RECEIVED

MAR 24 2014

S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Upon Certiorari to the South Carolina Court of Appeals

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

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

AMICUS CURIAE BRIEF OF THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

Danny C. Crowe
Crowe LaFave, LLC
P.O. Box 1149
Columbia, South Carolina 29202
(803) 724-5728

ATTORNEY FOR AMICUS CURIAE
THE MUNICIPAL ASSOCIATION OF
SOUTH CAROLINA

Table of Contents

Page

TABLE OF AUTHORITIES

Cases Page

Statutes

STATEMENT OF ISSUES ON APPEAL

The Municipal Association of South Carolina ("the Municipal Association") adopts, as the issue on appeal, the question presented in the main Brief of Petitioners.

STATEMENT OF THE INTERESTS OF THE AMICUS

The Municipal Association is a nonpartisan, non-profit association of the State's incorporated cities and towns. All of its 270 member municipalities are governments and public bodies that conduct public meetings and are subject to the State Freedom of Information Act (S.C. Code Ann. §30-4-10 et seq.)("the FOIA"). These municipalities have a substantial interest in the issue in this appeal, which plainly impacts how their meetings are to be conducted.

The emphasis of the FOIA on open meetings and open records has an obvious and pervasive effect on meetings and records of the municipalities and on the relationship of municipalities with the public. Because of this, and because of the criminal penalties and civil remedies provided by the FOIA, municipalities also have a substantial interest in the clarity, correctness and predictability of authoritative interpretations of the FOIA. The Court of Appeals decision rested on a forced statutory construction and an engrafting of legislative intent not fairly implied by the text of the FOIA. Such decisional rationales defy predictability and create uncertainty for public bodies subject to the FOIA.

STATEMENT OF THE CASE

The Municipal Association adopts the Statement of the Case in the main Brief of Petitioners.

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

The Municipal Association agrees with, and adopts, the clear and compelling legal arguments of Petitioners that the decision of the Court of Appeals in this case is a departure from traditional principles of judicial review and is an incorrect interpretation of the FOIA. In its role of amicus, the Municipal Association also offers to the Court, as the perspective of its member municipalities, that the manner of decision by the Court of Appeals produces uncertainty in the law, and that the decision and rationale of the Court of Appeals may have unintended adverse consequences for governments and the public.

In its decision, the majority of the Court of Appeals panel first attempted to explain away the import of the Legislature's deliberate choice of the words "[a]genda, if any, for regularly scheduled meetings" in S.C. Code Ann. §30-4-80(a). It did that by creating a new type of meeting -- a meeting at which "no formal action or discussion" takes place. (App. p. 91). As noted by Petitioners in their main Brief (at page 8), this distinction between meetings with "formal" or "informal" action or discussion is not recognized in the Act's definition in S.C. Code Ann. §30-4-20(d) of a "meeting" as the "convening of a quorum...to discuss or act... " As argued by Petitioners, this construction by the Court of Appeals was forced and erroneous. "Where the terms of statutes are positive and ambiguous, exceptions not made by the Legislature cannot be read into the Act by implication." Vernon v. Harleysville Mutual Casualty Company, 244 S.C. 152, 157, 135 S.E. 2d 841, 844 (1964).

The Court of Appeals then determined the dispositive "close question" of the case (whether an agenda can be amended during a meeting) (App. p. 91) by divining, despite the Act's silence on the issue of agenda amendment, that such an amendment is contrary to the purpose of the FOIA and "violates the spirit of FOIA." (App. pp. 91-92). By grafting onto the FOIA this view of the purpose and spirit of the FOIA and this view of how the purpose and spirit are "best served" (App. p. 92), the Court of Appeals plainly "read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself." Adkins v. Comcar Industries, Inc., 316 S.C. 149, 151-52, 447 S.E.2d 228, 230 (Ct. App. 1994), affirmed, 323 S.C. 409, 475 S.E.2d 762 (1966), citing Laird v. Nationwide Insurance Company, 243 S.C. 388, 395, 134 S.E. 2d 206, 209 (1964). (See also the argument of Petitioners at pages 11-13 of their main Brief and page 7 of their Reply Brief.)

Judicial determinations of FOIA violations surely must require more than a tenuous distinction and the invocation of the spirit of legislation, particularly when the legislation itself is admittedly silent on the issue. While no doubt well intentioned, such a judicial interpretation necessarily creates uncertainty for governments in construing and applying the provisions of the FOIA, as they are required to do, on pain of civil and criminal penalties.

