

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Roger L. Couch, Circuit Court Judge

Opinion No. 5490 (S.C. Ct. App. Withdrawn, Substituted, and Refiled August 16, 2017)

Anderson County.....Petitioner,

v.

Joey Preston and the South Carolina Retirement System.....Respondents.

APPENDIX TO ANDERSON COUNTY'S
PETITION FOR WRIT OF CERTIORARI
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

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ISSUES ON APPEAL

On November 18, 2008, the outgoing County Council of Anderson County, dominated by political allies of County Administrator Joey Preston, voted to give Preston a Severance Package worth over \$1.1 million. The vote to approve the Severance Agreement included the County Council Chair, who was actively soliciting Preston for a County job at the time. This appeal presents the following questions:

1. Did the Circuit Court err in approving of the Severance Package, given that the Package was a product of fraud and abuse of power, and was unreasonable, capricious, and a violation of public policy because it was based on a phantom claim, paid Preston more than the maximum value provided for in his Employment Agreement, and was passed in a manner inconsistent with the democratic process, and that Preston knew these facts?
2. Did the Circuit Court err in approving the Severance Package despite the fact the Package was passed with votes of Council members with patent conflicts of interest?
3. Where Preston was plainly aware of the improper votes being cast in favor of his million-dollar severance, did the Circuit Court err in holding that Preston had no duty to point out the impropriety, and in holding that the Severance Agreement cannot be rescinded for breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation?
4. Where the Circuit Court's Order invalidated a total of four votes and held that the Severance Agreement passed by a 2-1 vote, and where three votes do not constitute a quorum of the Anderson County Council, did the Circuit Court err in refusing to invalidate the Severance Agreement, and in denying Anderson County's motion to amend its Complaint to seek invalidation on the basis of this absence of a quorum?

5. Did the Circuit Court err in holding that future payments due to Preston from the South Carolina Retirement System – payments made possible only because of the Severance Package – are not available in fashioning a remedy for the impropriety of the Severance Package?
6. Did the Circuit Court err in holding that the equitable remedy of rescission is unavailable to address the improprieties of the Severance Agreement?
7. Did the Circuit Court err in holding that Anderson County's lawsuit to challenge the Severance Agreement violated the terms of the Settlement Agreement, and that Preston therefore may petition for attorney's fees?

STATEMENT OF THE CASE

Anderson County filed its Complaint on November 12, 2009. (R. pp. 84-96)

Preston filed an Answer and Counterclaim on August 10, 2010. (R. pp. 109-122)

Anderson County filed its Reply to Counterclaim on September 7, 2010. (R. pp. 123-126)

On December 12, 2011, the case was designated as complex, and on February 28, 2012 it was assigned for all purposes to the Honorable Roger L. Couch. (R. pp. 80 & 81)

Anderson County filed an Amended Complaint on March 30, 2012. (R. pp. 127-159)

Preston filed an Answer to the Amended Complaint and Counterclaim on May 3, 2012. (R. pp. 160-228)

Anderson County filed its Reply on June 29, 2012. (R. pp. 229-237)

Certain of Preston's counterclaims – arising out of his arrest for driving under the influence and allegations concerning an investigation of Preston in 2009 – were settled by agreement and dismissed by stipulation filed on October 23, 2012. (R. pp. 247-248)

The parties filed cross-motions for summary judgment, which were heard on October 16-17, 2012 and denied in all respects as to both parties by Order dated October 23, 2012. (R. pp. 82-83)

The matter was tried without a jury to Judge Couch from

October 29, 2012 through November 2, 2012. Judge Couch made his rulings in an Order dated May 3, 2013. (R. pp. 1-43)

Anderson County filed its Motion to Alter or Amend Judgment on May 13, 2013. (R. pp. 3163-3176) Anderson County also filed a post-trial Motion to Amend Complaint, in light of Judge Couch's disqualification of four votes, on July 15, 2013. (R. pp. 3245-3270) Both of those motions were denied by Order filed November 8, 2013. (R. pp. 44-79)

Anderson County filed its Notice of Appeal on November 22, 2013.

STATEMENT OF FACTS

I. Introduction

On November 18, 2008, Joey Preston and a lame duck County Council controlled by his political allies abandoned any pretext that they were public servants with fiduciary obligations to the citizens of Anderson County. They were so intent on thwarting what – they were sure – the incoming majority had planned that they ignored fundamental rules of conflict of interest, and their obligation to deal prudently with public money.

The result was an unjustifiable \$1.1 million payout to a public servant (the "Package" or "Severance Agreement"). The purported basis for the payment was settlement of a logically impossible claim that Preston's existing employment contract (the "Employment Agreement") had been "anticipatorily breached." This claim was plainly without merit, since the Employment Agreement provided that Preston could be terminated at any time, without cause, and because the purported "breach" was a prediction of future political action by persons who were not in office and so could not act for the County. In fact, Preston was in no danger of termination by the existing Council, which included a solid majority of his supporters. The Severance Package further offended rationality by

giving a public official far more than the severance to which he would have been entitled under his Employment Agreement under any scenario – including a \$7,600 per month public pension for life, starting at age 45, courtesy of the taxpayers.

