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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

RECEIVED

The Honorable G. Thomas Cooper, Jr.  
Circuit Court Judge

MAR 24 2016

SC Court of Appeals

Appellate Case No. 2014-000829  
Circuit Court Case No. 2014-CP-32-00697

Vivian Atkins, Robert P. Frick, and Kay Hollis, in their official capacity as members of the Town Council of the Town of Chapin, .... Appellants,

v.

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, and the Town of Chapin, ..... Defendants,

of whom

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, and Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, are the ..... Respondents.

PETITION FOR REHEARING

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## INTRODUCTION

In reversing Judge Cooper's ruling below, the Court deviated from two bedrock legal principles. First, the Court determined that the law-of-the-case doctrine is no longer a rule of law, but is now applicable on a discretionary basis and can be ignored when it would lead to an "unreasonably harsh" outcome. (Opinion at 7.) Second, the Court narrowly construed a Chapin Town Ordinance in a manner that created a statutory void, and the Court then filled that void with a judicially-created remedy that is not found anywhere in the Town's Code of Ordinances or in the South Carolina Code. (*Id.* at 9–11.)

In addition to violating these established legal principles, the Court's ruling creates the specter of confusion, dissension, and endless litigation within the Town of Chapin where none existed under Judge Cooper's ruling. As it stands, the Court's opinion reinstates actions taken by the Appellants two years ago that clumsily attempted to amend the very ordinance at issue in this case on the basis that it conflicts with this Court's now-reversed opinion in *Lambries v. Saluda County Council*.<sup>1</sup> The proposed amendment only attempted to truncate the Mayor's approval authority regarding agendas for "called" meetings. In litigation, though, the Appellants have attempted to re-characterize their own work as a "scrivener's error," as the Court recognized in Footnote 5 of its opinion.

But the proposed amendment says what it says, and the potential for even more litigation over an issue that should not even be heard by this Court seems evident. The Respondents respectfully submit that the Court should rehear and dismiss this case, and allow the Town to proceed beyond this case without disruption.

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<sup>1</sup> A copy of that proposed amendment was presented to the trial court as an attachment to former Councilwoman Atkins's April 23, 2014 affidavit (R. pp. 223–25), but appears to have been inadvertently omitted when the Appellants compiled the Record on Appeal. It is attached to this Petition for the Court's review.

## **STATEMENT OF POINTS OVERLOOKED OR MISAPPREHENDED**

1. Applicability of the Law-of-the-Case Doctrine: The Court refused to dismiss this appeal when the Appellants appealed Judge Cooper's rulings only as those rulings related to two of the three defendants. It reasoned that the law-of-the-case doctrine is discretionary and inapplicable where the result could be "unreasonably harsh." (Opinion at 7.) This is inconsistent with the law of South Carolina, the Court's appellate jurisdiction, and the very authorities cited in the opinion in support of this proposition.

2. Construction of Chapin Town Ordinance § 2.206: The Court construed Chapin Town Ordinance § 2.206(b) to apply only to agendas for "regular" meetings. (Opinion at 9.) It did so without analysis or citation to any authority. On its face, though, this ordinance is not so limited, and the Court's vacuum-creating construction violates a host of principles of statutory interpretation.

3. Construction of Chapin Town Ordinance § 2.202: The Court construed Chapin Town Ordinance § 2.202 to allow the decision to hold a "special" meeting to function as the equivalent of establishing the meeting agenda required under the Freedom of Information Act. This construction ignored the plain language of Ordinance § 2.206(b), the plain language of the Freedom of Information Act, the distinction between when a meeting takes place and what may be considered at the meeting, and the authority given to municipalities to establish how they will prioritize public business.

## ARGUMENTS AND AUTHORITIES

**I. By routine application of the law-of-the-case doctrine, this appeal should be dismissed due to the Appellants' failure to appeal Judge Cooper's rulings as they relate to all of the defendants below.**

**A. The Appellants sued three defendants, but they chose to appeal Judge Cooper's rulings only as to two of the defendants.**

There is no dispute that the Appellants sued three defendants in the trial court: Mayor Wilson, in his official capacity as Chapin's mayor; Councilman White, in his official capacity as a Town Councilman; and the Town of Chapin, "a body politic organized and existing under the laws of the State of South Carolina." (R. p. 19.) There is likewise no dispute that Judge Cooper declared the law, dismissed the case, and granted post-judgment relief favorable to all three defendants and adverse to all Appellants. (R. pp. 1–9 (granting "Defendants' Motion"); *id.* 12–18 (granting "Defendants' Motion").)

Nowhere did Judge Cooper ever suggest that his rulings applied to the individual elected officials but not to the Town of Chapin itself. Indeed, such rulings would have made no sense, as the issues of the case dealt with the construction of Chapin's Code of Ordinances, laws that apply town-wide regardless of who holds the elected positions.

