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**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**S.C. Supreme Court**

**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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***AMICUS CURIAE* BRIEF OF THE  
SOUTH CAROLINA ASSOCIATION OF COUNTIES**

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## **INTERESTS OF AMICUS CURIAE**

The South Carolina Association of Counties (“Association”) is a nonpartisan, non-profit association of the State’s forty-six counties. The Association was founded in 1967 as an organization dedicated to improving county government for our member counties and protecting the promise of Home Rule guaranteed by Article VIII of the South Carolina Constitution.

Each of the Association’s members is a county government and public body, which conducts public meetings and is subject to the Freedom of Information Act (S.C. Code Ann. §30-4-10 et seq.)(“FOIA”). Each of the Association’s member counties has a substantial interest in the issue on appeal as the outcome impacts both how county council meetings will be conducted and how the counties will be governed. This case presents a direct threat to Home Rule and South Carolina counties’ ability to determine the methods and procedures by which they govern and conduct council meetings.

Pursuant to Rule 213, SCACR, the Association respectfully submits this brief in support of Petitioner Saluda County Council and asks that this Court enter judgment for Saluda County.

## **STATEMENT OF ISSUE ON APPEAL**

The Association respectfully adopts, as the issue on appeal, the Question Presented as set forth by Saluda County in the Brief of Petitioner.

## STATEMENT OF THE CASE

The Association respectfully adopts the Statement of the Case and facts as set forth by Saluda County in the Brief of Petitioner, and adopts only those sections of the Respondent's brief as set forth verbatim herein.

## ARGUMENT

1. THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT AND INTERPRETING THE FREEDOM OF INFORMATION ACT TO PROHIBIT A PUBLIC BODY FROM AMENDING ITS AGENDA DURING A REGULARLY SCHEDULED MEETING

A. No Agenda Is Required For Regularly Scheduled Meetings Under S.C. Code Ann. §30-4-80(a)

An agenda is not required by the Freedom of Information Act ("FOIA") for regularly scheduled meetings under S.C. Code Ann. §30-4-80(a). There is a clear distinction in the text of the statute between "regular" meetings and "called, special, or rescheduled meetings." See S.C. Code Ann. §30-4-80(a). These different types of meetings have different notification requirements, and nothing in the code requires an agenda to be published for "regular" meetings. See S.C. Code Ann. §30-4-80(a) ("Agenda, if any, for regularly scheduled meetings...."). The Association supports the position of the Court of Appeals dissent, the trial court, the Attorney General, and the argument of the Petitioner on this matter. See Lambries v. Saluda Cnty. Council, 398 S.C. 501, 507, 728 S.E.2d 488, 491–10 (Ct. App. 2012) (Pieper, J., dissenting) ("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.") (reh'g denied, July 25, 2012); App. P.7 ("There is no other interpretation possible except that an agenda is not

even required [for regularly scheduled meetings] under FOIA.”); Op. S.C. Att’y Gen., 2009 WL 1968596 (June 9, 2009) (“We agree with your assessment that FOIA does not specifically require public bodies to have an agenda and the use of the phrase ‘if any’ in section 30-4-80(a) further supports this understanding.”); Op. S.C. Att’y Gen., 1984 WL 159828 (Feb. 22, 1984) (“*If there is an agenda* [for a regular meeting]....” (emphasis added)); Brief of Pet., p.6 (“The clear meaning of the language is that agenda are discretionary, not mandatory, for regularly scheduled meetings.”).

In an attempt to confuse the issue, Respondent argues that “regularly scheduled meetings must be called meetings, because to hold otherwise would create absurd results.” (Brief of Resp. p.4). The purpose of this argument is to equate a regularly scheduled meeting to a called meeting, because called meetings require posting of an agenda under the third sentence of §30-4-80(a). Regularly scheduled meetings are not “called” meetings. McQuillin Municipal Corporations notes:

Corporate meetings may be: (1) regular or stated; (2) special or called; and (3) adjourned. Regular or stated meetings are usually prescribed by charter. . . . Special or called meetings are convened by the mayor or chief executive of the corporation. . . or in some other definite way, on due notice to all of the members.

