. § 30-4-15 (emphasis added). Both the Supreme Court and the Court of Appeals recognize that the purpose of the FOIA is to protect citizens from secret government activity. *See Seago v. Horry County*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008); *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (2003). That purpose is not violated by amendment of a published agenda, in open session and in full public view.

The FOIA is not intended to dictate how open meetings are conducted. Rather, its stated purpose is to insure that meetings are open to public view and that the records of public bodies are open for inspection, so that citizens can learn of the actions taken by their public officials. Both the trial court and the Court of Appeals dissenting opinion correctly found that the meeting of Council on December 8, 2008, did not violate the purpose of the FOIA. App. pp. 7-8, 93-94. The meeting was conducted in open session, Council amended the agenda in open session, and Council passed the resolution in open session.

The Court of Appeals majority's construction of Section 30-4-80(a) expanded the stated purpose of the FOIA of allowing citizens to "learn and report fully" official activity and improperly rewrote the requirements of the legislation to achieve that expanded purpose. Its decision created two sub-classes of "regularly scheduled meetings," mandated agendas for one of those sub-classes, and prohibited amendment of such agendas, contrary to the language of the FOIA itself. The majority's rationale engrafted onto the FOIA an agenda requirement and an amendment prohibition not contained in or implied by the statutory language.

In an apparent effort to give meaning to the "if any" language, the Court of Appeals majority drew a distinction, not found in the FOIA, between regularly scheduled meetings at which formal action or discussion is to take place and regularly scheduled meetings at which no formal action or discussion is to take place. The majority held:

> the "if any" language simply recognizes that regularly scheduled meetings of public bodies may occur during which no formal action or discussion is to take place. If so, there is no agenda and no requirement for publication of a blank piece of paper.

App. p. 91. The distinction the majority created between a meeting at which formal action or discussion is to take place and a meeting at which no formal action or discussion is to take place has no foundation in the language of the FOIA and is actually in conflict with the definition of "meeting" expressly contained in the FOIA:

> "Meeting" means the convening of a quorum of the constituent membership of a public body . . . *to discuss or act upon a matter* over which the public body has supervision, control, jurisdiction or advisory power.

*See* S.C. Code Ann. § 30-4-20(d) (emphasis added). The so-called "meeting" contemplated by the majority, at which no formal action or even discussion is to take place, is not a "meeting" under the definition of the statute. The majority's attempt to give meaning to the "if any" language of Section 30-4-80(a) by creating this new sub-class of "meeting" is contrary to the statutory definition of "meeting" and cannot be sustained.

The majority's construction of the FOIA cannot be squared with the plain language of the Section 30-4-80(a), which clearly treats differently three separate and distinct classes of meetings – (1) regularly scheduled meetings, (2) called, special, or rescheduled meetings, and (3) emergency meetings – and imposes different notice and

agenda requirements on each class. Nor can it be squared with the definition of "meeting" under Section 30-4-20(d). The "if any" language is applicable to *all* regularly scheduld meetings. Under the plain language of the statute, the posting of an agenda is within Council's discretion for any regularly scheduled meeting.

Apart from the substantive basis for reversing the Court of Appeals majority's analysis of this aspect of the issue, this Court should also reverse the majority opinion on procedural grounds. In adopting the rationale discussed above, the majority violated the rules of error preservation applicable in the appellate courts. To be preserved for appellate review, an argument must be raised to and ruled upon by the lower court. *See Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939). The rationale of the majority opinion was not raised to or ruled upon by the lower court. The only documents included in the record on appeal that reflect the arguments made in the court below are the motion for preliminary and permanent injunction and the motion for reconsideration. App. pp. 40-46, 49-52. A review of those documents reveals that the rationale adopted by the majority was *not* advanced in the court below. In the court below, Lambries argued that a regularly scheduled meeting is a "called" meeting and that an agenda is required for all called meetings, including regularly scheduled meetings, under the sixth sentence of Section 30-4-80(a). *See* App. pp. 50-51. In the court below, Lambries also argued that *the only exception* to the agenda requirement is found in the seventh sentence of the statute – the exception for emergency meetings of public bodies. *See* App. pp. 43, 51.

In his brief in the Court of Appeals, Lambries for the first time made the conclusory argument[1] that "if no formal action is to be taken, no agenda is required." App. p. 72. In oral argument, for the first time,[2] Lambries advanced the argument that no agenda is required for a regularly scheduled meeting if there is to be no formal action or discussion. This argument was inconsistent with his assertion in the court below that emergency meetings are *the only exception* to the agenda requirement. The majority premised its holding on this new argument, never presented or ruled upon in the court below. This argument was not preserved, and it could not serve as the basis for the majority's decision to reverse the lower court's denial of a temporary injunction.