Michael Thompson, who chaired the meeting, was actively courting Preston for a County job at the time of the vote. The daughter of the chair of the Personnel Committee – who negotiated the Severance Package and introduced it onto the agenda with the statement that he was the only Council member who had read it – had only two weeks before received a ridiculously beneficial contract obviously designed to tie the hands of any future Council that might want to terminate her contract.

The primary justification offered by Preston at trial for his golden parachute was that his friends on County Council could legitimately pay Preston whatever amount they chose – without judicial scrutiny – because the political atmosphere in Anderson County was “toxic.” To prove this “toxicity,” Preston pointed to an amalgam of events that occurred years before, anonymous acts not attributable to the County, and predictions of future legislative action by persons not yet in office. It is noteworthy, though, that Preston endured this purported “toxicity” until the voters of Anderson County elected a new County Council. What Preston wanted to call a “breach” was nothing more than a change in the political landscape. It was utterly arbitrary for the outgoing Council to use public money to pay Preston over a million dollars, fully funding his retirement, because he might – in the future – face a difficult political landscape, in what is plainly a political job.

The Circuit Court established a potentially harmful precedent in placing the law’s imprimatur on these corrupt goings-on. Under that ruling, a million-dollar severance package that was voted to a public servant by legislators with clear financial ties to him is acceptable. Under that ruling, a “severance” payment to a public servant far in excess of

any arguable legal entitlement is reasonable. Under that ruling, a public servant does nothing wrong when he sits silently by and allows tainted votes to be cast for his own severance. That ruling should be reversed.

II. Preston's Tenure and His Employment Contract

Joey Preston was the County Administrator of Anderson County from 1996 through most of 2008. (R. pp. 912-913) In July of 1998, Preston obtained an Employment Agreement with the County. (R. pp. 1891-1899) The Employment Agreement was favorable to Preston. It purported to have an initial term of three years, and to renew perpetually for an additional year at the close of each contract year. (R. p. 1892)

Importantly, the Employment Agreement expressly allowed termination without cause. Thus, termination itself – with or without cause – could not be a breach.

A. The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, paragraphs A, B, and C of this Agreement.

(R. p. 1892 at Sec. 2.A) In the event of termination without cause, the Employment Agreement included a provision for severance pay and benefits:

B. If the Administrator is terminated for any reason other than those set out above, he shall be deemed to have been terminated without cause and shall be entitled to all pay and financial benefits remaining on his contract for the balance of the contract period in a lump sum or in incremental payments, as he, in his sole discretion, shall choose, as severance pay for such termination without cause. . . . The total severance pay under this Agreement shall not exceed thirty-six (36) months aggregate, total compensation at the rate of pay in effect upon termination. . . .

(R. p. 1893 at Sec. 3.B) While the Employment Agreement was generous, contrary to Preston's view, it provided him no guarantee of employment for life.

III. Election of a New Council, and Preston's Claim of "Anticipatory Breach"

In Anderson County, the entire County Council stands for re-election every two years. (R. p. 307, line 18-p. 308, line 1) In June of 2008, challengers won primary elections against several incumbent County Council members who were friendly to Preston. (R. pp. 310-312; pp. 925-928) Because those primary victors would not face an opponent in the general election, the practical effect was that they would very probably take office as part of a new County Council in January 2009. (R. pp. 935-936; pp. 1187-1188) Some of the new Council members, along with two returning Council members, had run on platforms calling for examination and possible reform of the financial and governance practices of the Preston administration. (R. pp. 310-312)

It is important to emphasize that this new Council would not be sworn in before January 2009, and that until then the old Council – a majority of which was vigorously supportive of Preston – remained in office. (R. pp. 312-313; pp. 1199-1200) Preston recognized this and acted swiftly to exit on favorable terms before the potential investigation could get underway.

Preston engaged attorney Rob Hoskins to assert a claim against the County for him. Hoskins first wrote to County Council on September 25, 2008 – that is, before the general election in November. (R. pp. 1914-1915) In that letter, Hoskins asserted on behalf of Preston that the *intent* of the *incoming* majority-elect to examine the Preston years amounted to an "anticipatory breach" of Preston's Employment Agreement: "[i]t has come to Mr. Preston's attention that certain existing Council Members have made statements that they and certain newly elected Council Members *intend, after January 2009*, to prevent him from carrying out his duties as County Administrator." (*Id.*; emphasis added) Thus, Preston's anticipatory breach claim was based on a forecast in September 2008 that future

actions of a future Council would “render[] his ability to serve the people of Anderson County beyond January 1, 2009 impossible.” (*Id.*) Despite all the discussion at trial of the “toxic” environment, the simple fact was that the *only* event that led to Preston’s claim of “breach” was a free election; Anderson County never took any official action affecting Mr. Preston’s contract or his employment status.