McQuillin Mun. Corp. § 13:08 (3d ed., Rev. 2002). This clearly supports the interpretation of FOIA that regular meetings are not called meetings. This position is also supported by the S.C. Attorney General. See Op. S.C. Att’y Gen., 1984 WL 159828 (Feb. 22, 1984) (discussing differing notification requirements for “Regular Meetings,” “Called, Scheduled, or Re-scheduled Meetings,” and “Emergency Meetings”). Therefore, if the legislature

intended the agenda requirement from the third sentence of §30-4-80 to also apply to regularly scheduled meetings, they would have stated so.

Furthermore, Respondent himself, Mr. Dennis Lambries, is the editor of A Handbook for County Clerks to Council in South Carolina (“the Handbook”). S.C. Clerks to Council Ass’n & Univ. of S.C. Inst. of Pub. Affairs Ctr. for Governance, A Handbook for County Clerks to Council in South Carolina (Dennis Lambries, ed., 2nd ed., S.C. Clerks to Council Ass’n, et al., 2000). In the Handbook, Mr. Lambries notes a clear distinction between regular meetings and special meetings:

Regular Meetings — Regular meetings are held at a specified date and time each month. A quorum is required for the transaction of all business. Regular meetings are held for general county business and for the enactment of ordinances and resolutions.

Special Meetings — The Chairman or a majority of the council members may call special meetings. In general, special meetings are called to address pressing issues that cannot be held until the next regular meeting. Special meetings may also be called to address or receive information on issues of concern with the citizens of a community (e.g. infrastructure, law enforcement, or other issues where input is encouraged, and/or desired). Like regular meetings, special meetings require at least 24 hours advance notice and must indicate the purpose of the meeting, the date, the time, and the location of the meeting.

The Handbook at C-9. The language of the 3rd edition of the handbook is substantially similar and will not be reproduced here.<sup>1</sup> There is no mention of a called meeting in either

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<sup>1</sup> The third edition of A Handbook for Clerks to Council in South Carolina includes a section entitled “Amending an Agenda” which reads: “**The [Association] advises county councils to refrain from amending the agenda during a council meeting.** A 2012 Court of Appeals opinion held that this practice violated the notice requirements of the FOIA.” S.C. Clerks to Council Ass’n, A Handbook for County Clerks to Council in South Carolina 9–10 (3d ed., S.C. Ass’n of Cntys., 2013) (emphasis in original) (citing *Lambries v. Saluda Cnty. Council*, 398 S.C. 501, 728 S.E.2d 488 (Ct. App. 2012)). Obviously, this section was added only after the Court of Appeals decision was published. Mr. Lambries was not involved in the publication of the third edition.

version of the publication. Respondent's argument that a regular meeting must be a called meeting is unsupported by his own work.

Respondent also argues that "if any" is "not a synonym for 'optional' and is not a synonym for 'discretionary,'" but that "[t]he phrase 'if any' is a synonym for whether something exists." Brief of Resp., p.6. However, Respondent uses the phrase "if any" as a synonym for "discretionary" or "optional" in the Handbook. The Handbook states: "Discretion should be used in distribution of executive session agendas if they are used. The Council should give direction to a Clerk as to what department heads, **if any**, should receive these agendas." The Handbook at C-5 (emphasis added). Clearly here, Lambries does not use "if any" as a synonym for whether department heads exist in a county government; he uses "if any" to indicate that it is up to the discretion of the county council to determine which department heads should receive a copy of an executive session agenda. "If any" may be used as a synonym for "discretionary" or "optional" and it is plausible the Legislature intended to use it in this manner in S.C. Code Ann. §30-4-80(a).

The view that an agenda is not required for a regularly scheduled meeting is also supported by treatises on municipal corporations. McQuillin Mun. Corp. § 13.08.20 (3d ed., Rev. 2002) ("Unless the meeting is convened for a special purpose, its object need not be specified in the notice.").

B. Saluda County Was Granted Authority to Establish Its Own Meeting Rules by the Home Rule Act

Article VIII of the South Carolina Constitution provides that “[t]he General Assembly shall provide by general law for the structure, organization, powers, duties, functions and the responsibilities of the counties. . . .” Art. VIII, § 7, S.C. Const. Furthermore, our constitution states that “[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.” Art. VIII, § 17, S.C. Const.

