

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Appellate Case No.: 2015-000406

NOV 16 2015

S.C. SUPREME COURT

J.C. Nicholson Jr., Circuit Court Judge
Trial Court Case NO.: 2008-CP-10-3308

Stephen George Brock,

Petitioner,

v.

Town of Mount Pleasant,

Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

- I. DID THE COURT OF APPEALS PROPERLY INTERPRET THIS COURT'S HOLDING IN LAMBRIES II?
- II. DID THE COURT OF APPEALS CORRECTLY FIND THAT CERTAIN MATTERS WERE NOT PRESERVED FOR APPEAL?

STATEMENT OF THE CASE

This action came before the Circuit Court by way of a Complaint filed by Stephen Brock (hereinafter “Petitioner” or “Brock”) whereby Petitioner alleged various violations of S.C. Code Ann. § 30-4-10 et seq. (2007), the Freedom of Information Act (herein “FOIA” or “Act”) by the Town of Mount Pleasant (herein “Respondent” or “Town”). Petitioner also made a claim under S.C. Code § 30-1-10 et seq. (2007), the Public Records Retention Act (herein “Records Retention Act” or “RRA”) alleging the Town failed to adhere to the RRA.

During the trial on January 24, 2011, the Honorable J.C. Nicholson properly considered all the evidence presented at trial and correctly dismissed Counts I and V of Brock’s Amended Complaint which claimed the Town violated FOIA by amending Town Council agenda at its December 5, 2007 meeting. Judge Nicholson further found Brock failed to produce sufficient evidence showing the Town violated FOIA by failing to announce the specific purpose of executive sessions at the November 13, November 16, and December 5 meetings. The trial court declined to find the Town violated RRA by Town Council’s past actions of deleting e-mails discussing town business, finding the law in that area is constantly developing, and the Town has since assigned council members laptops and e-mail accounts, and adopted a Computer Policy.

The trial court, however, did find that Brock presented sufficient evidence demonstrating the Town violated FOIA by acts which are not subject of this appeal and awarded Brock injunctive relief on those issues. The trial court also enjoined Town Council from “deleting, destroying, or otherwise eliminating any Town electronic communications concerning public business except to the extent such destruction is accomplished in accordance with a lawfully established records retention policy.” The trial court awarded Brock \$42,000 in attorney’s fees and costs.

Brock filed a Rule 59(e) motion to amend or alter judgment, arguing the order did not address the issue of whether a matter added to an executive session agenda may be acted upon by a public body after reconvening into open session. App. 163. The trial court amended its order to include a finding that FOIA does not prohibit a public body from acting on items added to an agenda for executive session upon reconvening to open session. App. 133.

Brock appealed these orders. App. 27-71. In a published opinion filed November 5, 2014, the South Carolina Court of Appeals reversed the Circuit Court on only one issue, holding that Town violated FOIA by failing to announce the specific purpose of an executive session during the November 13 meeting with regard to retaining individual counsel “now and in the future”. App. 17. This Court granted Certiorari by Order dated August 19, 2015.

STATEMENT OF THE FACTS

At issue in this case is a series of special meetings held in 2007 wherein Town Council orally amended its executive session agenda to include additional items, and then voted on these items upon reconvening. Petitioner contends that the amendments, the announced purposes and the actions authorized were inappropriate.

The Record reveals that it is not unusual for Council meetings to last until 11:00 p.m. App. 339, l. 13-15. Though the Town's rules of order include an executive session as a standard agenda item at regularly scheduled meetings, the Town, so as not to inconvenience the public by interrupting business at regular meetings, from time to time held special meetings in advance of regular meetings where executive session matters were addressed. App. 452, l. 1 – 453, l. 13. The Record demonstrates that each of these special meetings was noticed in accordance with law. App. 656, 722, 730, 746, and 750; S.C. Code Ann § 30-4-80(a).

Respondent disputes Petitioner's representation that the Town of Mount Pleasant "has a practice of taking formal action on matters that are not noticed by the required posted meeting agenda, nor included in formal amendment of the meeting agenda." Pet. Br. P. 13. This case is about a series of meetings that took only place in 2007 where executive sessions were conducted to discuss negotiations to purchase, later condemn, and engage in litigation over a piece of property along Shem Creek.

Petitioner wants this Court to examine each of these meetings in a vacuum without the benefit of understanding the underlying legal circumstances that precipitated the actions of Council during this brief period in time.

The Town was interested in acquiring property in its picturesque Shem Creek area to

solidify “public access to one of the most important bodies of water in the community.” App. 448, lines 1-6. The property consisted of highland that was once the site of an OK Tire Store contiguous to the adjoining marshes and docks that provided access to Shem Creek. The property was commonly referred to as the Shem Creek or O.K. Tire Store property. *Id.* The Town’s interest in the property was well known, having been publicized by television reports, articles in the Post & Courier, and openly discussed at both committee and Council meetings. App. 448, lines 19-25.

