THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

William Paul Keesley, Circuit Court Judge

Case No: 2008-CP-41-0004
Appellate Case Number: 2012-212790

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. *Whether the Freedom of Information Act requires government bodies to give notice to the public of items they intend to discuss and decide upon at public meetings?*

STATEMENT OF THE CASE

Dennis N. Lambries ("Lambries") brought this action seeking preliminary and permanent injunction to prevent what he believed and what the South Carolina Court of Appeals found are violations of the Freedom of Information Act by Saluda County Council (the "Council"), T. Hardee Horne, William "Billie" Pugh, Steve Teer, Jacob Schumpert, and James Frank Daniel, Sr. (the "Councilmen")(the Council and the Councilmen will hereinafter be referred to as "Saluda"). See Complaint, p. 1. On July 24, 2009, Lambries received notice of an order denying his motion for preliminary injunction. See July 13, 2009 Order Motion to Reconsider, p. 1. On August 2, 2009, Lambries moved for a reconsideration of the Order. See Motion to Reconsider, p. 1. That motion for reconsideration was decided by Order that was received on August 12, 2010. See August 12, 2010 Order. This appeal was filed on September 3, 2010.

STANDARD OF REVIEW

A dispute regarding the interpretation of a statute is a matter of law for the court. *Stewart v. Richland Mem'l Hosp.*, 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002), *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. *New York Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 309, 649 S.E.2d 28, 29 (2007); *Sloan v. South Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466-67, 636 S.E.2d 598, 605-06 (2006) (stating the

appellate court is free to decide the question based on its consideration of law, public policy, and the court's sense of justice). Appellate argues that the standard should be the abuse of discretion standard. It is well settled, however, that the misinterpretation of a law is an abuse of discretion. *State v. Pagan,* 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Either way, the reason this Court granted certiorari was because of the importance of understanding the statute at issue in this case and this case boils down to what is the appropriate interpretation of a statute.

FACTS

On December 8, 2008, the regularly scheduled meeting of Saluda was held. See Complaint, ¶ 11 and Exhibit 1, Answer 8. During the meeting, Saluda amended the agenda without notice and without exigent circumstances and passed a resolution not on the pre-meeting agenda. See Complaint, See Complaint ¶ 12, Exhibit 2, Answer 9. Upon finding out about the resolution and amendment, Lambries investigated the practices of Saluda to find that Saluda regularly amends its Agenda pursuant to Roberts Rules of Order and without any notice to the public. See Complaint Exhibit 3, Affidavit of Lambries ¶ 7. In fact, for the period from January 2007 through June 2009, Saluda amended its Agenda, without notice to the public and without exigent circumstances, eleven (11) times. Affidavit of Lambries ¶ 7.

LEGAL ARGUMENT

I. *The Freedom of Information Act requires government bodies to give notice to the public of items they intend to discuss and decide upon at public meetings.*

Section 4-9-110 of the South Carolina Code of Laws (the "Code") governs the operation of the meetings of Saluda. This Section requires that "All meetings shall be conducted in accordance with the general law of the State of South Carolina affecting meetings of public bodies." S.C. Code

Ann. §4-9-110 (Law Co-op. 2007). One of the general laws of South Carolina affecting meetings of public bodies is the Freedom of Information Act. S.C. Code Ann §§ 30-4-10 et seq. (Law Co-op 2007). Section 30-4-80 of the Code specifically states in relevant part that:

> All public bodies ... must give written public notice of their regular 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 public notice of any called, special or rescheduled meetings. Such notice must be posted as early as practicable but not later than twenty-four hours before the meeting. The notice must include agenda, date, time and place of the meeting.

S.C. Code Ann. §30-4-80 (Law. Co-op. 2007). The only exception to the requirement of public notice to include agenda, date, time and place of the meeting is also included in this same section where it states that this "requirement does not apply to emergency meetings of public bodies." *Id.*

In its initial Order denying the preliminary injunction, the trial court focused on the phrase "if any" in determining that no notice of any kind is ever required for regular meetings after they are scheduled at the beginning of the calendar year and amendments to the agenda can be freely made. The brief of the Appellant takes this determination to its absurd conclusion that the posting of an "agenda is optional." See Brief of Appellant, p. 5. In fact, the Freedom of Information Act makes mandatory the posting of an Agenda, if one exists, for all meetings.

As pointed out in the motion to reconsider, the trial court simply ignores and renders completely meaningless the requirements provided for in the last three sentences of the statute and simply ignores the requirement that an agenda be published for a "called" meeting. Similarly, Appellants seek to differentiate between a "regularly scheduled meeting" and a "called" meeting.

Appellants argue that regular meetings are not "called" meetings and do not require the notice provisions required for "called" meetings. Even though they make this argument, they cite no authority for this proposition, and no authority exists for this proposition.