Appellants have never argued otherwise, but they did not appeal Judge Cooper's decisions as they relate to all three defendants. Instead, they chose to appeal those orders only as they related to the two individual defendants, leaving the rulings intact insofar as they related to the Town of Chapin.

This distinction was set forth in their first Notice of Appeal, which designated only Mayor Wilson and Councilman White as "Respondents" and distinguished them from the entire group of trial-level defendants. (First Notice of Appeal at 1 (filed Apr. 22, 2014).) This distinction was carried through to the Proof of Service of that Notice of

Appeal, which indicated that the appeal was being taken only as to Mayor Wilson and Councilman White. (Proof of Service of First Notice of Appeal at 1 (filed Apr. 22, 2014).)

The Appellants reiterated this same distinction between the three trial-level defendants and two Respondents in their second Notice of Appeal and its accompanying proof of service. (Second Notice of Appeal at 1 (filed May 22, 2014); Proof of Service of Second Notice of Appeal at 1 (filed May 22, 2014).)

Just as they were the masters of their Complaint below, the Appellants were masters of their appeal before this Court. Their choice to proceed on appeal against only some, rather than all, of the trial-level defendants should have been dispositive here.

**B. Because the Appellants did not appeal Judge Cooper's rulings as they relate to the Town of Chapin, appellate jurisdiction never vested over the Town.**

As explained in Respondents' Motion to Dismiss Appeal, an appellant must serve notice of its intent to appeal on each respondent within thirty days of receipt of the adverse ruling, or appellate jurisdiction is lost. *See Elam v. S.C. DOT*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.”).

This service requirement is essential to vesting the Court with appellate jurisdiction over potential respondents. In this case, however, no service was ever made as to the Town of Chapin, the Town was never included as a respondent in this matter, and the Appellants have never argued to the contrary.

Rather than holding the Appellants to their litigation decisions, the Court set aside their failure to appeal Judge Cooper's rulings as they relate to the Town of Chapin, stating: "Here, we do not construe Appellants' formulation of the case caption as a failure to appeal the circuit court's orders as they relate to the Town, especially given the confusion created by the Mayor's refusal to add to a meeting agenda the topic of appointing a town attorney." (Opinion at 7.) But there is nothing to construe with either of the Appellants' two notices of appeal; both unambiguously stated that only Mayor Wilson and Councilman White—but not the Town of Chapin itself—were the Respondents.<sup>2</sup>

The South Carolina Supreme Court has been clear that appellate jurisdiction does not vest over trial-court parties who are not timely identified as "respondents" in a notice of appeal. *See Conner v. City of Forest Acres*, 348 S.C. 454, 461–62, 560 S.E.2d 606, 609–10 (2002) (reversing the Court of Appeals' decision to ignore an appellant's captioning of her notice of appeal, and dismissing an appeal as it related to two trial-level defendants who were not identified as appellate-level respondents until five months after the notice of appeal had been served).

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<sup>2</sup> The Respondents do not understand the Court's remark about any perceived "confusion." Under no circumstances could the Appellants have participated in selecting adverse counsel. *See generally* S.C. Code Ann. § 8-13-700 (prohibiting elected officials from voting on matters in which they have a conflict of interest); Rule 1.7(b)(3), S.C. Rules of Prof'l Conduct (providing that "a lawyer may represent a client if the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal"). Accordingly, it is irrelevant that no lawyer currently holds the title "Town Attorney," and it is also irrelevant that there was disagreement among Council as to hiring a "Town Attorney" at the time this litigation was filed. It defies any logic that the Appellants think that they could sue an entity and then play some role in selecting that entity's attorney. Any suggestion of "confusion" by the Appellants about not being permitted to pick opposing counsel for this case is illusory at best.

Unlike *Conner*, these Appellants have never attempted to re-characterize their decision to exclude the Town of Chapin from this appeal as a “clerical error” on their notices of appeal, nor have they attempted to belatedly graft the Town of Chapin onto this case as a respondent. As such, the Court indisputably does not have appellate jurisdiction over the Town of Chapin. Its ruling that “Appellants have properly perfected their appeal of the circuit court’s orders as to all defendants in the case” is, therefore, contrary to South Carolina law and the Court’s limited appellate jurisdiction. (Opinion at 7.)

**C. The Court improperly deemed the law-of-the-case doctrine to be “discretionary” when it declined to apply this rule here, as dismissal is the only appropriate result when appellate jurisdiction fails to vest.**

In addition to conflicting with *Conner*, the Court’s decision improperly set aside the natural result that flows from *Conner*’s application here: that an unappealed ruling as to one defendant becomes the law of this case as to all Respondents and, as such, divests the Court of appellate jurisdiction. In bypassing this outcome, the Court declared that the law-of-the-case doctrine is “discretionary.” (Opinion at 7.) This statement is contrary to the law both of South Carolina and nationwide.