In 2007, Town Council initiated negotiations to purchase the property. App. 448, lines 15-18. The negotiations started to intensify in the summer and fall of 2007. *Id.* In October 2007, Town Attorney Allen Young (herein “Young”) was directed by Council to make a final offer, and, if rejected, initiate legal action. App. 732. A final offer to purchase the Shem Creek property was made and rejected. App. 449, lines 4-6.

Thereafter, Town filed a condemnation action on the Town’s behalf to acquire a portion of the property. *Id.* However, days prior to the Town filing its condemnation action, the owner, attorney Mark Mason, filed his own 90-page lawsuit against the Town and individual council members, in both their individual and official capacities on October 24, 2007. App. 404, line 1 – p. 405, line 23. Mason opposed the future taking and asserted several causes of action, including actions for fraud, deceit, FOIA violations, and alleged violations of the condemnation statute. App. 291, lines 1-23. At trial, Mason confirmed serving “rafts of discovery ... on the Town and also on the Council, individually and in their official capacities....” *Id.* The litigation settled in early January 2008. Petitioner’s claims in this case reference executive sessions related to this litigation and settlement, and the purchase of the property; topics appropriate for discussion in an executive session. A review of the proceedings of the contested meetings is in order.

AUGUST 14, 2007

On August 14, 2007, the Town held a special meeting prior to its regularly scheduled meeting. App. 730-732. The items noticed on the posted agenda read as follows:

I. EXECUTIVE SESSION

- A. Legal and Contractual Matters
 - 1. Property Acquisition
 - 2. SCE&G Right-of-Way
- B. Legal Advice regarding pending cases
- C. Personnel Matters
 - 1. Duties of Town Administrator, Legal Counsel and Board & Commissions
 - 2. Appointments to Boards & Commissions
 - (a) Commercial Development Design Review Board
 - (b) Open Space Foundation

Id.

The Record shows that, during the meeting, the Town Administrator, Mac Burdette (“Burdette”), indicated that the agenda called for an executive session. *Id.* Burdette then announced the first purpose for executive session stating that “Council would be discussing legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with Shem Creek and other areas, as well as [an] SCE&G right of way.” *Id.* He also stated that Council would “receive legal advice regarding pending cases.” *Id.* Young announced the cases, which included: *Save Snee Farm vs. JKM Holdings* and *Save Hungryneck Corridor vs. Town of Mount Pleasant*. *Id.* Young then announced the remaining legal matters for discussion: “possible litigation regarding [the] Old Park drainage issue and Dunes West Boulevard repair issues.” *Id.* Burdette announced the personnel matters to be discussed, and stated that Council wished to add to the executive session agenda “discussion with legal counsel in reference to legal representation regarding possible pending legal cases.” *Id.* A motion was made and all present were in favor. *Id.* Upon reconvening in open session the following actions

were taken:

Mr. Gawrych made a motion to direct legal counsel to move forward with negotiation a piece of property as discussed in executive session; seconded by Ms. Stokes-Marshall. All present were in favor.

Ms. Stokes-Marshall made a motion to direct legal counsel to proceed with legal and contractual matters in reference to property acquisition and right of way as discussed in executive session; it was seconded by Mr. Gawrych. All present were in favor.

Mr. Bustos made a motion to authorize legal counsel to proceed as discussed in executive session pertaining to Dunes West Boulevard and Olde Park and to proceed with litigation if necessary; it was seconded by Mr. Gawrych. All present were in favor.

Id.

OCTOBER 9, 2007

On October 9, 2007, the Town held a special meeting immediately prior to its regularly scheduled meeting. App. 722-726. The items noticed on the posted agenda read as follows:

- I. Approval of TIF Priorities
- II. Presentation by Charleston County School District and Glick-Boehm regarding the new Moultrie Middle School and Farmers Market Pavilion
- III. **EXECUTIVE SESSION**
 - A. Legal and Contractual Matters
 - (1) Shem Creek
 - (2) Proposed project near Six Mile Road and US 17
 - B. Economic Development Prospect pertaining to property in the vicinity of Wando Business Park
 - C. Personnel Matters pertaining to:
 - (1) Town Employee Grievance Hearing
 - (2) Appointments to Boards & Commissions:
 - (a) Planning Commission
 - (b) Open Space Foundation
 - (c) Workforce Housing Advisory Committee

Id. (emphasis in original).

During the meeting Burdette requested that Council add two items to the agenda under executive session. *Id.* He stated the first item is for “legal consideration regarding the Buist Lawsuit settlement and the second would be contractual matters regarding property acquisition for property in the vicinity of town hall.” *Id.* A motion was made to amend the agenda and all present were in favor. *Id.* Later in the meeting, Burdette announced that a few items needed to be discussed in executive session, including:

Legal matters pertaining to the Buist lawsuit, contractual matters pertaining to property acquisition in the vicinity of Town Hall, legal and contractual matters concerning Shem Creek property, a proposed project near Six Mile Road and US 17, an economic development prospect and some personnel matters pertaining to an employee grievance and appointments to the Boards and Commissions.

Id.