IV. The Lame Duck Council’s Response to Preston’s Demand

The sitting Council referred Preston’s claim to its Personnel Committee, chaired by Ron Wilson. (R. p. 334, lines 10-19; p. 1189, lines 3-15; pp. 989-990) Wilson – who has since pled guilty to operating a multi-million-dollar Ponzi scheme – was a Preston supporter. (R. p. 316, lines 17-20; pp. 685-687)

The Personnel Committee hired an employment attorney – Tom Bright – to advise it. (R. pp. 2003-2006; p. 338, lines 5-25; pp. 441-442; p. 1190, lines 10-24) Bright advised the committee and Council that Preston did not at the time have a claim for “anticipatory breach,” and that Council had the option of doing nothing. (R. pp. 458-460; pp. 340-341; p. 1198, lines 1-23) Bright also advised the committee that Preston’s Employment Agreement might be wholly invalid under *Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), because the Agreement purported to extend beyond the term of the County Council that approved it. (R. p. 459, lines 12-18; p. 471, line 24-p. 472, line 3; pp. 477-479) Ignoring this advice, the Personnel Committee instructed Bright to negotiate a settlement with Preston – he was told to “try and get the best deal you can.” (R. p. 464, line 21-p. 465, line 17)

On October 23, 2008, Preston’s lawyer sent Bright a letter making a demand for \$1,276,081.00: \$827,222.00 for the “total value of the money and benefits due” under Preston’s Employment Agreement (as calculated by Preston’s lawyer); \$356,087.00 to

purchase service credits to allow him to retire immediately on a full pension; and \$92,772.00 to fund a health reimbursement account. (R. pp. 2026-2028)

The October 23, 2008 Hoskins letter acknowledged that Preston's demand was for more than Preston was due under his Employment Agreement, calculating the total amount due under the Employment Agreement as \$827,222.00. (*Id.*) Hoskins justified this by alluding to unspecified "tort claims" that Preston would assert against current and incoming Council members – presumably those pledged to investigate his regime. (*Id.*) In fact, though, Preston's demand was not calibrated to those tort wrongs, but was *expressly* calculated to allow Preston to retire immediately with a full pension.

Faced with the outgoing Council's determination to settle, Bright had little negotiating leverage. (R. pp. 464-465, 468-472) The final Severance Package called for payments of approximately \$1.1 million, which included full severance under the Employment Agreement *plus* purchase of service credits to give Preston a lifetime pension at age 45.¹ (R. pp. 1002-1003; pp. 1985-1989; pp. 2026-2028; pp. 2037-2039)

V. County Council's Series of Votes on the Severance Package

The Severance Package was considered at the scheduled November 18, 2008 meeting of County Council. The meeting was video-recorded and transcribed. (R. pp. 1918-1959; p. 1983) The videotape is impossible to watch without seeing that Preston's supporters made a choreographed effort to ram through approval of the Severance Package with no notice to those who would oppose its passage and with as little time for deliberation and public comment as possible.

¹ Had Preston not received this Severance Package, he would not have been entitled to receive retirement payments until he turned sixty. (R. pp. 1287-1292; pp. 251-252 at ¶¶ 5-10; pp. 253-255 at ¶¶ 5, 11-14)

All seven Council members were present for the vote on Preston's Severance Package on November 18, 2008. Five were friendly to Preston. The other two – Bob Waldrep and Cindy Wilson – had supported investigation of his administration. (R. pp. 2170-2226; p. 420, lines 13-21; pp. 1199-1200; p. 921, lines 14-24; pp. 1327-1329, 1331-1332)

Despite prior, coordinated groundwork by certain Council members to locate funding for the Severance Package and to orchestrate its passage, consideration of the Severance Package was not placed on the agenda distributed in advance of the November 18 meeting. (R. pp. 1916-1917; pp. 344-346; pp. 546-547; p. 821; pp. 1202-1222) Instead, on Ron Wilson's motion the agenda was amended – toward the end of the meeting – to add the matter. (R. pp. 1940-1941; p. 1983) This occurred even though there remained other scheduled Council meetings in 2008 when the Severance Package could have been placed on the agenda in advance. (R. pp. 344-346, 349-354; p. 1223)

When he introduced the Severance Package, Ron Wilson said that "no one has seen this except Mr. Bright and myself." (R. p. 1965, lines 1-3; p. 1983) Despite this, there was essentially no discussion of the details of the Settlement Package, Preston's asserted claim, or the value of the Package. After truncated debate, Bill McAbee moved to end debate. (R. pp. 1963-1968; p. 1983) That motion passed, and the Severance Package was approved by a vote of 5-2, with Cindy Wilson and Waldrep voting against. (R. p. 1968; p. 1983)

This, however, did not end the matter. Councilman Greer revealed he had consulted in advance with County employees to identify "an area [of the general fund budget] in which they could locate this amount of money." (R. p. 1969, lines 1-11; p. 1983; p. 2044; pp. 2047-2048) Greer passed out a previously prepared document showing

how the Preston Settlement Package could be funded. (R. p. 1946; p. 1983; pp. 1990-1992) The motion to approve budget transfers to fund the Settlement Package passed. (R. p. 1946, line 11-p. 1948, line 45; p. 1983)

At that point – in a truly remarkable moment – Councilwoman Floyd asked “Do we need to vote to reconsider this?” (R. p. 1949, lines 2-3; p. 1983) This showed that the majority had planned a strategic series of votes for the Preston Package. In fact, Greer testified that he had a working copy of Preston’s severance agreement in advance of the November 18, 2008 meeting (R. p. 1210, lines 3-9); that he never shared that copy with Council members Cindy Wilson or Waldrep (R. p. 1210, lines 14-17); and that he spoke with each of the other four members of Council who voted with him in favor of Preston’s severance agreement before the November 18, 2008 Council meeting because he was interested in “knowing, in advance of the November 18th meeting, whether or not [he] had sufficient votes to approve the severance agreement for Mr. Preston.” (R. p. 1210, line 22-p. 1211, line 19)