As it relates to decisions of a trial court that are not appealed, the law-of-the-case doctrine is well-established in South Carolina:

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. An unappealed order, right or wrong, is considered the law of the case.

Jean Hofer Toal, *et al.*, *Appellate Practice in South Carolina* 214 (3d ed. 2016)

(collecting numerous South Carolina cases; internal citations omitted).

This is not a discretionary procedural point, but instead is a necessary function of appellate jurisdiction. If appellate jurisdiction does not vest, then an appellate court has no authority to review a decision or to dictate an outcome to a party that is not before it. *See generally Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (“Jurisdiction is generally defined as ‘the authority to decide a case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.’” (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))); *see also Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188–89, 714 S.E.2d 547, 549–50 (2011) (vacating a decision rendered by the full Workers’ Compensation Commission due to the absence of appellate jurisdiction). The absence of jurisdiction, not an appellate court’s exercise of discretion, is why an unappealed decision always stands, “right or wrong.” *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014).

Because this Court did not have appellate jurisdiction over the Town of Chapin, the law-of-the-case doctrine divested the Court of any authority to reverse Judge Cooper’s rulings below, as they applied equally to the Respondents and to the Town itself. This is the natural result of: (1) the Appellants’ decision not to appeal Judge Cooper’s rulings as they relate to the Town; and (2) the Court’s lack of jurisdiction over rulings and parties who are not before it.

Instead of following this unambiguous limitation on its own authority, the Court held that dismissal of this appeal would be an “unreasonably harsh” outcome. (Opinion at 7.) It is not. Indeed, dismissal is the only result permitted under these circumstances:

Generally, a proceeding to review a judgment, order, or decree will be dismissed if all parties who are essential to the review are not made parties to the proceeding, unless there has been a proper summons and severance or equivalent proceeding or unless the defect may be and is cured.

4 C.J.S. *Appeal and Error* § 353 (“Nonjoinder”) (2007).<sup>3</sup>

This fundamental limitation of appellate jurisdiction applies when the same ruling is issued against all parties, but is only appealed as to some. *See, e.g., Jemison v. Brown*, 202 So. 2d 44, 45 (Ala. 1967) (“It is academic that all parties to an action whose interest will be affected by a reversal of the judgment or decree appealed from must be made parties to the appellate proceedings. Otherwise we cannot consider the case as to the non-joined appellees.”); *Kirby v. Woods*, 90 S.E.2d 4, 5 (Ga. 1955) (holding that the court was without appellate jurisdiction and dismissing an appeal where a judgment was entered in favor of four defendants but was appealed only as it related to two of the defendants).

It applies when similar orders with “interwoven” rulings are issued against multiple parties, but only one order is appealed. *See, e.g., Bye v. Fed. Land Bank Ass’n*, 422 N.W.2d 397, 399–400 (N.D. 1988) (dismissing an appeal for lack of jurisdiction when the trial court issued summary judgment on “interwoven” issues in two separate orders in favor of two separate groups of defendants, but the plaintiff only appealed one order against one group of defendants).

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<sup>3</sup> Operation of the law-of-the-case doctrine in a case involving how a municipality establishes a meeting agenda is a much less “harsh” use of the doctrine than other times South Carolina’s courts have acknowledged the limited scope of their appellate jurisdiction under this doctrine. *See, e.g., State v. Black*, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (relying on the law-of-the-case doctrine to affirm a twenty-year prison sentence); *State v. Woods*, 382 S.C. 153, 161, 676 S.E.2d 128, 132 (2009) (holding that the law-of-the-case doctrine left “no basis for reversal” in affirming a death sentence); *Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653–54 (2006) (holding that the law-of-the-case doctrine “requires affirmance” of a family court order removing a child from a custodian who had cared for the child after being abandoned by his mother).

And it applies even when the party left out of an appeal failed to file any responsive pleading at the trial level. *See, e.g., In re Estate of Johnson*, 279 P.2d 271, 275 (Kan. 1955) (dismissing an appeal for lack of appellate jurisdiction when a judgment was entered in favor of several defendants, including one who was sued both in his individual capacity and in his capacity as an executor of a will, but was only appealed against those defendants in their individual capacities, even though the dual-capacity defendant never filed any trial-level pleadings in his capacity as executor).

Accordingly, the Respondents respectfully submit that the Court misapprehended the scope of its appellate jurisdiction when it set aside the law-of-the case doctrine here in favor of allowing this appeal to proceed. It should reconsider that ruling, vacate its decision, and dismiss this appeal.