Upon reconvening to open session, a motion relating to the executive session discussion of the legal and contractual matters concerning the Shem Creek property was passed. *Id.* Specifically, the motion authorized “the Town Attorney [Young] to make a final offer and if not accepted to pursue formal legal action as discussed in executive session.” *Id.* The offer made by Young was rejected, and he pursued formal condemnation action to acquire the property. App. 449, lines 7-17.

NOVEMBER 13, 2007

On November 13, 2007, Town Council held a special meeting prior to its regularly scheduled meeting. App. 750-751. The posted agenda included an executive session, which listed as an item for discussion:

- A. Legal and Contractual Matters pertaining to properties near Shem Creek
- B. Personnel Matters – Appointments to Boards & Commissions
 - 1. Workforce Housing Advisory Committee

2. Pride Committee
3. Accommodations Tax Advisory Committee

Id.

During the meeting, Burdette stated “staff would like to ask Council to go into executive session to discuss legal and contractual matters pertaining to properties near Shem Creek and to also discuss personnel matters pertaining to appointments to Boards and Commissions.” *Id.*

Thereafter, “Mr. Gawrych made a motion to amend the agenda to add as item C legal advice pertaining to Ordinance 07060 pertaining to the comprehensive plan and as item D would [sic] be [sic] legal advice pertaining to an opinion from the Attorney General Concerning the Planning Commission.” *Id.* All present were in favor of adding the amendments. *Id.* A motion to adjourn into executive session was passed. *Id.* Upon reconvening to open session, Town Council took the following actions:

Mr. Gawrych made a motion to direct the Town Attorney to move forward with the discussions as discussed in executive session pertaining to a piece of property on Shem Creek; seconded by Ms. Stokes-Marshall. All present were in favor.

Mr. Bustos made a motion to authorize the Mayor and members of Council to obtain their individual attorneys for all lawsuits now and in the future with all fee statements to be reviewed by the Town Attorney; seconded by Mr. Gawrych.¹

Id.

NOVEMBER 16, 2007

On November 16, 2007, Town Council held another special meeting. App. 629-630.

The posted agenda included an executive session, which listed: “Legal Advice pertaining to OK Tire property litigation.” *Id.* During open session, two separate motions were made to amend the

¹ Burdette confirmed that the action authorizing the Mayor and individual members of Council to obtain their own individual attorneys was related only to the Shem Creek litigation where the Council was being sued in their individual capacities. App. 451, line 19 – p. 452, line 10.

executive session agenda. *Id.* The first motion was “to amend the agenda to include personnel matters pertaining to the Clerk of Council.”² *Id.* The second motion was “to add personnel matters relating to the Boards and Commissions.”³ *Id.* Mayor Hallman stated that a motion was needed for Council to enter executive session to discuss “legal advice pertaining to the OK Tire property litigation and to discuss other personnel matters as mentioned.” *Id.* To clarify, Young stated that the executive session would involve all three items mentioned. *Id.* Council voted to adjourn into executive session, and upon reconvening took the following actions:

Mr. Glasson made a motion to adjust the position requirements and compensation for the Clerk of Council as discussed in executive session; seconded by Mr. Gawrych. All present were in favor.

Mr. Bustos made a motion to reject the offer that was tendered in reference to the Shem Creek property and OK Tire Store property litigation; seconded by Mr. Swails. All present were in favor.

Mr. Bustos made a motion to authorize the attorney to prepare a letter as discussed in executive session in reference to the personnel actions regarding boards and commissions; seconded by Mr. Gawrych. All present were in favor.

Id.

At trial, Burdette was asked to explain why the published agenda did not include notice that action would be taken. App. 486, lines 18-25. He responded that, oftentimes, Council goes into executive session without knowing that an action will need to be taken but, from time to time, information received in executive session warranted that action be taken for the good of the public. App. 486, line 18 – p. 487, line 19. He added that when any action is taken following an executive session, it is always related to the purpose for which Council went into executive

² Burdette testified that this matter related to the Clerk of Council’s resignation, which took place earlier on the day of the meeting. App. 364, lines 10-20.

³ The Record indicates that the second personnel matter related to the Petitioner, who, at the time, was serving as chairman of the planning commission. App. 486, lines 5-13). Burdette testified that Council needed to discuss actions taken by the chairman that “some members of Council felt were insubordinate, inappropriate, [and] disloyal.” App. 486, lines 5-8.

session. App. 511, lines 6-10.

DECEMBER 5, 2007

The next Town Council meeting took place on December 5, 2007. App. 656. The meeting was a special meeting held in lieu of Town Council's regularly scheduled monthly meeting. App. 656. Under the item for executive session, Council included a list of anticipated discussion topics. *Id.*

After the close of business on that day, a proposed settlement agreement of the OK Tire litigation was delivered to the Town Attorney at his home. App. 406, line 19 - p. 407, line 6). The settlement detailed the demands for settling, set a date by which the settlement had to be accepted (24 hours after delivery to the Town Attorney) and made clear that time was of the essence. App. 407, lines 20-24. At the beginning of the meeting of December 5, Burdette asked that an item be added to the executive session scheduled later in the meeting. App. 660. Burdette described the item as "to receive legal advice pertaining to the OK Tire Store Litigation". App. 661.