After this reminder, a motion was made to reconsider the funding transfers. (R. p. 1949; p. 1983) That passed, and after another truncated debate that was primarily squashed by Chairman Thompson on a point of order, McAbee moved to end debate. (R. p. 1950; p. 1983) The funding package was then re-approved on reconsideration. (R. p. 1951; p. 1983)

Promptly thereafter, McAbee moved to reconsider the Severance Package. (R. p. 1951; p. 1983) McAbee acknowledged that he made this motion *not* out of a desire to see the measure fail, but as a “parliamentary tactic” designed to insulate the approval against any later attack – based on his understanding that once a matter has been reconsidered once, “it precludes any further reconsideration.” (R. pp. 628-629)

Immediately after his motion to reconsider was passed – within about *12 seconds* – McAbee moved to end debate on the matter he wanted reconsidered. (R. p. 1951, line 10-p. 1953, line 9; p. 1983) The motion to end debate passed, but only by 4-3, with Greer joining Waldrep and Cindy Wilson in voting against. (R. p. 1952, lines 34-37; p. 1983)

The final Council vote on the Severance Package followed. Waldrep abstained, having earlier explained an abstention with the statement that he “can’t figure out what in the world” Council was doing. (R. p. 1951, lines 33-35; p. 1952, line 34-p. 1953, line 9; p. 1983) In the meeting minutes, the final recorded vote was 5 in favor, 1 against, and 1 abstention. (R. p. 1953, lines 6-9; p. 1983) Immediately after that vote, the Council took up a motion to hire a new administrator. (R. pp. 1953-1959; p. 1983). Floyd had a proposed contract for the new administrator already with her, again confirming the majority had orchestrated this series of votes in advance. (R. p. 1953, lines 12-35; p. 1983) At that point, despite several agenda items that remained undiscussed, Thompson solicited a motion to adjourn and Council adjourned without conducting any further business. (R. p. 1959, lines 15-42; p. 1983).

A few points arising from analysis of the videotape of this extraordinary event are worth emphasis: (i) the time from distribution of the proposed Severance Agreement (which supposedly no one but Ron Wilson had seen) to the initial vote on it was about 11 minutes; (ii) the time from passage of the motion to reconsider the Severance Package to McAbee’s motion to end debate on reconsideration was about 12 seconds; (iii) only a minuscule portion of the debate was devoted to the merits of Preston’s claims, whether they should be settled, or the terms of the Settlement Agreement. (R. p. 1983)

Moreover, the approval of the Severance Package was done by simple motion, not an ordinance. (R. p. 1983) Under the Anderson County Code, an “ordinance” requires

(among other characteristics also not present here) three separate readings on three separate days. Anderson County Code of Ordinances § 2-38.

VI. The Terms of the Severance Package

The Severance Agreement contained these key provisions (R. pp. 1985-1989):

- Preston agreed to relinquish his position as County Administrator effective at the close of business on November 30, 2008. That is, Preston *voluntarily resigned* before the new majority that supposedly “breached” his contract even took office.
- The County agreed to pay Preston \$1,139,833.00 (less withholdings):
 - \$359,258.00 to be paid to the South Carolina Retirement System to purchase “service credits”;
 - \$780,575.00 paid in cash to Preston;
 - The County also gave Preston the title to his then-current County vehicle, a 2006 GMC Yukon Denali.

VII. Facts Supporting Invalidation of the Severance Package

The core facts that require invalidation of the vote to pay Preston \$1.1 million in County funds are not subject to doubt.

A. The Terms and Circumstances of the Severance Package Itself.

The terms of the Severance Package itself are sufficient to invalidate it. First, the County purported to pay Preston for “anticipatory breach” at a time when the sitting County Council was in his corner, and the majority that he expected to terminate him had not taken office. There had been no County action that constituted anticipatory breach. Moreover, Preston’s Employment Agreement made it clear that he could be terminated by Council “at any time.” (R. p. 1892 at Sec. 2.A) Thus even termination could never be a “breach” of the Employment Agreement. At most, it might entitle him to severance. Accordingly, the Severance Package was not a true response to an actual breach – and it

certainly was not an arm's length negotiation. Instead, it was a political bailout from political allies, to spare Preston the discomfort of dealing with a new Council not as favorably disposed toward him. While this might be understandable politics, it is an unconscionable use of County money.

This is confirmed by the fact – established in demand letters from Preston's own lawyer – that Preston was *paid more than he was owed* under his contract. (R. pp. 2026-2028; pp. 2037-2039) The Employment Agreement made no provision for a pension for life (or even a Yukon Denali.) (R. pp. 1891-1899) The Severance Package was a purely political payoff, dressed up in the garb of a settlement. But there was nothing to settle.

B. Council Members Had Financial Interests Intertwined with Preston and Should Not Have Voted on a Matter for His Benefit.