Contrary to the lack of authority for the position of the Appellants, the Respondent has cited statute after statute for the proposition that regularly scheduled meetings must be called meetings, because to hold otherwise would create absurd results. Specifically,

1. Section 4-11-265(A) relating to the budget authority of a governing body states, "[t]he legislative delegation of any county, including the Senator, may, by majority vote at a duly called meeting, initiate a referendum in that county to determine the wishes of the registered electors residing in the geographical areas of all special purpose and public service districts (districts) with regard to budgetary powers and election of the governing bodies of the districts." S.C. Code Ann. §4-11-265(A) (Law Co-op. 2007). Under the Appellant's theory, the ability to initiate a referendum is not allowed at regularly scheduled meetings because these regularly scheduled meetings are not the "called" meetings as required by this section of the Code. That would be an absurd result.

2. Section 6-25-115(F) provides that special purpose districts have the following authority to issue a "construction note ... pursuant to this chapter without obtaining the consent or approval of this State or its political subdivision, or an agency, commission, or instrumentality of this State, but such a construction note may not be issued without the prior approval of a majority of the commissioners of the joint system present and voting at a duly called meeting of it." S.C. Code Ann. §6-25-115(F) (Law. Co-op. 2007). Again, under Appellant's theory, a construction note may not be issued at the regularly scheduled meetings. Again, that would be an absurd result.

3. Section 59-19-80 relating to the authority of school districts, states "[n]o teacher or other employee shall be employed or any purchase made except in a duly called meeting of the board." S.C. Code Ann. §59-19-80 (Law. Co-op 2007). Again, under the Appellants' theory, the hiring of teachers could not accomplished at "regularly scheduled" meetings because they are not "called" meetings. Further, under the Appellants' theory, nothing may be authorized to be purchased at the regularly scheduled meetings because they are not "called" meetings. Again, these would be absurd results.

So, the real issue is what is a "called" meeting? Clearly, called meetings are different from special

meetings or rescheduled meetings. A review of the other sections of the Code establishes that a called meeting is merely one in which the members of a body are "summoned to attend". *See* BLACK'S LAW DICTIONARY (5th Edition). Contrary to the position taken by the Appellants, "the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Mun. Ass'n of South Carolina v. AT&T Commc'n of Southern States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); *see also Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning."). Called meetings include regularly scheduled meetings where the members of the body are "summoned to attend." Further, they are only summoned to attend when the body needs to discuss matters and act upon items. If the body is being called to take formal action, the meeting is a called meeting and an agenda is required with twenty four (24) hours notice of the items to be decided.

In an attempt to argue against this easily understood interpretation, the Appellants make several arguments. First, the Appellants make the argument that the Court of Appeals incorrectly recognized that, sometimes, local governing bodies don't have anything to discuss or act upon during a regularly scheduled meeting. This fact was admitted to during oral arguments before the Court of Appeals by counsel for the Appellants. Further, anyone that has ever participated in local government would attest to this fact. Nevertheless, Appellants now seek to reject this admission and distance themselves from this fact.

Instead of acknowledging their prior admission and the plain truth of local governance, the Appellants seek to have the court adopt some hyper technical reading of the statute to the effect that there can be no meeting without something to discuss or act upon. Brief of Appellants, p. 8. It is

unclear how this hyper technical reading of the statute helps the Appellants' argument. If you have a regularly scheduled "meeting" with nothing to discuss, the Appellants' hyper technical argument is that the governing body isn't really having a meeting. But, this hyper technical reading ignores the fact that the Section 30-4-80 requires that at the beginning of the year the public body give "written public notice of their meetings ... [to] include the dates, times and places of such meetings." S.C. Code §30-4-80. At the time this notice is given, these public bodies may not have anything to discuss or act upon, or at least they may not know what is to be discussed or acted upon at these "regularly scheduled meetings." So, following through on the hyper technical reading of the Appellants, the regularly scheduled meetings should not be called meetings at all, until they know what they have to discuss or act upon. Yet, the statute does call them "meetings", an inconvenient fact that the hyper technical reading simply ignores and causes the hyper technical reading to logically implode upon itself. Such an unnatural reading cannot be the proper interpretation.

Further, in this argument, the Petitioner takes the phrase "if any" to new and unheard of heights. The phrase "if any" is not a synonym for "optional" and is not a synonym for "discretionary." The phrase "if any" is a synonym for whether something exists. As admitted by the Petitioner before the Court of Appeals in oral arguments, this phrase means and is most naturally interpreted to mean that in some instances, a governing body doesn't have anything to decide. In those circumstances, it would be found to have no agenda. It would be absurd to find that if the governing body has nothing to decide, the governing body must post a blank piece of paper as its agenda.

Similarly, the plain meaning of this phrase is not that the governing body can tell the world that it does have a certain list of items on its agenda ("Bait") only to then amend the agenda to decide

other issues ("Switch") without the required twenty four (24) hours notice. That was the very issue before the Court of Appeals and the majority decision clearly finds that public bodies do not get to engage in such a Bait and Switch.[1] Under the plain meaning, Public Bodies must give twenty four (24) hours notice of the issues they intend to decide.