When Council reached the place on the agenda for the executive session, its purposes were announced as follows:

- **Legal Advice** pertaining to Mathis Ferry Road (DEPAUL) relative PS&J
- **Legal Advice** pertaining to EEOC complaint relative to firefighter applicant (Personnel matter)
- **Personnel matters** pertaining to appointments to Board & Commissions
- **Legal Advice** regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties.

App. 682 (emphasis in original).

Young clarified that the legal advice pertained to the OK Tire litigation. App. 683. Upon reconvening to public session, a motion was made to accept the settlement agreement and to

transfer money from an account to effectuate the settlement. *Id.* Specifically:

Mr. Bustos made a motion to approve the settlement agreement discussed in executive session pertaining to the OK Tire Store property condemnation lawsuits and authorize Mayor Hallman to execute the agreement; seconded by Mr. Gawrych. All present were in favor.

Mr. Swails made a motion to authorize the Town Administrator to transfer an additional \$3 million into the water access property acquisition project for a total project budget of \$6 million; transferred funds would come from the various TIF projects as described on page 29 of the mid-year budget book; seconded by Mr. Gawrych. All present were in favor.

Id.

On December 6, 2007, prior to the 5:00 pm deadline stated in the settlement offer, the Mayor executed the settlement agreement, and the purchase was publicized in a local newspaper the following day. App. 236, lines 20-23; App. 399, lines 14-18.

Petitioner was at the meeting when the agenda for the executive session was publicly amended. App. 211, lines 7-10. He had the opportunity to make his displeasure known at the citizens' comment period, but did not do so. For his own reasons, he left the meeting early and was not present to hear the outcome of the executive session discussion. *Id.*

DECEMBER 17, 2007

On December 17, 2007, Town Council held a special meeting. App. 845. The posted agenda listed the following items for discussion:

Authorization and/or confirmation of the Settlement Agreement pertaining to the OK Tire property lawsuits, specifically including the purchase of the Shem Creek property for \$6,000,000.00 (OK Tire and the Bailey Docks)

Amendment to FY 2007/2008 Budget regarding purchase of property on Shem Creek

Id.

At the meeting Council reaffirmed the actions taken to settle the Shem Creek litigation. App. 420, lines 25 – 421, line 3.

In accordance with S.C. Code Ann. § 5-7-250(b), the Town has adopted standing rules of procedure. These rules are codified and specify how agendas may be amended. App. 773.

The circuit court held that the Town's amendments to the executive session agendas did not violate the FOIA. App. 119. Specifically, the circuit court held that "exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business." *Id.* As to the December 5th meeting, the circuit court also held that Town Council later "endorsed its prior actions by taking the same action on the same subject matter at a later meeting where the added agenda item had been timely included on the posted agenda." *Id.*

STANDARD OF REVIEW

The standard of review in FOIA cases is limited to determining "whether (1) the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached is clearly erroneous." *Spannaus v. Dep't of Justice*, 813 F.2d 1285, 1288 (4th Cir.1987) (internal quotation marks omitted). Legal errors are reviewed *de novo*. *Simmons v. Dep't of Justice*, 796 F.2d 709, 710 (4th Cir.1986); *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 358 (4th Cir. 2009).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT DECISION THAT FOIA DOES NOT PROHIBIT COUNCIL FROM ACTING ON ITEMS PROPERLY ADDED TO AN EXECUTIVE SESSION AGENDA.

a. The Town Complied with the Requirements of FOIA and the Precedent Set Forth in *Herald*.

The FOIA does not and has never required an agenda for an executive session. See S.C. Code

Ann. § 30-4-10 et. seq. (2007) and *Herald Publishing Company, Inc. v. City of Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986). This circumstance notwithstanding, the Town's practice in 2007 was to list the topics it anticipates discussing in executive session on its posted agendas as of the date of publication. App. 656, 722, 730, 746, and 750. On those few occasions where additional important matters become known after an executive session agenda had been published, the Council, albeit superfluously, amended the agenda to include the item for discussion. App. 442-443; *Brock vs. Town of Mt. Pleasant*, (No. 2008-CP-10-3308) (2011). No language in the FOIA prohibits a last minute decision to add an item for discussion in executive session so long as the specific purpose is publicly announced prior to adjournment into executive session. See S.C. Code Ann. § 30-4-70. The circuit court held that Town Council's purposes for entering each executive session were specifically announced as required by the FOIA. App. 120.

The record reveals the Town adhered to both the procedural and substantive requirements of S. C. Code Ann. § 30-4-70. App. 660, 723-726, 731-733, 747, and 751. Contrary to any contention otherwise, § 30-4-70 does not preclude a public body from acting on a matter discussed in executive session. It only precludes such action being taken while behind closed doors, and there is nothing in the Record that suggests that occurred.