**D. The authorities cited in the Court’s opinion on the law-of-the-case issue do not stand for the proposition for which they are cited.**

Nor do any of the authorities cited by the Court support a contrary outcome. In both the text of the opinion and in Footnote 6, the Court cited four sources—none from South Carolina—for the proposition that the law-of-the case doctrine is discretionary and may be freely disregarded to avoid an “unreasonably harsh” outcome. (Opinion at 7 & n.6.) These authorities, however, only discuss the law-of-the case doctrine in the context of a court revisiting one of its own prior rulings in the same case, which is fundamentally different from an appellate court being unable to review an unappealed or partially appealed trial-court order:

1. *Southern Railway Co. v. Clift*, 260 U.S. 316 (1922): In *Southern Railway*, the Court held that it was not bound to follow a prior appellate ruling, and explained that the law-of-the case doctrine did not necessarily control on “a second appeal.” *Id.* at 319.

2. Slowinski v. Valley National Bank, 624 A.2d 85 (N.J. Sup. Ct. App. Div. 1993): In *Slowinski*, the court reviewed whether the law-of-the-case doctrine applied where a plaintiff obtained a default judgment against one defendant, amended its complaint to add a new defendant, and then tried to bind the new defendant to a ruling made during the default proceedings to which it was not even a party. *Id.* at 88–90. The court explained that this was more appropriately viewed as a question of collateral estoppel, though it held that doctrine did not apply under these circumstances, either. *Id.* at 90–92. The statement for which this Court quoted *Slowinski*, though, arose from a passage that discussed the law-of-the-case doctrine as it applies to a trial court’s discretion to revisit its prior rulings as a case proceeded. *See id.* at 89 (“The doctrine of ‘law of the case’ is also applied to the question of whether or not a decision made by a trial court during one stage of the litigation is binding throughout the course of the action.” (quoting *State v. Hale*, 317 A.2d 731 (N.J. Sup. Ct. App. Div. 1974))).

3. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper. Federal Practice & Procedure § 4478 (2d ed. 2002): The passage from this treatise cited in the Court’s opinion discussed the law-of-the-case doctrine in the context of a “reluctan[ce]” by courts “to reopen a ruling once made.” *Id.* at 637. This discussion focused on a court’s authority to revisit prior decisions and “relations” and “comity” among coordinate courts, not on an appellate court’s jurisdiction to review trial-level decisions not before it.

4. 5 C.J.S. Appeal and Error § 991 (2007): This final citation in the Court’s opinion also deals only with the law-of-the-case doctrine as it applies to multiple appeals. The section is entitled “Former decision as law of the case, generally,” and the passage quoted in the Court’s opinion related to the following summation: “Generally, an

adjudication on the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.” *Id.*

Not surprisingly, the only South Carolina Supreme Court authority of which the Respondents are aware suggesting the law-of-the-case doctrine could ever be discretionary arises in the same context as the four authorities cited in the Court’s opinion. In *State v. Hewins*, 409 S.C. 93, 100, 760 S.E.2d 814, 817–18 (2014), a criminal defendant was stopped and searched, and was ultimately issued a ticket for an open container violation and arrested for possession of crack cocaine. After being found guilty of the open-container violation in magistrate’s court, the defendant attempted to dispute the validity of the search in a subsequent trial on the crack cocaine offense. *Id.* at 101, 760 S.E.2d at 818.

The South Carolina Supreme Court held that the earlier magistrate’s court conviction did not constitute collateral estoppel in the later circuit court trial. *Id.* at 112–13, 760 S.E.2d at 824. At the close of the collateral-estoppel analysis, the *Hewins* Court included a footnote stating that the law-of-the-case doctrine would also not apply under these circumstances because it is “discretionary” with no “preclusive effect on successive trial proceedings.” *Id.* at 113 n.5, 760 S.E.2d at 824 n.5.<sup>4</sup>

*Hewins* is consistent with the authorities cited in the Court’s opinion, but—like the string cite in the opinion—it also does not address an appellate court’s fundamental

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<sup>4</sup> In *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015), this Court also stated that the law-of-the-case doctrine was “discretionary” in the context of successive trial court proceedings. In that opinion, also authored by Judge Geathers, the Court cited the same four authorities for this proposition that were cited in its opinion in this case. *Id.* at 572 n.6, 776 S.E.2d at 403 n.6. While those authorities are accurate support for the Court’s opinion in *Flexon*, they are irrelevant to how the law-of-the-case doctrine applies in this case.

inability to review an order affecting trial-level parties who are not parties on appeal. Because the Court's opinion is directly contrary to South Carolina and nationwide law governing appellate jurisdiction and the Court's inability to disregard the law-of-the-case doctrine, it should be reconsidered, this appeal should be dismissed, and Judge Cooper's rulings should be reinstated.<sup>5</sup>

**II. The Court ignored norms of statutory construction when it interpreted a municipal ordinance in a manner that created a void in the law where none previously existed, then filled that newly-created void with a judicial remedy not provided for in the law.**

In addition to improperly exercising appellate jurisdiction where it does not exist, the Court disregarded long-established rules of statutory construction when it created a legislative vacuum by affixing an arbitrarily narrow construction to Chapin Town Ordinance § 2.206(b), and then filled that vacuum with a judicial remedy that is found nowhere in Chapin Town Ordinance § 2.202.