Anderson County presented evidence that three votes for the Severance Package should never have been cast. Indeed, the Circuit Court *agreed* with the County as to two of those three votes,² but concluded that the enactment of the Severance Package was nevertheless legal. As we discuss hereinafter, even one tainted vote requires invalidation here, and that standard was easily met.

Chairman Michael Thompson. At the time he was chairing the County Council's decision to pay Preston \$1.1 million and voting repeatedly in favor of Mr. Preston's interests, Michael Thompson was *actively seeking County employment for*

² In addition to Michael Thompson and Ron Wilson, the County showed an improper financial relationship between Preston and Councilman Bill McAbee. Most starkly, the County demonstrated that Preston was signing off on "economic development" travel for McAbee and a close friend and business associate, even after McAbee had been voted out of office – at which point the travel could serve no County purpose, and could be only for McAbee's personal enjoyment and business advantage. (R. pp. 2141-2148; pp. 610-611, 614-615; pp. 1072-1073) Given the clear impropriety of the Thompson and Wilson votes, and the fact that even one bad vote is enough to invalidate the Severance Package, we focus primarily on those facts.

himself from Preston. (R. p. 778, line 25-p. 779, line 15; p. 783, line 3-p. 784, line 4; p. 785, lines 6-22; pp. 791-798; pp. 815-828; pp. 1985-1989; pp. 2072-2075; p. 2076; pp. 2079-2081; pp. 2082-2083; pp. 547-552; pp. 1015-1017; p. 1022, line 19-p. 1023, line 9; pp. 1026-1031; pp. 1036-1044) Mr. Thompson admitted as much, the Circuit Court so found, and there can be no serious dispute on this point. (R. p. 778, line 25-p. 779, line 15; p. 783, line 3-p. 784, line 4; p. 785, lines 6-22; pp. 791-798; pp. 815-828; pp. 8-9) Indeed, Thompson approached Preston within a day or two of his vote on the Severance Package to obtain Preston's signature on a document to officially hire him, after being told by another County official that such a hiring would be a conflict of interest. (R. pp. 824-827; p. 548, line 21-p. 549, line 15; pp. 1037-1039) Thompson's clear conflict of interest was not disclosed to Council or to the public, by Thompson or by Preston, at the time that Thompson voted for the Severance Package. (R. p. 827, line 19-p. 828, line 4; pp. 774-775)

Councilman Ron Wilson. Councilman Wilson was chair of the Personnel Committee to which the Council referred Preston's claim of "anticipatory breach." (R. p. 334; p. 1189) Under Councilman Wilson's leadership, the Personnel Committee oversaw the negotiation of Preston's Package. Councilman Wilson made the motion that Council approve Preston's Package. (R. pp. 1940-1941; p. 1983) Wilson twice voted for approval of the agreement and voted for other motions favorable to it, including the motion to terminate debate. (R. pp. 1940-1945; p. 1983)

A year earlier, in September 2007, Preston had signed on behalf of Anderson County a contract with a consulting company (Palmetto Agricultural Consultants) owned and operated by Councilman Wilson's daughter (Allison Schaum) for consulting services related to agricultural programs. (R. pp. 2149-2152; pp. 1051-1053; pp. 1714-1715)

Schaum had no previous experience in this area, and Anderson County was her company's only client at the time. (R. pp. 1745-1754) The original contract was a month-to-month contract, with a fixed hourly rate of \$65, when Schaum admitted she had never before worked for more than \$15 per hour in her life. (R. pp. 2149-2152; pp. 1755-1757; p. 1761, lines 6-10; p. 1768, lines 11-19)

On November 1, 2008, while Preston's claims were before the Council and being negotiated by Councilman Wilson's Personnel Committee – and approximately one week after Preston's lawyer sent his October 23 demand for just over \$1.2 million – Preston caused the County to enter into a new contract with Palmetto Agricultural Consultants that significantly improved the benefits to Schaum and her company. (R. pp. 2158-2161; pp. 1769-1774; pp. 1057-1058; pp. 1069-1071) The new contract increased the hourly rate to \$75 per hour, provided yearly increases in the hourly rate thereafter until the rate reached \$95 per hour, and converted the contract from month-to-month to a contract with a definite term of three years. (*Id.*) In addition, the new contract contained a truly extraordinary provision, giving Councilman Wilson's daughter the right to "liquidated damages" calculated at her hourly rate multiplied by 30 hours per week for the remainder of the three-year term if the County terminated the contract before the end of three years, this despite the fact that Schaum was not anticipated to, and never did, work more than about 20 hours per week. (*Id.*; R. p. 1758, lines 3-8; p. 1761, lines 20-24; pp. 1068-1069) The sweetening of the contract was entirely gratuitous. Preston signed the new contract – and thus obviously was aware of it – yet sat quietly by while Ron Wilson voted for Preston's \$1.1 million Severance Package.

C. Preston's Knowledge of – and Silence in the Face of – the Tainted Votes.

Preston plainly was aware of these conflicts of interest. He knew Chairman Thompson was pursuing him for a job, and he knew he had upgraded the contract of Councilman Wilson's daughter. (R. pp. 1038-1039, 1057-1058, 1069-1071) Preston was also present in Council chambers while these individuals debated and voted on his Severance Package, and yet he said nothing about these improper votes. (R. pp. 1918-1959; p. 1983; p. 997) He had a duty to speak up, as an employee and as a public servant.