The General Assembly has recognized the overarching need for public business to occur in the open; hence, the adoption of S.C. Code Ann. §30-4-70. However, the General Assembly has recognized in this enactment that, in certain specified instances a public body may require a closed session to accommodate the vetting of certain issues without embarrassment or to receive legal advice and litigation strategy or to address matters pertaining to the public *fiscus*. With this statute, the General Assembly balanced the need for public bodies to act expeditiously regarding sensitive matters, with the public's need for transparency. A requirement that a municipality

disclose every privileged detail of an active lawsuit to the public, as Petitioner demands, creates an untenable and impractical situation for elected officials to conduct business.

S.C. Code Ann. § 30-4-70 is straightforward: an executive session can only be convened for certain purposes; prior to convening an executive session, the purpose for the session must be announced; and no action may be taken in executive session. *See* S.C. Code Ann. § 30-4-70.

During these meetings, the reason for each session was announced, each specified purpose fell within the statutory categories listed in S.C. Code Ann. § 30-4-70(a) and no action was taken during the executive session. *Id.* All actions taken were only by way of a vote occurring in public session. *Id.* These facts are undeniable, and wholly comport with the procedure required by S. C. Code Ann. § 30-4-70 and are on all fours with *Herald Publishing Company, Inc. v. City of Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986) as discussed below.

Petitioner's reliance on S. C. Code Ann. § 30-4-80 is misplaced. This statute governs the time when an agenda must be posted in advance of a meeting. *See* S.C. Code Ann. § 30-4-80. It does not require an agenda for an executive session or preclude any additions to that executive session agenda. *Id.* Precedent established by the Court of Appeals in *Herald* lays this issue to rest. In *Herald*, as here, proper notice of a special meeting was given, the agenda of which included an executive session. 291 S.C. at 6. In *Herald*, as here, during the meeting Council added items to be discussed in executive session and announced each purpose. *Id.* at 6, 11. In *Herald*, as here, it was contended that the Council violated the FOIA in not adhering to the notice requirements set forth in the Act. *Id.* at 11. This Court properly and flatly rejected that contention, finding:

The Act [FOIA] does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session. Instead, the Act requires that the presiding officer of a public body which has

voted to go into executive session shall announce the purpose of the executive session. Section 30-4-70(5). Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in an open session. The Act recognizes this by providing that an executive session can only follow an open session, where the public body must vote in public to meet in executive session.

Id. at 11-12.

Petitioner's argument that Town Council violated the FOIA's notice provision fails for the same reason that the claimant in *Herald* failed: the Act simply does not require that an agenda for an executive session be posted or that the news media be notified of the agenda for executive session. As a result, the circuit court properly concluded that Petitioner failed to meet his burden of proof with respect to his claim regarding the improper amendment of executive session agenda items.

Petitioner argues that Town Council failed to "formally amend its meeting agenda to allow for any action items upon reconvening to public session." Am. Br. of Pet., pp. 6, 7, 9, 10, 13, 14, 15, 17, 18, 21, 23, 24, 26, 28, and 30. In finding FOIA does not require agendas for executive session items, this Court in *Herald* reasoned that, as a practical matter, public bodies may not know what they are going to discuss in executive session until reconvening in open session. 291 S.C. at 12. It logically follows, and the Court of Appeals supported this logic, that public bodies cannot know whether a formal action will be necessary until after meeting in executive session. Consistent with this Court's reasoning in *Herald*, the circuit court dismissed Petitioner's claims regarding improper notice and action. App. 119.⁴

⁴ This finding was supported by Councilman Burdette's testimony that certain situations, for example, employee matters, occur between the issuance of the agenda and the meeting, but require that action be taken by Council. App. 446, lines 1-20. If there was a complete bar on Council's ability to amend agenda items, such as its ability to amend an agenda to discuss pressing personnel matters, Burdette testified there could be serious effects and legal ramifications. App. 445, line 21 – p. 446, line 9.

b. Exigent Circumstances Create an Exemption to FOIA Notice Requirements.

The circuit court determined the actions of council during the December 5th meeting did not violate the notice provisions of FOIA due to the existence of exigent circumstances. The circuit court substantiated its reasoning and the circumstances giving rise to this holding. App. 119, n. 16.5

The circuit court correctly relied on *Herald* for the premise that agendas for executive sessions may, at times, require amendment and subsequent action. See *Herald*, 291 S.C. at 11-12. The General Assembly also acknowledged this premise when it amended § 30-4-80 in June of this year.⁶ Notwithstanding the above, the Court of Appeals subsequently determined that Town sufficiently announced the purpose of the executive session agenda on December 5th.

c. The Town Sufficiently Announced the Purpose of the Items Added to its Executive Session Agendas.