In 1975, the South Carolina Legislature passed the Home Rule Act, S.C. Code Ann. § 4-9-10 et seq., moving the authority to govern counties from the state legislative delegations, to independent county councils. The Home Rule Act provided for county governments to select a form of government under which to administer their county government functions.<sup>2</sup> See S.C. Code Ann. §4-9-10. Saluda County selected a “Council” form of government outlined in S.C. Code Ann. §4-9-310, which provides for the responsibilities of that form of government: “[T]he responsibilities for policy making and administration of county government shall be vested in the county council.” S.C. Code Ann. §4-9-310. The remainder of §4-9-310 provides that “the structure, organization, powers, duties, functions and responsibilities of county government under the council form shall be as prescribed in Article 1 of this chapter.” Id. Article 1 provides for general authority of county governments under all forms of governance (Council, Council-Administrator,

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<sup>2</sup> Upon being granted home rule, counties were provided with five potential styles of governance: Council, Council-Supervisor, Council-Administrator, Council-Manager, and County Board of Commissioners. The County Board of Commissioners form of government was found unconstitutional in Duncan v. York Cnty., 267 S.C. 327, 228 S.E.2d 92 (1976).

Council-Supervisor, and Council-Manager) and specifically authorizes a county council to “determine its own rules and order of business.” S.C. Code Ann § 4-9-110.

Furthermore, a portion of this chapter, S.C. Code Ann. §4-9-25, provides:

All counties of the State, in addition to the powers conferred on their specific form of government have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to health and order in counties or respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them. The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of the county.

S.C. Code Ann. §4-9-25.

In another publication of Respondent, he has interpreted these sections and recommended that county councils develop a set of policies regarding how they will conduct business and govern themselves:

**The final set of policies the council should develop concerns how it conducts business and how it governs itself.** The council should monitor and govern itself, as well as individual council members. The council must conduct business with discipline and integrity.

The council should have operating guidelines that address council discipline and responsibilities—including attendance requirements; coming to meetings prepared to discuss issues and make decisions, reading materials sent prior to the meeting; and standards of conduct, such as treating fellow council members with respect. **Council should adopt policies on rules of procedure to include an order of business, dealing with public input, length of meetings, placing items on the agenda, how far in advance of the meeting materials must be distributed, etc.**

Lambries & Berger, A Handbook for County Government in South Carolina: Chapter 2 – The Governing Body: County Council, 18–19, S.C. Ass’n of Cntys. (5th ed. 2012) (emphasis added). So, Respondent, himself an expert in local government operations, suggests that county councils adopt their own procedures for order of business and placing items on an agenda.

It is clear that counties are given the authority to enact their own meeting rules and procedures as long as they are “not inconsistent with the Constitution and general law of this State.” S.C. Code Ann. §4-9-25. Again, Respondent encouraged this practice in his writings.

This Court upheld the authority of a county council to “determine its own rules and order of business” in McSherry v. Spartanburg Cnty., 371 S.C. 586, 589, 642 S.E.2d 431, 433 (2007). In McSherry, a Spartanburg County councilmember introduced an ordinance for first reading at a council meeting at such time as “neither the title nor the ordinance was written.” Id. at 588, 641 S.E.2d at 432. Spartanburg County’s rules of procedures allowed for an ordinance to be “introduced for first reading at any meeting of the Council by title only.” Id. at 598, 641 S.E.2d at 433. Implicit in the fact that the ordinance was proposed without even a written title is the notion that this ordinance was not published on any agenda. This Court stated that “[a]lthough we are disconcerted by the methodology utilized by Council in this matter, we disagree with Appellants’ argument” that the procedure of enacting this ordinance was flawed. Id. at 589–90, 641 S.E.2d at 433. This Court reasoned that it would be against precedent to overturn the discretionary decision of a legislative body and substitute the courts judgment for that of elected representatives. Id. at 590, 641 S.E.2d at 433 (citing

Thompson v. Livingston, 116 S.C. 412, 419, 107 S.E. 581, 583 (1921); Sloan v. Greenville Cnty., 356 S.C. 531, 555–56, 590 S.E.2d 338, 351 (Ct. App. 2003)).

Therefore, county councils, and Saluda County in particular, maintain the authority to set their own meeting rules and order of business, to include the ability to amend their agenda in an open council meeting, if they so choose. As recognized in the circuit court order, Petitioner Saluda County Council “has enacted rules that allow the agenda to be amended. App. p.5.

