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November 20, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
via facsimile also to: (803) 734-1839

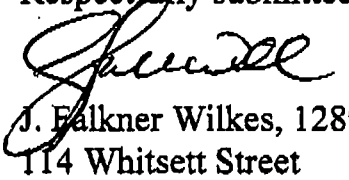
Re: Stephen George Brock, Appellant v. Town of Mount Pleassant, Respondent
Case No.: 2008-CP-10-3308; Appellate Case No.: 2012-208787

Dear Ms. Kitchings,

Enclosed please find the Appellant's Petition for Rehearing in the above captioned case. As today is the deadline for filing the Petition I have faxed an advance copy and confirmed actual receipt. I have been advised that this will meet the requirements of Rule 221(a) when combined with a simultaneous mailing of the original. I have also enclosed a Certificate of Service as well as a check for the filing fee.

Please let me know if anything further is needed in regards to the Appellant's Petition.

Respectfully submitted,



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c.
Town of Mount Pleasant
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Jessica S. Jubrick
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Stephen George Brock, ... Appellant,

v.

Town of Mount Pleasant, ... Respondent.

PETITION FOR REHEARING

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PETITION

The Appellant respectfully submits that the Court's decision in this case overlooked or misapprehended points that are essential to the determination of issues, and moves for a rehearing based on the following:

(IV) PUBLIC NOTICE

This Court's opinion fails to properly apply the Supreme Court's holding in Lambries II, which distinguished between the notice requirements for regular meeting agendas and those for special meetings:

> "Moreover, although the specific types of meetings are not defined in FOIA itself, in light of the General Assembly's references to these different meetings in Section 30-4-80(a) and its general references in section 4-9-110 to meeting requirements, we believe the General Assembly made an intentional delineation because the terms do have commonly understood distinctions in the common parlance for procedures governing public bodies."

Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) (Lambries II),

Lambries II, which was decided after the briefing of this case, recognized that the permissible topics of a special meeting are limited to the "objects of the call" on the noticed agenda. Because all of the meetings at issue in this case were special meetings, a properly noticed agenda is required under Lambries II. To be proper: "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." S.C. Code Section 30-4-80. *Emphasis added.*

Finding that there is no definition of "agenda" in state law, this Court's opinion fails to give any substance to agenda requirement under 30-4-80. It further fails to consider the applicability of the Town's rules of order and the definition of agenda provided therein. *Robert's*

Rules of Order is cited as Respondent's parliamentary authority. *Roberts* states that order of business, orders of the day, agenda, and program are related concepts having to do with the order in which business is taken up in a session...". (§41 (15) *Robert's Rules of Order, Newly Revised, 10th Edition*)... Usually an agenda covers an entire session, in which case it is the order of business for that session...". (*id*).

This Court's decision holds that notice of a special meeting to hold an executive session is implied notice to the public that formal action might follow: "from the posted and amended agendas, the public and press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and *may take some action upon reconvening to open session.*" This allows the Town to avoid having to provide 24 hour notice of formal action to be taken in special meetings, even where the only matter on the agenda is an executive session.

In this case the posted agenda for special meetings of November 13 and November 16 indicated only that the Council would hold an executive session. There was no notice that Council might take formal action during the special meeting. The November 16 agenda specifically indicates an executive session and followed by adjournment. For both the object of the call for the special meetings was only for the board to go into executive session, not for the board to take any formal action. The Court's holding therefore leaves the public to speculate as to whether any special meetings set only to have an executive session, might result in some formal action. This clearly defeats the purpose of the 24 hour notice provision applicable to special meetings under 30-4-80 and is contrary to the reasoning in Lambries II.

This Court further erred in holding that Brock did not appeal from the trial court's finding that Town Council could amend its special meeting agendas and then take formal action. The

Court's decision focuses on the argument relating to the amendment of the executive session agenda while overlooking the fact that this is also an argument on the improper amendment of the special meeting agenda, of which the executive session agenda is simply a part. Brock has argued that Council violated FOIA by adding items to its meeting agenda during special meetings. Brock does not argue that the Town is prohibited from discussing anything it wants in executive session. The requirement for announcing the specific purpose of the executive session are clear, as is the lack of any posting requirement for executive session topics. Allowing executive sessions to satisfy the notice requirements for special meetings is clearly in conflict with FOIA. Brock has clearly argued that notice of executive session does not constitute adequate notice that the Town might decide to take otherwise take unnoticed formal action, especially in a special meeting where the only properly noticed action for the special meeting is to convene into executive session.

This Court's decision fails to distinguish between special and regular meetings. The reasoning of Lambries II shows this to be error: "By mandating an agenda for regularly scheduled meetings and forbidding County Council from amending its agenda, the Court of Appeals is, effectively, treating a regularly scheduled meeting as a called, special, or rescheduled meeting." Contrary to Lambries II this Court has held: "To the extent Brock's notice issue is preserved, Section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meeting twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take." This simply eviscerates Section 30-4-80 and is contrary to the entire analysis in Lambries II.

This Court has misperceived important aspects of Brock's argument. Here, Brock has not

argued that the Town Council is required to notify the public of the actions it plans to take after an executive sessions of regular meetings since agendas of regular meetings can be amended. Brock argues that the public must be notified by posted agenda of formal action intended to be taken at special meetings to meet the requirements of FOIA, and that notice with agenda must be posted 24 hours in advance of a special meeting. Brock does not seek to have the public notice 24 hours in advance of executive sessions as no such notice is required under FOIA and Lambries II.