The circuit court appropriately relied on the holding in *Herald* to support its conclusion that the Town adequately amended its executive session during a special meeting by announcing

⁵ Additionally, Mark Mason's testimony confirmed that the Town did not receive the Shem Creek/O.K. Tire Store Settlement Agreement until after Mason signed the Agreement at some point during the day on December 5, 2007, the same day as the Town Council Meeting. App. 407, lines 13-19. Mason's testimony confirms that the first page of the agreement included a time is of the essence clause. App. 409, lines 1-4. Specifically the agreement stated "This Settlement Agreement has been executed by Landowners and if not executed by the Mayor on behalf of the Town and delivered to Landowners' counsel by Thursday, December 6, 2007 at 5:00 p.m. it shall be of no force and effect." App. 652-655.

⁶ All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies. Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours' notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. Nothing herein relieves a public body of any notice requirement with regard to any statutorily required public hearing. S.C. Sen. 121 S.0011 1st Reg. Sess. (June 18, 2015).

the specific purposes of its sessions. App. 120 n. 21. In *Herald*, the court reasoned that because the purpose stated for entering executive session specifically disclosed what was going to be discussed, no violation of the Act occurred. 291 S.C. at 11. The definition of “specific purpose” set forth in the 1987 amendment provides, “[a]s used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section”. SC Code Ann. § 30-4-70(6)(b). The definition of specific purpose in the 1987 amendment is in accord with the *Herald* court’s language. Thus, even if the circuit court somehow erred in referencing the language in *Herald* as opposed to the FOIA’s language in determining whether Town Council met the announced purpose requirement, the end result is the same.

Petitioner argued to the Court of Appeals that Council’s stated reasons for going into executive session were too general, equating the Town’s actions with those of the council in *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 530 S.E.2d 369 (2000). Petitioner states, “In *Quality* [sic] the purpose for the executive session was: ‘C. Towing – Contractual Recommendation’.” App. 58. Petitioner then asserted in his brief to the Court of Appeals:

With very little discussion the Court of Appeals in *Quality* held that the above language clearly failed to meet the requirements of FIOA [sic]:

“FOIA is clear in its mandate that the ‘specific purpose’ of the session ‘shall be announced.’ Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private.”

Id. (quoting *Quality Towing*, 345 S.C. at 164).

In *Quality Towing*, Myrtle Beach City Council was taken to task, not because the purpose of the executive session was not specific enough, but because the purpose was not announced at

all. 345 S.C. at 164. The Court made note that there was no indication that the agenda item was read, or announced, so as to advise the public of what was to be discussed. *Id.* According to the minutes from the Myrtle Beach City Council meeting, upon arriving at the agenda item, the mayor simply “advised this matter would be discussed in Executive Session”. *Id.*

Unlike *Quality Towing*, each purpose of the contested executive sessions was announced and the announcement was specific. The circuit court Order is detailed in this regard, as are the minutes of Council proceedings. App. 120-121. FOIA does not require perfection in detail, nor should it. To require a public body to disclose in detail the specifics of the topic to be discussed defeats the authorized purpose for convening an executive session, and as noted by the circuit court, could have the effect of compromising legal strategy, unnecessarily causing embarrassment to personnel and undermine contractual negotiations; a realistic concern in this situation in 2007. App. 120, n. 21 ¶ 4. The Court of Appeals’ restrictive approach in reversing the circuit court’s holding on the November 13th announcement creates an untenable, illusory framework for municipalities in the future.

The purpose of the executive session during this meeting was for council to receive legal advice regarding the Shem Creek lawsuit, which named all council members in their individual capacities. Following this session, Councilman Bustos made a motion for all council members to obtain their individual attorneys for all lawsuits now and in the future. App. 751. Despite representations to the contrary during oral argument and in Respondent’s brief,⁷ the Court of Appeals, in error, determined that this was in violation of FOIA because to announce Council planned to discuss “legal matters” or obtain “legal advice” on a particular issue [Shem Creek] was not sufficient specificity. App. 15.

⁷ Tr. Mac Burdette at App. 451, line 19 – p. 452, line 10.

d. The Town Properly Ratified the December 5th Vote to Settle the Shem Creek Litigation.

The Court of Appeals did not address the issue of ratification, and instead held the Town sufficiently announced the purpose of its December 5th executive session, thereby rendering the issue of ratification moot. App. 14. However, in light of the Questions granted by the Court, Respondent will address ratification.

The circuit court properly held that, even if there was a violation of the FOIA at the meeting of December 5, 2007, which Respondent contests, such violation was cured at Town Council's subsequent meeting on December 17, 2007 where the actions taken at December 5th meeting were affirmed. In *Multimedia, Inc. v. Greenville Airport Commission*, 287 S.C. 521, 524-525, 339 S.E. 2d 884, 886-887 (Ct. App. 1986), this Court held that no cause of action is stated under the FOIA where the complaint reveals the prior action was subsequently ratified at a meeting in compliance with the law. The Court in *Multimedia* also held that substantial compliance with FOIA will satisfy the requirements where a technical violation has demonstrated no effect on a complaining party. *Id.*

Petitioner challenged the circuit court holding, contending its reliance on *Multimedia* was in error. Br. of Pet. 19. In support of this contention, Petitioner relied on post-*Multimedia* amendments to S. C. Code Ann. § 30-4-70. Contrary to his assertion, the 1987 amendments to § 30-4-70 have no relation to, and in no way undermine, the *Multimedia* ruling.