C. Saluda County Maintains the Authority to Amend Its Agenda Without Violating FOIA

Even if, as the Respondent argues, the “if any” language in S.C. Code Ann. §30-4-80(a) requires an agenda for a regularly scheduled meeting of a county council to be posted twenty-four hours prior to the commencement of the meeting, there is nothing in the constitution or laws of this state that prohibit the amendment of the agenda in the open forum of a regularly scheduled meeting if the individual council’s rules so allow. In McSherry, this Court also noted that “nothing in the Code or in Article VIII...requires that an ordinance be in written form when it receives first reading.” McSherry, 371 S.C. at 590, 641 S.E.2d at 434. Likewise, nothing in the Code or Article VIII prevents a county council from amending its agenda in an open regularly scheduled council meeting.

The amendment of an agenda for a city council executive session was considered by the S.C. Court of Appeals in Herald Pub. Co. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986). In Herald Publishing, a newspaper challenged the members of York City

Council alleging they “violated the procedural requirements of the [FOIA] by changing the published agenda for the [executive session] meeting” because “the council took up matters not on the agenda while in executive session.” *Id.* at 11, 351 S.E.2d at 882–83. The court of appeals found that “[t]he [FOIA] does not require that an agenda for an executive session be posted” and that there was not “any prejudice to the newspapers as a result.” *Id.* at 11–12, 351 S.E.2d at 883. The Herald Publishing court found that the Council did not violate [FOIA].” *Id.* at 12, 351 S.E.2d at 883. According to McQuillin, “At any meeting of which due notice has been given, the governing body may, in the usual course, act on any matter.” McQuillin Mun. Corp. § 13:08 (3d ed., Rev. 2002). Likewise, Saluda County Council did not violate FOIA by amending its agenda in open session of a regularly scheduled meeting on December 8, 2009.

The county council is vested with the authority to promulgate its own rules of procedure as long as they are not inconsistent with the state constitution or state laws. Nothing in the constitution or the law of this state prohibits a county council from amending their agenda in an open and public regular meeting. Saluda County has promulgated and followed rules of procedure which allow it to amend its agenda. For this Court to read into the statute a prohibition on something which the Act is clearly silent would be a travesty.

2. FOIA VIOLATIONS SHOULD BE DETERMINED ON A CASE-BY -CASE BASIS AND NOT BE SUBJECT TO A BLANKET RULE

“The question of whether a local governing body has substantially complied with the notice requirements of an open meeting law is deemed to be a mixed question of law and fact

to be determined on a case-by-case analysis of the language of the statute and the evidence before the court.” McQuillin Mun. Corp. § 13:07.15 (3d ed., Rev. 2002).

A. What Constitutes “Amending and Agenda” Is Undefined

There is no way to outline what a prohibition on amending an agenda would encompass. Governmental entities frequently remove items from the agenda the day of the meeting. Would this be considered amending the agenda? What about the section for public input? If a citizen spoke on an issue that was not put on the agenda, would that be amending the agenda? Often, items on agendas are reordered because of scheduling conflicts. Does that constitute amending the agenda? What about a motion for an amendment to a proposed ordinance that changes the ordinance to include something new? What about the proposal of an ordinance on first reading? Does it have to be on the posted agenda? Are council members prohibited from talking about anything that is not specifically listed on the agenda for that particular regularly scheduled meeting? A blanket rule preventing a public body from amending an agenda will do more harm than good. FOIA violations should be considered on a case-by-case basis looking to whether the body intended to circumvent the purpose and intent of FOIA. Clearly, the circumvention of FOIA was not the intent of Saluda County Council.

B. No Specificity Is Required Of An Agenda

FOIA contains no direction of what is required of an agenda or how detailed it must be. In fact, the Court of Appeals recognized that the word “agenda” is not defined in FOIA.

Lambries v. Saluda Cnty. Council, 398 S.C. 501, 504 n.2, 728 S.E.2d 488, 490 n.2 (Ct. App. 2012). The court, however, decided that “agenda” should “not [be] viewed narrowly as only a formally prepared piece of paper but instead [should] represent[] the impactful actions and business the paper memorializes.” Id. By defining “agenda” in this way, the Court of Appeals concluded the “if any” language of §30-4-80(a) means that if there is no formal action or discussion to take place, then there is “no requirement for publication of a blank piece of paper.” Id. This argument is illogical. If a public body were required to post an agenda for every regularly scheduled meeting, then the public body must also post one for a regularly scheduled meeting where nothing is to be discussed in order to inform the public of the fact that no official business is scheduled. If the body were not to post this blank agenda, those who frequently check the agenda of the regularly scheduled meetings would think that the body has failed to post the required agenda. The Court of Appeals’ distinction between regularly scheduled meetings with formal business and regularly scheduled meetings without formal business is untenable. Either an agenda is required for all regularly scheduled meetings, or it is not required for all regularly scheduled meetings. To interpret the “if any” language to not require a posted agenda only in the case that there is no business to be conducted by the body at a regularly scheduled meeting, as the Court of Appeals did, is absurd.