**A. Without any analysis or explanation, the Court improperly added words to Chapin Town Ordinance § 2.206(b) when it construed the ordinance only to apply to “regular” meetings of Town Council.**

The crux of Judge Cooper's May 5, 2014 Order was that Chapin Town Ordinance § 2.206(b)—which requires meeting agendas to be “approved by the Mayor” before distribution—applies to all Town Council meetings in Chapin, regardless of the

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<sup>5</sup> The Respondents raised these issues through a motion to dismiss after briefing had closed because there was a theoretical chance that the Appellants would try to belatedly graft the Town of Chapin onto this appeal. They did not, but the Respondents could confidently argue that the Appellants intentionally omitted the Town of Chapin from this appeal only after the Appellants ignored the January 22, 2015 letter from the Clerk of Court regarding the caption of the case. Because dismissal of the appeal is the appropriate remedy when there is a jurisdictional defect, the Respondents moved for dismissal, rather than seeking leave to amend their brief to include this argument as an additional sustaining ground. (*Contra* Opinion at 6 (“Notably, Respondents did not amend their appellate brief to list this issue as an additional sustaining ground or to otherwise argue this issue.”).)

meeting's title as a "called" or "special" or "regular" or "emergency" or "rescheduled" meeting. (R. pp. 12–18.) Judge Cooper provided a significant, detailed discussion supporting this holding, including observations that there are no terms in the ordinance's plain language that limit its applicability only to "regular" meetings and that there are no other provisions of the Chapin Town Code that discuss how agendas for meetings are to be established. (*Id.*)

In holding that Judge Cooper's determination amounted to an abuse of discretion, the Court did not engage in any analysis regarding the plain language of Ordinance § 2.206(b). (Opinion *passim*.) At most, the Court skipped this necessary analytical step by stating that Ordinance § 2.206(b) "requir[es] the Mayor's approval of the agenda for regularly scheduled meetings." (*Id.* at 9.) This ordinance undoubtedly does this, but there is nothing in its plain language that suggests its scope is limited only to "regularly scheduled meetings," as the Court appears to have assumed without evaluation.

It is, of course, the rule that statutes and ordinances are to be enforced as they are written. *See, e.g., Hayes v. State*, 413 S.C. 553, 560, 777 S.E.2d 6, 10 (Ct. App. 2015) (holding that a statute must be enforced according to its "plain language," and that because the statute itself did not distinguish between certain types of criminal sentences, the Court could not, either). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 553 S.E.2d 578, 581 (2000).

Here, the Town of Chapin has a single ordinance governing how agendas for Council meetings must be established: Ordinance § 2.206(b). This ordinance provides

that “[t]he agenda shall be approved by the Mayor, prior to distribution” to Councilmembers and to the public. Chapin, S.C., Code. § 2.206(b) (R. p. 114).

There is no other provision in the Chapin Town Code that addresses how meeting agendas are to be prepared. In fact, this ordinance is entitled “AGENDA,” *id.* § 2.206 (R. p. 114 (all capitals in original)), and its title is designed to “indicate or emphasize” the ordinance’s contents, *id.* § 1.204 (R. p. 230). *See Beaufort County v. S.C. State Election Comm’n*, 395 S.C. 366, 373 n.2, 718 S.E.2d 432, 436 n.2 (2011) (“This Court may, of course, consider the title or caption of an act in determining the intent of the Legislature.”).

Because it is the sole ordinance that discusses meeting agendas, it is no surprise that Section 2.206(b) does not distinguish how agendas should be prepared based on the type of meeting being held. Instead, the ordinance requires all meeting agendas to be subject to mayoral approval, a power that Judge Cooper held was (1) unambiguous (R. p. 4); (2) discretionary (*id.* at 4, 6); and (3) consistent with Chapin’s strong-mayor form of government (*id.* at 3). Importantly, the Appellants have withdrawn any objection they may have had to that ruling, as the Court noted on Page 2 of its opinion.