Prior to 1987, a public body could formally act on matters while in executive session. See S.C. Code Ann. § 30-4-70(a)(5) (1976). Such action could only be effectuated, however, by a public vote ratifying the action taken in executive session. *Id.* The former statute read: "...[a]ny formal action taken in executive session shall thereafter be ratified in public session prior to such

action becoming effective.” *Id.* The 1987 amendments withdrew from public bodies the ability to take any action in executive session, and required that an action could only be taken in public session. See S.C. Code Ann. § 30-4-70 (1987). Petitioner argues that *Multimedia* only held that where a formal action was taken in executive session, such action was valid if subsequently ratified in open session. Br. of Pet. 19. Petitioner incorrectly asserts that the removal of the ratification reference renders *Multimedia* of no importance. *Id.*, 19-20. This is not the case.

At issue in *Multimedia* was the hiring of an airport director at a meeting that was not publicly noticed. 339 S.E.2d at 885. At a subsequent, properly noticed meeting, the Airport Commission affirmed its decision to hire the director. *Id.* *Multimedia* contested the hiring as a violation of the FOIA. *Id.* at 885-886. This Court upheld the actions of the Airport Commission, finding that affirming the prior action at a subsequent, lawfully noticed meeting cured the prior notice defects, when no harm in the interim had occurred. *Id.* at 886. As applied here, assuming for argument a FOIA violation occurred at the December 5, 2007 meeting of Council, which Respondent contests, the acts of Council revisiting the issue at a subsequent, properly noticed meeting, including placing the item on the agenda, cured the defect. In addition, the fact that Petitioner showed absolutely no prejudice as a result of the action is further reason to sustain the holding of the circuit court.

Essentially, Petitioner is claiming that absent the FOIA statute specifically providing for a ratification procedure, a FOIA violation cannot be cured. In other words, a public body is powerless to correct mistakes. This premise is not just without legal precedent, but it would also frustrate the ability of public bodies to attend to the efficient and effective conduct of the public’s business. Petitioner’s proposed result is anathema to sound public policy.

e. The Holding in *Lambries II* Does Not Overrule the Holding in *Herald*.

Municipalities should be judged by the law as it existed at the time. In 2007, during these meetings, Town council followed the applicable law stated in *Herald* as it related to executive session agendas during special meetings. The holding in *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785 (2014) (*Lambries II*), does not discuss amending agendas to executive sessions so as to overrule *Herald*. *Lambries II* addressed an amendment that added a substantive matter to a published agenda. *Id.* The agenda amended was not an executive session agenda. *Id.* The amendments with which Petitioner takes issue in this case were all amendments to executive session discussion items – not general meeting agenda items. The facts of *Lambries II* also differ from the facts of *Herald* and of this case. *Lambries II* did not purport to alter *Herald*. Indeed, the two can be squared: agendas of executive sessions, not being required, and often arising due to a matter that arises during a meeting, may be altered during a session, so long as the purpose for the session is announced and comports with the statute; an agenda addition pertaining to non-executive session matters may not be made, except in compliance with the notice requirements of S.C. Code Ann. § 30-4-80. Further, while the Court of Appeals in *Lambries I* interpreted FOIA to restrict a public body’s ability to amend agenda items during meetings, the court did not overrule its own opinion in *Herald*, which still controls the addition of agenda amendments involving executive session items. Further, this Court in *Lambries II*, 409 S.C. at 18, 760 S.E.2d at 794, reversed *Lambries I* and held: “In the absence of a such a legislative directive here, we decline to judicially impose a restriction on the amendment of an agenda for regularly scheduled meetings, especially when it is clear that no agenda is required at all.” *Id.* The General Assembly has recently provided that directive. Senate bill S.11 requires an agenda for regular and special meetings, but also provides a mechanism for municipalities to amend as well. This enactment,

while supportive of Council's prior acts in 2007, does not alter the precedent set forth in *Herald* as it applies to executive session agendas. Therefore, the decision of the circuit court should be upheld.

f. Municipalities Need Guidance on the Practical Application of FOIA

Municipal adoption of the spirit of the FOIA does not make compliance with the ambiguous provisions of FOIA as interpreted by our courts in different factual contexts in the ever insatiable, internet-fueled "gotcha" age a simple task for even the most vigilant. Scores of decisions made daily by every municipality and intended to be compliant risk the imposition of significant 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.* This Court further limited the trial court's discretion in *Sloan v. S. Carolina Dep't of Revenue*, 409 S.C. 551, 552, 762 S.E.2d 687, 687 (2014), when it remanded the matter back to the trial court holding that the prevailing party was entitled to recover his reasonable attorney's fees and costs in this action because he was the "prevailing party." *Id.* at 689.

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 added).