D. Public Integrity Is at Stake.

It bears emphasis that this is not a private contract case. The matter involves the Court's authority to undo an improper *public* action. Preston's allies were not owners of a business, deciding how to spend their own money. They were charged with the public interest, and they were bestowing public funds with no justification.

"Corruption" is the abuse of entrusted power for private gain. The key facts of this case are not subject to serious dispute, and they render the Preston Severance Package plainly and deeply corrupt. The Circuit Court's decision to let the Severance Package stand sends an unacceptable message that the courts have no power to redress this sort of public chicanery. The courts are not so powerless in the face of blatant wrong.

SUMMARY OF ARGUMENT

The 2008 County Council election marked a sea change for Preston. Faced with this popular repudiation, and before the new Council was seated, Preston asserted that his Employment Agreement had been "anticipatorily breached." While the County had taken no action concerning Preston's employment, the lame-duck Council voted to settle this claim with a Severance Package that paid Preston over \$1.1 million in taxpayer money.

The Circuit Court erred in placing a legal seal of approval on that deal. Preston's Package was championed by Council members who should have been disqualified. Preston knew of the disqualifying facts, yet sat silently by. The Package was rammed through County Council in an obviously orchestrated fashion. It was premised on a cause of action that could not exist, and it paid Preston more than he could hope to recover even if he had a cause of action. The Circuit Court should have rescinded the departing Council's ill-conceived parting gift to Preston. The Package is invalid for a number of reasons, each of which is sufficient and all of which taken together are overwhelming.

I. The Severance Package Is Void Because it Was a Product of Fraud and Abuse of Power, it Was Unreasonable and Capricious, and it Violated Public Policy. Courts have authority to review arbitrary enactments like this Package. First, Preston's claim for "anticipatory breach" was premised on the prediction that the *incoming* County Council was likely to take some unspecified improper action toward him. The Circuit Court erred in confusing a hodgepodge of political postures and rhetoric with actual official conduct. Because the persons Preston said were "anticipatorily" breaching his contract were not in office, had no authority, and could not take and had not taken any official action, his claim was baseless. Anderson County, his employer, had done nothing.

Second, Preston's employment contract clearly provided that he served at the pleasure of County Council and could be terminated at any time and for any reason; the question was only whether he would be owed severance upon such termination. Preston's termination, in and of itself, simply could not have been a breach of contract.

Moreover, even if Preston could have claimed breach of his contract, Preston's own attorney admitted the "settlement" paid to Preston exceeded the maximum amount he could have claimed for breach. This was arbitrary.

Finally, the “debate” on the Severance Package was a sham. The Package was added to the agenda by an amendment offered toward the end of the meeting and with no advance notice. The proposed Severance Package was then swiftly distributed, “debated,” passed, “reconsidered,” and voted on again – in addition to being funded in a separate action – all in a choreographed dance, with virtually no substantive debate.

II. The Tainted Votes Cast in Favor of the Severance Package Require its Rescission. Even the Circuit Court’s Order – which upheld the Severance Package – could not escape the conclusion that the votes of Councilmen Michael Thompson and Ron Wilson were clearly improper. The Circuit Court said this did not matter. It did.

First, Courts around the country have held – correctly and persuasively – that a single tainted vote is sufficient to invalidate an action in cases like this one. Specifically, (i) where the enactment at issue confers a specific benefit for one individual rather than establishing a law of general applicability; (ii) where the action was not part of a County ordinance but instead was passed by a simple motion; (iii) where consideration was marked by procedural irregularities; (iv) where tainted votes were cast by the chair or other key proponents of the action; *or* (v) where the matter was passed without notice or any opportunity for public comment or political redress, a single improper vote is sufficient to void the infected outcome. Here, not just one of these factors is present; they all are.

Second, even if the County were required to invalidate a number of votes equal to the margin of passage of the Package, a single tainted vote would suffice. The passage of the Severance Package included a motion to reconsider – a parliamentary maneuver designed to prevent later reconsideration. The vote to end debate on the reconsidered motion was only 4-3. (R. p. 1974, line 10-p. 1976, line 9; p. 1983) Because this one-vote margin was a necessary step in final approval, invalidation of a single vote is enough.

III. Preston Breached His Fiduciary Duty, and Engaged in Fraud, Constructive Fraud, and Negligent Misrepresentation When He Did Not Disclose the Facts That Required Disqualification of Thompson and Ron Wilson. Preston was aware that Michael Thompson was soliciting a County job from him, and that he had just upgraded Ron Wilson's daughter's county contract for no good reason, and yet he stood silently by and let them cast votes, thus implicitly and fraudulently representing to all present that their votes were proper, and breaching his duties to the County and its taxpayers. The Circuit Court erred in holding that Preston – who was still County Administrator – had no duty to speak in the face of this knowledge.