The fact that Section 2.206(b) does not distinguish among meeting types, and therefore applies equally to all meetings, should be dispositive here. But the Court held that Section 2.206(b) is actually limited only to “regularly scheduled meetings” before pivoting to the remainder of its decision. (Opinion at 9.)

The Court did not provide any analysis for this holding. It did not provide any explanation for this holding. It did not cite any authority in support of this holding. It did not identify anything in the ordinance itself that supports this holding.

This single holding is dispositive of this case, but it is directly contrary to the basics of statutory construction.

**1. The Court cannot add words to an ordinance.**

As noted above, courts must interpret statutes and ordinances according to their plain meaning. *Hodges*, 341 S.C. at 85, 553 S.E.2d at 581. They may not add to or change a statute's words. *See, e.g., Moseley v. Welch*, 218 S.C. 242, 255, 62 S.E.2d 313, 319 (1950) ("We are not at liberty to add to the statute any conditions of this nature. These are considerations that must be addressed to the law making body."); *Lawson v. S. Ry. Co.*, 91 S.C. 201, 215, 74 S.E. 473, 477 (1912) ("When the Courts add to a statute words it does not contain, the decision is not binding, because the judicial department has no power to add to statutes by one decree or many.").

Here, there is no way for the Court to reach its limiting construction of Section 2.206(b) without adding the bracketed language: "The agenda [for regularly-scheduled meetings only] shall be approved by the Mayor, prior to distribution." Such statutory rewriting is not a proper judicial function and amounts to an implied repeal of the ordinance's actual language. *See Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010) (reiterating that implied repeal is disfavored).

**2. The Court should not construe ordinances in a way that creates a vacuum.**

In addition to adding words where none are found, the Court's narrow construction of Section 2.206(b) creates a blind spot in the Chapin Town Ordinances where none previously existed. Prior to the Court's opinion, Section 2.206(b) was construed to apply to agendas for all meetings, regardless of the type of meeting being held, consistent with its plain language. (R. pp. 14–18.) But under the Court's limited

construction, there are now no provisions in the Town Ordinances for establishing and approving agendas for special meetings, called meetings, rescheduled meetings, emergency meetings, or any meeting type other than “regular” meetings.

This is directly inconsistent with the norm that courts should construe statutes and ordinances in a manner that does not create gaps in the law. *See generally Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 544 (Del. 2015) (“[I]t would be incongruous to create statutory gaps and apply judicial fillers when an alternative, equally compelling statutory construction does not require courts to do so.” (citing *Pickett v. United States*, 216 U.S. 456, 460 (1910))).

**3. The Court should avoid interpreting laws in a way that creates an absurd result.**

At the time Chapin Town Ordinance § 2.206(b) was passed, the General Assembly required public bodies to publish agendas for all types of meetings except “regular” meetings. *See Lambries v. Saluda County Council*, 409 S.C. 1, 16, 760 S.E.2d 785, 793 (2014) (“In sum, nowhere in [the then-governing version of] FOIA is there a statement that an agenda is required for regularly scheduled meetings.”).

But under the Court’s narrow construction of Section 2.206(b), Chapin’s ordinances would have provided a method for establishing agendas for meetings that did not require an agenda, but would not have provided a method for establishing agendas for meetings that actually were required to have an agenda. It is unreasonable to assume that Chapin’s ordinances were designed to address something that was not required by state law while simultaneously ignoring what was required by state law. *See Beaufort County*, 395 S.C. at 371, 718 S.E.2d at 435 (“Moreover, it is well settled that statues dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to

produce a single, harmonious result.”); *S.C. Tax Comm’n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 168, 447 S.E.2d 843, 846 (1994) (“In giving effect to legislative intent, we are constrained to avoid an absurd result.”).

**4. The inclusion of language in only one part of an ordinance indicates that its omission elsewhere is intentional.**

Finally, the Town of Chapin was clearly aware that different types of meetings could take place when it identified a timing requirement for posting agendas that was limited only to “regular” meetings. Chapin, S.C., Code § 2.206(a) (R. p. 114). Because the Town specified that the requirements of the first sentence in Section 2.206(a) applied only to “regular” meetings, but did not include similar limitations in Section 2.206(b) regarding the scope of mayoral authority over agendas, that omission leaves no doubt that there are no such limitations on mayoral authority. *See Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (“The canon of construction ‘expressio unius est exclusion alterius’ or ‘inclusio unius est exclusion alterius’ holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” (quoting *Hodges*, 341 S.C. at 86, 533 S.E.2d at 582)).

\* \* \* \* \*

Because the Court overlooked or misapprehended these principles of statutory construction and restrictions on its authority to alter or add language to ordinances, the Respondents respectfully submit that the Court should reconsider its decision.