The majority characterized as a "close question" whether a published agenda for a regularly scheduled meeting can be amended during the meeting without violating the FOIA, "because no provision appears to prohibit such action." App. p. 91. Notwithstanding the acknowledged *silence* of the FOIA on this question, the majority found that allowing amendment of a published agenda undercuts the notice requirement of the FOIA. In so ruling, the majority ignored the plain language of the notice requirement for regularly scheduled meetings: "The notice must include the dates, times, and places of such meetings." *See* S.C. Code Ann. § 30-4-80(a). Had the General Assembly intended to mandate the posting of an agenda for regularly scheduled meetings, it would have employed the same language used later in Section 30-4-80(a)

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[1] A conclusory argument is deemed abandoned. *See Crawford v. Central Mortgage Co.*, 404 S.C. 39, 44 n.2, 744 S.E.2d 538, 541 n.2 (2013); *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 620, 602 S.E.2d 747, 750 (2004).

[2] An argument raised for the first time at oral argument is not preserved and should not be considered. *See State v. Fossick*, 333 S.C. 66, 69 n.1, 508 S.E.2d 32, 33 n.1 (1998); *South Carolina Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 249-50, 551 S.E.2d 274, 278 (Ct. App. 2001).

with respect to called, special, or rescheduled meetings: "The notice must include *the agenda*, date, time, and place of the meeting." *Id.* (emphasis added). The majority erred in imposing both an agenda requirement and a prohibition against amending a published agenda in an area about which the statute is *silent*. The "if any" language of the FOIA vests in the public body the discretion to publish an agenda for regularly scheduled meetings. No language in the FOIA prohibits amending such an agenda at the meeting of the public body. The majority exceeded its judicial authority in reading such a prohibition into the statute.

The majority invoked the principle that the FOIA is to be liberally construed. App. p. 91. However, principles of statutory construction do not come into play where the language of the statute is clear and unambiguous. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556-57, 725 S.E.2d 704, 707 (2012).

In its opinion, the majority ignored the principle that prohibits the judiciary from restraining by injunction the exercise of legislative power by municipal corporations, including counties. *See Patton v. Richland County Council*, 303 S.C. 47, 49, 398 S.E.2d 497, 498 (1990). The majority's interpretation of the FOIA operates as a restraint on legislative power, imposing a prohibition on amending an agenda not contained in the FOIA.

The majority also ignored S.C. Code Ann. § 4-9-110, which provides that "[t]he [county] council shall determine its own rules and order of business." Council has enacted rules that allow the agenda to be amended. App. pp. 5, 8. The FOIA contains no

express prohibition on a public body's amending its published agenda. By reading such a prohibition into the FOIA, the majority has gone beyond a liberal construction of the FOIA and expanded its scope to impose an agenda requirement and an amendment prohibition not contemplated by the purpose or the plain language of the statute. The doctrine of separation of powers limits the court's power in construing legislation:

> The court cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute; to legislate and not to interpret. However, this court has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts. There is a marked distinction between liberal construction of statutes by which the court determines their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced.

*Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151-52, 447 S.E.2d 228, 230 (Ct. App. 1994) (citations omitted), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996). In this case, the majority ignored the doctrine of separation of powers, which prohibits its legislating from the bench and imposing a prohibition against amending agenda not contained in the FOIA.

The majority misapprehended the impact of a public body's amendment of its agenda during a regularly scheduled meeting. Such action does not undermine the FOIA's purpose of allowing public access to public information. It does not undermine the FOIA's purpose that the activities of public bodies be conducted in open session and not in secret. It does not undermine the purpose that the public be able to learn and report the actions of governing bodies. Apparently believing that the purpose of the FOIA should be more expansive than the purpose articulated by the General Assembly, the

majority has engrafted a new requirement and a new prohibition onto the legislation actually enacted by the General Assembly. However laudable it may be that the majority believes the protections afforded by the FOIA's plain language do not go far enough, the expansion of those protections is uniquely within the province of the General Assembly.

As found by the trial court, Council had enacted rules of procedure that allow amendment of agenda, as authorized by S.C. Code Ann. § 4-9-110. App. pp. 5, 8. Council followed that procedure in its action of December 8, 2008. That procedure is a matter of public record of which the citizenry is charged with knowledge. App. p. 8. The purposes of the FOIA are not violated by Council's actions, under a practice and procedure that is a matter of public record and knowledge, in an open and public session. Amendment of published agendas does not violate either the language or the spirit of the FOIA, and the trial court properly denied the request to enjoin such amendments.