The uncertainty judicial interpretations of difficult enactment applied retrospectively based on the “spirit” (rather than the language or silence) of the FOIA creates unwarranted civil and criminal peril and is inconsistent statutory law specifically authorizing the Town council to “determine its own rules and order of business...” See S.C. Code Ann. § 5-7-250(b).

As an example, following the *Lambries I* decision, the municipal association reported an increase in the number of called or special meetings to deal with time-sensitive topics that could not be added by amendment to an agenda. This is similar to the action Petitioner complains about presently. Some municipalities also post the text of S.C. Code Ann. § 30-4-70 in its entirety under the heading “Executive Session” for fear that some topic that may fall under this topic will come up during an open session. Further, the retrospective application of the Court’s interpretation of this statute would have the effect of criminalizing conduct that was considered legal when originally performed and should be exercised sparingly. See *Collins v. Youngblood*, 497 U.S. 37 (1990) and *California Dep’t. of Corr. v. Morales*, 514 U.S. 499 (1985). These consequences, which are detrimental to the government’s ability to do business, have arisen in response to the continued lack of clarity in the statute and its interpretation.

II. THE COURT OF APPEALS PROPERLY CONSIDERED AND ADDRESSED ALL PERTINENT ISSUES.

The Court of Appeals found, as an initial matter in its holding, that Petitioner’s “arguments regarding the trial court’s rulings on: the applicability of Multimedia, Herald, and ratification provisions; exemptions to FOIA’s provisions; and the alleged repeated violations are not preserved” and limited Petitioner’s argument to “whether or not FOIA prohibits a public

body from acting on items added to a special meeting agenda upon reconvening to open session.” App. 12. The applicability of *Multimedia, Inc. v. Greenville Airport Comm’n*, 287 S.C. 521, 525, 339 S.E.2d 884, 887 (Ct. App. 1986), as discussed above, related to ratification of any FOIA violations during the December 5 meeting. Petitioner raised an objection in his Rule 59(e) Motion for Reconsideration. Petitioner disputed the trial court’s holding that the Town did not violate FOIA during its December 5, 2007 due to the fact they subsequently ratified any potential violation during its December 17 meeting. (App. 163). The trial court relied on *Multimedia* to support its determination. While this issue was not addressed on the appellate level, the Court of Appeals found no violation of FOIA, because it agreed that Town adequately announced the specific purpose of the December 5th meeting; therefore, its subsequent examination of the applicability of ratification became moot.

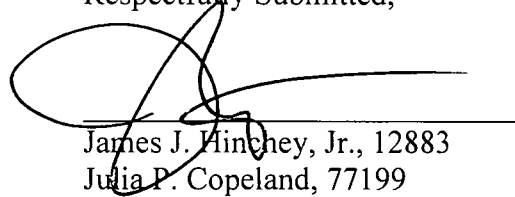
Petitioner includes *Herald Publishing Co., Inc. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986) in his Table of Authorities; however, he does not discuss *Herald* in his brief other than to address the fact that the Court of Appeals refused to consider it. As discussed above, the circuit court relied on *Herald* to support, among other things, its determination that exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business. *Id.*; App. 119. The circuit court also relied on *Herald* to support its determination that Town sufficiently announced the purpose of its executive session agenda items. *Id.*; App. 120 n. 21. The Court of Appeals addressed *Herald* only to support its position that FOIA does not mandate an agenda for executive sessions. App. 13. While it is unclear what the Court intended to address with the phrase, “exemptions to FOIA’s provisions,” The circuit court addressed the presence of “exigent circumstances” as discussed in *Herald* as it related to the December 5 meeting. However, the

Court of Appeals determined that the Town did not violate FOIA on December 5th, because it sufficiently announced the specific purpose of the executive session; thus, the issue was moot. Finally, with regard to the "alleged repeated FOIA violations," Respondent believes the Court is referencing the meetings held on August 14, 2007 and October 9, 2007. Respondent agrees that the circuit court did not address these two dates. Petitioner also never discussed these two dates in any subsequent motion in circuit court; therefore, the Court was correct in refusing to consider these matters, because they were not presented to nor ruled upon by the trial court.

CONCLUSION

For the reasons stated above, this Court should uphold the decision of the trial court. The Town's acts in 2007 did not violate the requirements or the spirit of FOIA.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "James J. Hinchey, Jr.", is written over a horizontal line.

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November 13, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Appellate Case No.: 2015-000406

J.C. Nicholson Jr., Circuit Court Judge
Trial Court Case NO.: 2008-CP-10-3308

RECEIVED

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S.C. SUPREME COURT

Stephen George Brock,

Petitioner,

v.

Town of Mount Pleasant,

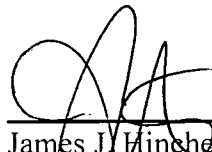
Respondent.

CERTIFICATE OF SERVICE

I certify that I have on the 13th day of November, 2015, served the Respondent's Brief on the Appellant by placing a copy of same in the U.S. Mail, first class postage prepaid, addressed to counsel of record as follows:

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