As well known to this Court, the FOIA specifically authorizes "[a]ny citizen of this State" to enforce "the provisions of this chapter [Chapter 4 of Title 30]" by way of a civil action for declaratory, injunctive and other equitable relief. S.C. Code Ann. §30-4-100(a). If the citizen (described in S. C. Code Ann. §30-4-100(b) as "a person or entity") prevails in obtaining the relief sought, "he or it may be awarded reasonable attorney fees

and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof." Id. In addition to these civil remedies, the FOIA provides its own criminal penalties: "Any person or group of persons who willfully violates the provisions of this chapter [Chapter 4 of Title 30] shall be deemed guilty of a misdemeanor" with fines or imprisonment ranging from $100 or 30 days for a first offense to $300 or 90 days for a third or subsequent offense. S.C. Code Ann. §30-4-110 (emphasis supplied).

The uncertainty and unpredictability of judicial interpretations based on the spirit (rather than the language or silence) of the FOIA is magnified when, as in this case, other statutory law specifically authorizes the county council to "determine its own rules and order of business." S.C. Code Ann. §4-9-110. A similar specific State statutory authorization is in place for municipalities. S.C. Code Ann. §5-7-250(b) provides, in pertinent part, that "The [municipal] council shall determine its own rules and order of business..."

As recognized in the circuit court order, the Petitioner Saluda County Council "has enacted rules that allow the agenda to be amended" (App. p.5). The circuit court further found that "In the present case, the amendment of the agenda was performed in open session and in accordance with Saluda County Council rules of order as codified in their ordinances." (App. p. 8). Many municipalities also have local rules of procedure (or adopt by ordinance national rules of procedure, such as Robert's Rules of Order) that allow amendment of an agenda during a meeting.

The Court of Appeals ruling also has produced uncertainty among counties and municipalities as to whether other local meeting rules of conduct will be determined to be

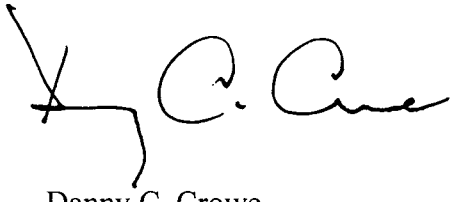
violations of the spirit of the FOIA or violations of the FOIA operating as "super-parliamentary rules of procedures." For example, some municipalities, out of concern over an extension of the rationale of the Court of Appeals, have curtailed or restricted the traditional audience-participation "Public Comment" portions of their Council meetings to avoid possible FOIA violations for allowing discussion to be presented to the Council on topics not published on an agenda in advance of a meeting.

Other municipalities, in an effort to preserve the Council's ability to discuss and act on rapidly occurring matters or events, have determined to amend local ordinances requiring the agenda to be published several days prior to a regular meeting and to shorten the time period for advance publication of the agenda to the 24-hour period referenced in the FOIA. The practical effect of this type of amendment is to reduce to one day the time that the agenda and the agenda topics are available and made known to the public. Another consequence of the Court of Appeals decision has been an increase in the number of called or special meetings (on 24-hours notice) to deal with time-sensitive topics (such as some contract or agreement approvals) that could not be added by amendment to an agenda. All of these consequences, to the detriment of the governments and the public, have arisen in response to the Court of Appeals' prohibition on amendment of agendas during meetings.

CONCLUSION

For the reasons stated above, and for the reasons stated by Petitioners in their Briefs, the Court should determine that the Court of Appeals should be reversed and that the decision of the circuit court should be affirmed. The Court should further determine that the FOIA, properly interpreted, does not prohibit the amendment of an agenda at a meeting of a public body.

Respectfully submitted,



Danny C. Crowe
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728

ATTORNEY FOR AMICUS CURIAE
THE MUNICIPAL ASSOCIATION OF
SOUTH CAROLINA

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Upon Certiorari to the South Carolina Court of Appeals

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Amicus Brief, as required by Rule 213, SCACR, complies with Rules 208(b) and 211, SCACR.

March 24, 2014

Danny C. Crowe
Crowe LaFave, LLC
P.O. Box 1149
Columbia, SC 29202
Attorney for Amicus Curiae The Municipal Association of South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAR 24 2014
S.C. Supreme Court

Upon Certiorari to the South Carolina Court of Appeals

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

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

CERTIFICATE OF SERVICE

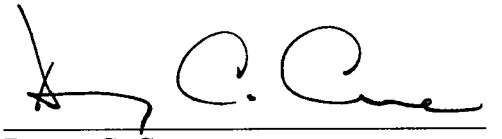
I certify that I have served the Amicus Curiae Brief of the Municipal Association of South Carolina on Respondent and Petitioners by depositing a copy of it in the United States Mail, postage prepaid, on March 24, 2014, addressed as follows:

Richard R. Gleissner
Gleissner Law Firm, LLC
1237 Gadsden St.
Suite 200A
Columbia, SC 29201

Christian G. Spradley
Moore, Taylor & Thomas, P.A.
110 S. Main St.
Saluda, SC 29138

Katherine Carruth Goode
229 S. Congress St.
Winnsboro, SC 29180

March 24, 2014



Danny C. Crowe
Crowe LaFave, LLC
P.O. Box 1149
Columbia, SC 29202
Attorney for Amicus Curiae MASC