The Court further mispercieves the fact that Town Council never actually publicly proposed or voted on the amendment of the special meeting agendas at issue. Even if Lambries II made no distinction between regular and special meetings, this Court's decision would still be in error as there was never a proper amendment providing notice of subsequent formal action. And even if there had been an amendment of the special meeting agenda during the special meeting, it would still be insufficient as it would fail to meet the 24 hour notice for special meetings. This Court's decision is, therefore, in direct conflict with the reasoning of Lambries II.

The Court has further erred in holding Brock's argument as to "ratification"not being raised or preserved. The issue of ratification was raised and ruled on by the trial court. The December 5th special meeting could not be "ratified" to cure the FOIA violation. Although subsequent properly noticed formal action might correct any contractual deficiencies between Mason and the Town as to the purchase of the property, it could not erase the FOIA violation existing on December 5th, or Brock's right to have a declaration as to the violation.

V. SPECIFIC PURPOSE PROVISION

The Court erred in finding that the specific purpose announcements of November 16,

2007 and December 5, 2007 disclosed "exactly" what was going to be discussed, and therefore met the requirements of 30-4-70. In the November 16th special meeting the announcement of the specific purpose of the executive session included amending the executive session agenda "to include personnel matters pertaining to the Clerk of Council" and personnel matters relating to the Boards and Commissions." The actions by Town Council following the executive session of the November 16 were: ...adjust the position requirements and compensation of the Clerk of Council (and) to prepare a letter as discussed in executive session.

Although compensation is a defined purpose for an executive session, "personnel matters" is not, and is insufficient to inform the public as to specific purpose of the session. In light of the existence of several boards and commissions in Mt. Pleasant, the Town failed to name even which board or commission was the subject of "personnel matters". The following motion to prepare a letter fails to reveal any identifiable purpose to the session. Similarly, the December 5th special meeting the resulted in a motion to settle a lawsuit by the purchase and financing of property for $6 million. The stated "specific purpose" was for "legal advice". This Court's finding that the public knew of a pending settlement, so as to somehow make the otherwise vague statement specific and clear, is inconsistent with the holding of Quality Towing: "FOIA is clear in its mandate that the specific purpose of an executive session shall be announced." Therefore, FOIA is not satisfied merely because citizens may have some idea of what a public body might discuss in private. This Court errs in relying on what the public might have guessed would be discussed in executive session to cure what is otherwise vague and undefined.

VI. PUBLIC RECORDS

This Court's decision fails to address numerous issues raised by Brock in regards to the issue of public records. The Court's decision interprets Brock's argument in regard to the destruction of e-mails among Town Council members as solely involving e-mails concerning discussion of public business. (See Amended Complaint. Page 6- Illegal Communication Concerning Pending Legislation). The Amended Complaint sets out the broader claim of destruction of e-mail due to the absence of a defined e-mail management and retention policy as required by law (Count IV misnumbered Count VI).

The record shows that the Town violated FOIA by communicating on public business via e-mail, as well as violating the RRA by routinely destroying and deleting those emails. Here the record shows that the Town failed to have an adequate policy as required by the Public Records Act, S.C. Code Section 30-1-10. Respondent's Final Brief admits to the absence of the policy required for e-mail management stating in part: "No evidence was presented to the hierarchy of these (deleted) e-mails as having, as established by the South Carolina Department of Archives and History, permanent value, transitory value or covenient (sic) value which had a bearing on the length of retention of if they have to be retained at all." No "hierarchy of e-mail" was in existence due to Respondent's failure to enact SCDAH policy for e-mail retention. Instead, the deletion of e-mails was left solely to individual preference, thus presenting obvious legal, operational, and public relations risks recognized by SCDAH policy.

Nor does this Court's decision address the failure of the Town's policy for elected officials use of Town computers and e-mail accounts to comply with the requirements for e-mail management. (Trial Exhibit - Plaintiff's No. 40). Reliance on the basis that the law regarding

e-mail management is "ever-developing" is unsupported by any in the record and ignores the fact that the Town failed to act timely and, when it did actually implement a policy, it still failed to meet the requirements of the RRA.

VII. ATTORNEYS COSTS AND FEES

This the court erred in failing to include for consideration on remand the additional beneficial results Brock obtained relating to the e-mail deletion. Here, although Brock was successful in having the Town enjoined from further destruction of emails, the trial court failed to consider this in its consideration or remand of attorney fees and costs. The remand for further consideration of attorney fees and costs should therefore include consideration of the additional beneficial results obtained in relating to the injunctive relief obtained. On the basis of the injunction issued by the trial court to prevent further destruction of public records, Brock should be further considered the prevailing party for consideration of additional attorney fees and costs on remand. *See* Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). "To the extent that Brock obtains further relief as outlined above, the Court should include in the remand for attorney fees consideration of any additional beneficial results.

CONCLUSION

Based on the foregoing, the Appellant petitions this Court for a rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have on the 20th of November, 2014, served the Appellant's Petition for Rehearing on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, and by facsimile, addressed to counsel of record as follows:

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Respectfully submitted,

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