The majority also ignored the significance of an FOIA violation, which can be criminal in nature. As the dissent recognized, the majority's judicial imposition of requirements not specifically expressed in the FOIA has the potential to lead to new and unintended criminal prosecutions. App. p. 94. Under these circumstances, and in light of the absence of language in the FOIA expressly prohibiting amendments of agenda of regularly scheduled meetings, the majority should have held the trial court's denial of injunctive relief was not an abuse of discretion.

The Court of Appeals majority noted that Lambries had not argued in this action that Council acted with ill intent. App. p. 91. However, throughout Lambries' return to the petition for writ of certiorari filed in te Supreme Court, he has imputed to Council an ill intent, characterizing the amendment of agendas of regularly scheduled meetings as a

"bait and switch." This new characterization and its negative implications should be disregarded by the Supreme Court in evaluating the legal issue raised by this action: whether the FOIA, which is *silent* on the question whether a public body may amend the agenda of a regularly scheduled meeting, should be construed to prohibit such amendments. The dissenting opinion provides a thoughtful and sound analysis of this question:

> Section 30-4-80 is completely silent as to whether an amendment to a published agenda for a regularly scheduled meeting is permitted. What is clear is that an agenda is not required for a regularly scheduled meeting, as indicated by the "if any" language in the statute. Because an agenda is not required for a regularly scheduled meeting, it is difficult to conclude that the statute's silence clearly demonstrates legislative intent to prohibit a public body from amending a discretionary agenda.

App. p. 93 (Pieper, J., dissenting) (citation omitted).

Rather than interpreting the FOIA in accordance with the clear, plain meaning of the language employed by the General Assembly, the majority expanded the statutory language to impose a prohibition not contained therein. It did so upon a finding that the purpose of the FOIA is "best served" by imposing this additional prohibition not found in the statute. App. p. 92. However, as the dissent correctly points out:

> ... Council's amendment of the agenda did not violate FOIA's purpose of providing the public access to a public body's actions behind closed doors. Council's amendment of the agenda did not infringe on Lambries' ability to learn and report fully on the activities of the public officials. While the public was not informed of the amendment to the agenda, the meeting was performed in an open and public manner, and the public was advised of both the meeting and the decisions reached at the meeting.

App. pp. 93-94 (Pieper, J., dissenting); *see* S.C. Code Ann. § 30-4-15 ("... 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... . ... this chapter must be construed so as to make it possible for citizens ... to learn and report fully the activities of their public officials ... ."). This Court should find the dissenting judge and the trial court correctly construed the FOIA. It should reverse the judgment of the Court of Appeals majority.

D. Additional Sustaining Ground.

The appellate court also has the authority to affirm the judgment of the lower court on any ground appearing in the record. Rule 220(c), SCACR. The Supreme Court should find Lambries is not entitled to the equitable relief of injunction on the basis of unclean hands.

The injunctive relief sought by Lambries was equitable in nature. *See Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). One who comes into court seeking equitable relief must do so with clean hands. *See Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 139-40, 714 S.E.2d 532, 534-35 (2011). Lambries, as a former chairman of Council, knew both the practice and the procedure of Council to amend its agenda and act on matters not appearing on the agenda published in advance of the meeting. Lambries had *personally participated* in such action during his tenure on Council.[3] App. p. 6. Lambries was not entitled to the equitable remedy of an injunction where he came into court with unclean hands. On this additional basis, the Court should uphold the decision of the lower court denying the requested injunction.

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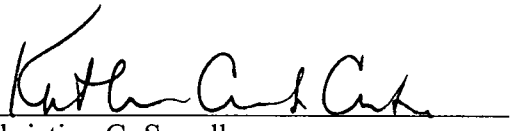
[3] Petitioners introduced evidence documenting multiple instances in which Lambries participated in the amendment of published agendas during his tenure as Council chairman, and the trial court made a factual finding concerning his having done so. App. p. 6. This finding was not appealed and is the law of the case. *See Cabiness*, 393 S.C. at 183 n.2, 712 S.E.2d at 420 n.2. In oral argument in the Court of Appeals, Lambries' counsel freely acknowledged Lambries' prior participation in the very practice he now challenges.

## CONCLUSION

This Court should reverse the decision of the Court of Appeals majority and affirm the judgment of the lower court.

Respectfully submitted,



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PROOF OF SERVICE

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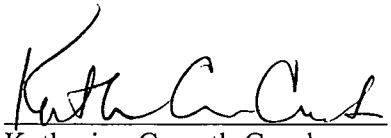
I certify that I have served the Brief of Petitioners upon respondent, Dennis N. Lambries, by mail, postage prepaid, to his attorney, Richard R. Gleissner, 3610 Landmark Drive, Suite G, Columbia, South Carolina 29204, this 18th day of November, 2013.



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