Second, the Appellants argue that the Freedom of Information Act "contains no express prohibition on a public body's amending its published agenda." Brief of Appellants, p. 12. This fact is recognized by the Court of Appeals decision. See, Order of Court of Appeals, Appendix, p. 91 ("no provision appears to prohibit such action"). But, the Freedom of Information Act does contain an express requirement for twenty four (24) hours notice of such an amended agenda. This notice requirement is not a heavy burden, it is merely to post the agenda on a bulletin board. As found by the Court of Appeals, "to allow an amendment of the agenda regarding substantive public matters [without such notice] undercuts the purpose of the notice requirement." Order of Court of Appeals, Appendix, p. 91.

This notice requirement is instrumental in fulfilling the Freedom of Information Act's purpose "to guarantee the public reasonable access to certain activities of the government." *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) *citing Martin v. Ellisor,* 264 S.C. 202, 213 S.E.2d 732 (1975). Specifically, the Freedom of Information Act governs "the right of citizens to information about the operation of their government." *Martin v. Ellisor*, 264 S.C. 202, 206, 213 S.E.2d 732, 733 (1975). This information is not limited to information about the past operations of

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[1] Prior to the ruling by the Court of Appeals, the Respondent could find no ill intent and did not argue ill intent. The Court, the Appellants and the Respondent were dealing with a novel issue. Since that ruling and the refusal of Appellants to embrace the concept of the Freedom of Information, one has to wonder whether Appellants are indeed fighting for the right to engage in such a bait and switch.

the government as the Appellants argue. See Brief of Appellant p. 12-13 (arguing the sole purpose is to learn and report of the past actions of governing bodies). This information is all information, including information about the decisions to be made by the government and the ability to participate in that decision making process. See *Fowler v. Beasley*, 322 S.C. 463, 469, 472 S.E.2d 630, 633-34 (1996) (discussing the prohibitions on actions in executive session so that public can participate in the formal actions of the public body)

Lastly, in an effort to escape the substantive issues in this appeal, the Appellants claim that procedurally, the "if any" issue presented in this appeal was not raised below and that the Respondent has unclean hands. The trial court relied upon the "if any" language in its ruling and to suggest this issue is not preserved in this appeal is beyond comprehension. Further, the trial court clearly and correctly rejected the unclean hands argument and no appeal of this ruling was taken. Also, for the Respondent to have unclean hands, the Appellants must admit that their actions are wrong and in violation of the Freedom of Information Act.

"Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005) (quoting *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)). Further, a court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law. *Hinton v. South Carolina Dep't of Prob., Parole, and Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004); *Doe v. Roe*, 353 S.C. 576, 580, 578 S.E.2d 733, 735-36 (Ct. App. 2003). Here, there is no reason to exclude regular meetings from the requirement that the governing body give notice, through an agenda, of what they intend to speak about and

decide.

CONCLUSION

An open government is the cornerstone of our democratic system and the Freedom of Information Act supports this open government. As stated by the General Assembly in its findings and purpose of the Freedom of Information Act as found in Section 30-4-15:

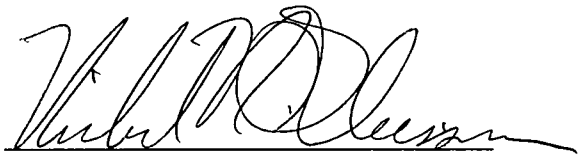
> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.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

S.C. Code Ann. § 30-4-15 (Law. Co-op. 2007). The requirement that business be performed in the open and that citizens be advised of the performance of public officials requires that the citizens receive notice of proposed action, not just action that has already taken place. As stated by in the 1989 opinion of the Attorney General, "[i]f any doubt exists as to action to be taken, the doubt should be resolved in a manner designed to promote openness and greater notice to the public." 1989 S.C. Op. Att'y Gen. 89-111, 1989 WL 406201 (October 11, 1989). Thus, without notice of the agenda relating to the actions to be taken by a public body, there can be no open government and there can be no avenue for the citizens to fully participate in their government.

As stated in *In re Hospital Pricing Litigation*, Opinion Number 26457(S.C. Sup. Court. March 2008), "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *See also Broadhurst v. City of Myrtle*

Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). Further, the history of the period in which the statute was passed may be considered in interpreting the statute. *Catawba Indian Tribe of S.C.*, 372 S.C. 519 n.6, 642 S.E.2d 751 n.6. In this case, the Freedom of Information Act was passed at a time when legislatures were very concerned about open government and the need for the people to have access to their governmental bodies.

"Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *TNS Mills, Inc.*, 331 S.C. at 624, 503 S.E.2d at 478. In this case, Saluda regularly engages in formal action by amending its agenda during "called" meetings without any notice to the public. This practice must stop and this court must reverse the decision of the trial court that allows, as a matter of law, this practice to continue.

By: 

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2014, addressed to its attorney of record as follows:

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