**B. The Court improperly conflated the authority to call a meeting with the authority to establish an agenda when construing Chapin Town Ordinance § 2.202.**

After placing an artificial barrier on the scope of Section 2.206(b), the Court compounded the error by crafting a judicial remedy to fill the gap created by its

construction of Section 2.206(b) with respect to how agendas are established for “special” meetings held under Section 2.202.<sup>6</sup> The remedy created by the Court, however, disregards the fundamental distinction between the authority to call a meeting and the authority to dictate the business conducted at that meeting.

As the Court recognized, both Chapin Town Ordinance § 2.202 and South Carolina Code § 5-7-250(a) provide that “special” meetings of Town Council may be called by the Mayor or a majority of Town Council. (Opinion at 9–10.) But neither this local ordinance nor this state statute prescribes how the agenda for a “special” meeting is established. The Court resolved this perceived disconnect by holding that the authority to call a meeting “necessarily implies” the authority to dictate the meeting’s agenda. (Opinion at 10.)

The law rejects such an “implication,” as the Court’s analysis overlooked the very next provision in the South Carolina Municipal Code. While South Carolina Code § 5-7-250(a) allows the Mayor or Town Council to call a “special” meeting, Section 5-7-250(b) authorizes municipalities—consistent with the ultimate goal of Home Rule—to establish for themselves how they wish to run their meetings and conduct their business. In Chapin, the Town Council has done this in a way that breathes life into its strong-mayor form of government.

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<sup>6</sup> The Court acknowledged that Section 2.202 itself does not fill this gap: “Section 2.202 is silent on the question of an agenda for special meetings.” (Opinion at 9.) But it misunderstood that silence as a deliberate decision by Chapin Town Council not to require mayoral approval over agendas for special meetings. (*Id.*) Section 2.202 is silent on this issue because the issue is *already* fully covered by Section 2.206(b)’s plain language, which requires mayoral approval over all meeting agendas. The Court should not give any weight to the absence of surplusage in Section 2.202.

Long before the Respondents were elected, the Town Council passed a series of ordinances delegating virtually all authority to manage meetings to the Mayor. *See, e.g.*, Chapin, S.C., Code § 2.201(a) (R. p. 231) (authorizing the mayor to unilaterally reschedule meetings); *id.* § 2.205 (R. p. 231) (“The Mayor shall preside at all council meetings.”); *id.* § 2.209(b) (R. p. 232) (providing that in the absence of a town attorney, “all questions of order shall be decided by the Mayor”).

The authority to regulate and approve agendas for all meetings is among these delegated duties and is consistent with South Carolina Code § 5-7-250(b). It is also consistent with the strong-mayor form of government’s focus on the executive to be the municipality’s leader with a single point of authority and a single executive accountable to the electorate.

Moreover, in a similar separation-of-powers dispute, the South Carolina Supreme Court has previously recognized that the authority to call a meeting is separate and distinct from the authority to determine what business is conducted at the meeting. *McConnell v. Haley*, 393 S.C. 136, 139 n.1, 711 S.E.2d 886, 888 n.1. (2011).

Nor does the Freedom of Information Act dictate a different outcome. The Court assumed that the power to call a special meeting was equivalent to the power to dictate the business of a special meeting because:

If the Mayor can disapprove an agenda for a special meeting called by a majority of Council members—an agenda that must be limited to the purpose(s) for calling the special meeting, *Lambries*, 409 S.C. at 15, 760 S.E.2d at 792—the special meeting will be left without a reason to proceed, effectively stripping the majority of its authority to call the meeting.

(Opinion at 10.) But the limitation on special meetings that *Lambries* highlighted and on which the Court based its ruling in this case is no longer the law.

In response to *Lambries*, the General Assembly amended the Freedom of Information Act to authorize public bodies to amend agendas during meetings upon a two-thirds vote. S.C. Code Ann. § 30-4-80(A). Accordingly, even if an agenda is stricken in its entirety, meetings will certainly have a reason to proceed because of the potential for items to be added to the agenda once a meeting is commenced.

For instance, in this case, if the Appellants wish to call a special meeting for their ultimate goal of ousting Mayor Wilson,<sup>7</sup> he is empowered by Ordinance § 2.206(b) to block that misuse of taxpayer resources. Under the Freedom of Information Act, the Appellants are then free to attend a special meeting that they have noticed, even if there is no agenda, with the goal of aggregating the requisite votes needed to add items to an agenda once the special meeting is commenced.