IV. The Circuit Court Erred by Invalidating Two Votes *Against* the Package, and then Failing to Recognize That This Holding Destroyed the Quorum Needed for Passage. In a bizarre procedural twist, the Circuit Court followed Preston's unprompted suggestion – prompted by concern over the one-vote margin of passage of the motion to end debate mentioned above – and held that the votes cast by Waldrep and Cindy Wilson were improper because of the general release contained in the Package. (R. pp. 10-12) The Circuit Court thus invalidated a total of four votes, out of the seven members of County Council. When the Circuit Court issued its Order, the parties were for the first time faced with the conclusion that – if the Circuit Court was correct – no quorum was present for the vote on the Package. While Anderson County does not agree with the invalidation of those two votes against the Package, if the Circuit Court was correct then the Package must be invalidated for lack of a quorum.

V. The Circuit Court Erred in Holding That the Courts Are Powerless to Provide a Remedy. The remedy for a void enactment like the Severance Package is rescission. Particularly where the public interest is so deeply implicated, the Courts are not

powerless to fashion a remedy. This is particularly true here, where one plainly improper element of the Package is a lifetime State pension. That flow of funds – secured with Anderson County funds – can be tapped as part of an equitable remedy.

VI. The County Did Not Breach the Severance Agreement by Seeking a Judicial Determination of the Package’s Validity. The Circuit Court held that this lawsuit violated the covenant not to sue contained in the Package. That claim obviously fails if the Package is voided, as the covenant would go away as well. Even if the Package were allowed to stand, Preston’s counterclaim for breach should be rejected. First, courts have recognized that an action challenging the validity of a contract containing a covenant not to sue is not a violation of that covenant. Such a covenant is not an “incontestability clause.” Second, the scope of the covenant is limited to claims “relating to Mr. Preston’s employment with the County or his actions as an employee on behalf of the County....” (R. p. 1987 at ¶ 8) Because the purpose of this suit was not to litigate over Preston’s employment, but to test the validity of the Package, the covenant is not implicated.

ARGUMENT

I. Standard of Review

In this equitable matter, this Court reviews the record *de novo*. *Independence Nat’l Bank v. Buncombe Prof’l Park, LLC*, 402 S.C. 514, 520, 741 S.E.2d 572, 575 (Ct. App. 2013) (“The appellate court’s standard of review in equitable matters is our own view of the preponderance of the evidence.”)

II. The Severance Package Was a Product of Fraud and Abuse of Power, It Was Unreasonable and Capricious, and It Violated Public Policy

Courts have the authority to invalidate an enactment, even in the absence of tainted votes, “in cases of fraud or clear abuse of power, or where [the action was] unreasonable or

more “unreasonable and capricious” than lavishing a seven-figure settlement on a public servant on the basis of a logically impossible legal claim.

2. *The Severance Package Paid Preston Far More Than the Maximum Value of His Claim.*

Preston’s own lawyer acknowledged in negotiations that the total severance benefit in the Employment Agreement was worth no more than \$827,222.00. (R. pp. 2026-2028; p. 453) (The County showed the amount was even less. (R. pp. 2651-2670; pp. 1283-1286)) When it voted to give Preston over \$1.1 million, County Council exceeded the maximum amount he could have obtained even if he had been terminated without cause.

The major component forming the difference between “full severance” and the amount Preston received was the payment of over \$350,000 to the Retirement System to purchase over seven and a half years of extra service credit to qualify Preston for immediate full retirement. (R. pp. 1985-1989; p. 456, line 2-p. 457, line 16; pp. 1287-1292; p. 251 at ¶ 6; pp. 2671-2681) Plainly, Preston’s Employment Agreement did not promise him employment all the way to retirement, nor did its severance provision provide for a pension for life. This payment – a gift by the County of a life pension starting at age 45 – is emblematic of the utter disconnect between the Severance Package and reality. Preston had no claim for such a pension. Yet his friends on County Council did not even blink in spending County money to confer that benefit. *Page v. MiraCosta Cmty. Coll. Dist.*, 102 Cal. Rptr. 3d 902, 922 (Cal. Ct. App. 2009) (payment by state agency of more than its maximum legal exposure improper, as “akin to payment of a wholly invalid claim”).

Thus, the Severance Package was indefensible even if one assumes the validity of Preston’s Employment Agreement. In fact, the Employment Agreement was not valid.

Preston signed his Employment Agreement – which purported to be a three-year contract with an evergreen renewal feature, and severance benefits tied to that term – in 1998. When it was considering Preston’s claims in 2008, County Council was advised by its employment counsel that Preston’s Employment Agreement was probably subject to the rule that a contract with a political appointee may not extend beyond the term of the County Council in which the contract was entered. (R. pp. 458-459, 471-472, 477-479)⁵ This would mean Preston’s Employment Agreement should have expired when a new Council took office in 1999 – and certainly would have expired when the incoming Council took office in 2009. The capriciousness of paying Preston more than his maximum severance is magnified by the Council’s disregard for the likely invalidity of Preston’s Employment Agreement. (R. pp. 458-459, 464-465, 477-479)

3. *The Severance Package Was Obtained Through Fraud.*

Under *Moody*, the grounds for judicial invalidation of an enactment include “fraud or clear abuse of power.” 319 S.C. at 186, 460 S.E.2d at 375. We discuss below the County’s independent causes of action for rescission based on fraud, fraudulent concealment, and negligent misrepresentation, but the same core facts also call for invalidation under *Moody*. As we detail in this brief – and the Circuit Court found – Council members with financial ties to Preston voted to give him a severance package. But what is critical here is not that corrupt participation, but Preston’s presence *and silence* in the face of that participation. Preston was present at the vote on his Severance Package.