Furthermore, since “agenda” is not defined by FOIA, there is no requirement for what must be included on an agenda. Without knowing what is required of an agenda, a rule stating that agendas may not be amended will likely result in more vague and ambiguous agendas in the future.

C. Determining FOIA Violations On A Case-By-Case Basis Allows For Legislative Deference While Upholding the Purpose and Intent of the FOIA

The purpose and intent of FOIA is clear, as set forth in S.C. Code Ann. §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 the 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, of 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 information.

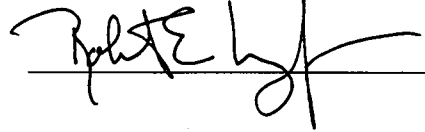
S.C. Code Ann. §30-4-15. Violations of FOIA should be determined on a case-by-case basis to allow the spirit of FOIA to be upheld by the counties and strengthened by the courts. Adopting a rule which disallows the amendment of an agenda by a county council in open session of a council meeting, by public vote, and placed in the minutes of the meeting, is in direct contradiction to FOIA. The activities of the Saluda County Council were performed in an “open and public manner” where interested parties were able “to learn and fully report of the activities of their public officials.” S.C. Code Ann. §30-4-15. Saluda County has, in no way, violated the purpose and intent of FOIA.

Furthermore, “substantial compliance with [FOIA] will satisfy its requirements where a technical violation has no demonstrated effect on a complaining party.” Multimedia, Inc. v. Greenville Airport Comm’n, 287 S.C.521, 525, 339 S.E.2d 884, 887 (Ct. App. 1986). If there was a technical violation of FOIA, the fact that Saluda voted to amend the agenda in open, public, regularly scheduled meeting, and placed the record of that vote into the minutes of the meeting, in accordance with their rules of procedure for all to see negates, through substantial compliance, any technical violation.

## CONCLUSION

County councils are not required to post an agenda for regularly scheduled meetings under S.C. Code Ann. §30-4-80(a). If an agenda is published for a regularly scheduled meeting under S.C. Code Ann. §30-4-80(a), nothing prevents a county council from amending that agenda in an open session of a regularly scheduled meeting according to the rules and procedures of the county council. While it may be best practice to publish a detailed agenda prior to each meeting and stick strictly to it, circumstances sometimes require an amendment to an agenda. Since local rules allow, and nothing in the laws or constitution of this state prohibit it, Saluda County Council should be able to amend their agendas in open, regularly scheduled council meetings. Certainly, the purpose of FOIA is to allow for citizens to be informed of the doings of their government and elected officials pertaining to public business. Saluda County council voting to amend an agenda on December 8, 2009, in an open session of a regularly scheduled meeting, pursuant to their own rules of procedure, did not violate FOIA, its spirit or purpose. The decision of the Court of Appeals must be reversed.

Respectfully submitted,



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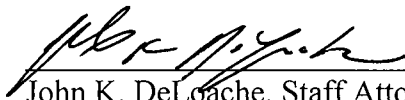
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**CERTIFICATE OF SERVICE**

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I certify that I have this 28 day of April, 2014, mailed a copy of the South Carolina Association of Counties' Amicus Curiae Brief to the following via U.S. Mail with sufficient postage thereto to the below listed attorneys.

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

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Dennis N. Lambries ..... Respondent,

v.

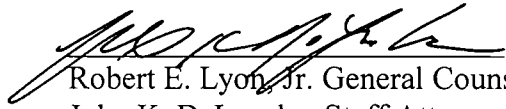
Saluda County Council;  
T. Hardee Horne, Chairman;  
William "Billie Pugh, Councilman;  
Steve Teer, Councilman;  
Jacob Schumpert, Councilman; and  
James Frank Daniel, Sr., Councilman ..... Petitioners

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**CERTIFICATE OF COUNSEL**

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The South Carolina Association of Counties' counsel hereby certify that the Brief of *Amicus Curiae* complies with SCACR Rules 208(b), 211 and 312.

  
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April 28, 2014