All elected officials will have political risks and rewards to weigh when evaluating how to use their respective authority provided by the Town Ordinances and State Code. Those political calculations and the consequences that can attach to each official's maneuvers, not the Judiciary altering or disregarding the terms of unambiguous ordinances, are the check on potential abuse of that authority. *See Cox v. Bates*, 237 S.C. 198, 213, 116 S.E.2d 828, 834 (1960) ("Therefore plaintiff and others so minded may seek at the ballot box remedy for what they consider to be a wrong. Much of his

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<sup>7</sup> *See generally* R. p. 171 (email from former Councilwoman Atkins requesting that Mayor Wilson add to a meeting agenda "a motion to schedule a hearing to determine the qualifications of Mr. Wilson" to remain mayor); R. p. 175 (email from Councilwoman Hollis requesting same); R. p. 228 (email from Appellants' counsel stating that he will direct the Appellants "to hold a special meeting of Council as soon as possible to initiate the steps necessary to consider the Mayor's qualifications to hold office and to explore whatever steps that are available to remove him from office in the most expedient manner possible").

argument here is, wittingly or not, concerned with legislative policy, with which the court has nothing to do.”).

Accordingly, the Court should reconsider its holding on this issue, as it overlooked the distinction between the authority to call a special meeting and the authority to establish that meeting’s order of business. Its ruling improperly created a judicial remedy to a political situation where the Chapin Town Ordinances and the South Carolina Code already outline the parameters of each official’s authority, and it should be revisited as a result.

### CONCLUSION

For the reasons explained above, the Respondents respectfully petition the Court to rehear this matter, vacate its earlier opinion, and dismiss this appeal for want of appellate jurisdiction. Alternatively, the Court should reconsider its construction of the governing Chapin Town Ordinances and enforce them according to their plain language, as Judge Cooper did below, rather than interpreting them in ways that are inconsistent with well-established principles of statutory construction.

Respectfully submitted,

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Attorneys for the Respondents

March 24, 2016  
Columbia, South Carolina

Attachment

Appellants' Proposed Amendment to  
Ordinance § 2.206

**ORDINANCE OF THE TOWN OF CHAPIN  
Amending Municipal Ordinance 2.206**

**ORDINANCE # \_\_\_\_\_**

WHEREAS, There appears to be an irreconcilable conflict between Section a. and Section b. of Town Code 2.206, which may be interpreted to give the Mayor veto power over agenda matters proposed by members of Council in conflict with SC Code Section 5-9-30(3), judicial and Attorney General rulings, the US and SC Constitutions; and Section a. also appears to be in conflict with the ruling of the SC Court of Appeals in Lambries vs. Saluda Co. Council (728 SE2d 488).

NOW THEREFORE, be it Ordained by the Town Council of The Town of Chapin, South Carolina in Council assembled by authority thereof, Town Code Section 2.206 is hereby amended as follows:

**2.206 AGENDA.**

Matters to be considered by the Mayor and Council at any called meeting (except emergency meetings) shall be placed on a written agenda prepared by the Municipal clerk and publically posted at least twenty-four (24) hours prior to the meeting. The agenda shall include the date, time, and place of the meeting, with notice to the media and others requesting such notice as required by the South Carolina Freedom of Information Act (SC Code Section 30-4-80). Any member of Council may request, before the 24 hour deadline, an item to be placed on the agenda by the Clerk for consideration by Council. Any such requested item, and any item proposed by electors, pursuant to SC Code 5-17-10, shall be placed on the agenda for consideration by Council.

So Ordained:

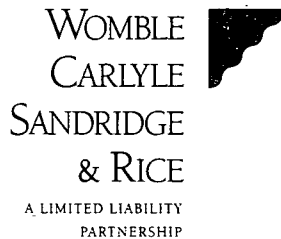
TOWN OF CHAPIN

  
Town Clerk

By   
Its Mayor Pro Tem

First Reading April 10, 2014  
Public Hearing     N/R      
Second Reading April 17, 2014





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March 24, 2016

**Via Hand Delivery**

The South Carolina Court of Appeals  
The Honorable Jenny Abbott Kitchings  
1220 Senate Street  
Columbia, SC 29201

Re: Vivian Atkins v. James R. Wilson, Jr.  
Appellate Case No. 2014-000829

**RECEIVED**  
MAR 24 2016  
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing please find an original and six copies of Respondents' Petition for Rehearing in this matter. Please file the original and return a clocked copy to us. Also enclosed is our check for the filing fees.

By timely filing this Petition, we understand that the Court will not issue a remittitur to the circuit court, leaving the circuit court's rulings in place until such time as the Petition and any subsequent filings may be ruled upon in accordance with the Appellate Court Rules. Rule 221(b), SCACR; *see Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 23 n.2, 736 S.E.2d 651, 655 n.2 (2012) ("An opinion of an appellate court is not final until the remittitur is filed in the lower court. The timely filing of a petition for rehearing stays the sending of the remittitur, thereby depriving the decision of finality."). We appreciate the Court's consideration in this regard.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

MTC/tm  
Enclosure

cc: Spencer Andrew Syrett