⁵ This Court has recently confirmed that advice, in a case involving Preston’s successor, whose invalid contract was approved by County Council in the same session in which Preston’s Severance Package was approved. *Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). The legal principle that decided *Cunningham* was known in 2008, and relied on by counsel for the County Council in advising regarding Preston’s claim. (R. pp. 458-459, 471-472, 477-479)

He plainly knew that Chairman Thompson was courting him for a job, and just as he plainly knew he had given a sweetheart contract to Councilman Ron Wilson's daughter.

Preston had a duty to speak up, and his silence constituted a fraudulent representation that the vote was proper. The law demands probity from the actions of a public body – especially when what is at issue is a benefit for a public employee with close ties to the voting officials. The obvious and inherent conflicts here, and Preston's silence about those conflicts, constitute the type of fraud that justifies rescission.

4. *The "Debate" on, and Approval of, the Severance Package Reinforce the Conclusion That the Severance Package Was Arbitrary and a Product of Abuse of Power.*

The lengths to which Preston and his allies went to shelter the vote on his Package from the democratic process cannot be appreciated without viewing the videotape of the November 18 meeting. (R. p. 1983) It is hard to do justice in words to the highly choreographed political theater that led to the votes for the Package.

The proposed Severance Package was shielded from public scrutiny until the last possible moment. The Package was added to the agenda only at the end of the meeting; distributed (but certainly not read); "debated"; passed; funded; had its funding reconsidered, debated, and passed again; and then was itself reconsidered, "debated" again, and passed a second time, all within a span of just over thirty minutes and with virtually no discussion of the merits or monetary value of Preston's claim or the settlement. While it is plain that some members of Council were aware of at least some of the provisions of the Severance Package, it is inconceivable that all had even read the document before it was voted on. The proponents repeatedly used points of order to limit debate, and moved to "call the question" several times to truncate that debate. Councilman McAbee acknowledged that his motion to reconsider the Severance Package was not from a desire

to have the matter reconsidered, but that it was a “parliamentary tactic” to ensure the matter could not be reconsidered at a later date. (R. pp. 628-629)

The arbitrariness of the settlement itself, coupled with this theatrical process, leaves no doubt that consideration and adoption of the Package was the very opposite of an open process, designed to discern and serve the interests of Anderson County. It was an exercise in raw political power, and it is subject to judicial correction. *See Peterson Outdoor Adver. v. Myrtle Beach*, 327 S.C. 230, 235-36, 489 S.E.2d 630, 633 (1997) (“When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary.” (internal citations omitted)).

5. *Preston’s Proffered Justifications Do Not Rescue the Severance Package.*

Faced with the implausibility of his claim of anticipatory breach, and the unreasonableness of the amount he was paid, Preston seeks to justify the Severance Package on the basis of the “toxic political environment” in Anderson County. Again, though, political posturing and rhetoric is not the same as an adverse employment action, and Preston had endured years of the “toxicity,” until the 2008 primary faced him with the prospect of a new political landscape.

Preston and the Circuit Court placed great weight on a series of meetings – which took place before the new Council was seated – involving Bob Waldrep, Cindy Wilson, the three Councilmembers-elect, and other interested citizens. (R. pp. 924-925, 933-934, 948, 950-955; pp. 5, 32-34) There is simply nothing impermissible about these meetings. Even assuming that these meetings included plans for possible future action that might involve Preston, this would not constitute anticipatory breach. When the meetings occurred, those present were not empowered to act for the County. Preston’s argument still reduces to a

claim that he *expected* some actionable conduct by a new County Council in the future. It is as if he had written a demand letter claiming payment because “I expect to be hit by a County dump truck next year.” However earnest the belief, that speculative claim of what might happen in the future would not justify a payment.

Preston’s reliance on a statement prepared by Councilmember-elect Eddie Moore and presented by Bob Waldrep, calling for an audit of County finances coupled with a paid leave of absence for Preston, is similar. (R. pp. 1900-1913; pp. 323-328, 383-385; pp. 942-947) The proposal is just that – a proposal. The gathering was not a formal Council meeting, and the proposal was never acted on.

As further proof of “toxicity,” Preston relies on a 2008 lawsuit he filed against Cindy Wilson and Bob Waldrep, in which he sought injunctive relief to prevent them from allegedly interfering with his job. In support of his request for a temporary injunction in that case, Preston set forth a laundry list of conduct that he ascribed to them in an affidavit. (R. pp. 2170-2226) Preston testified that this list of examples of interference was complete at the time the affidavit was prepared, that he would have included “everything [he] was aware of,” and that all of the incidents of interference pre-dated September 25, 2008 – the date of his demand letter to the County. (R. pp. 1914-1915; pp. 974-977) This collection of stored-up grievances will not support the decision in late 2008 to pay Preston \$1.1 million. First, the list itself collects every grievance back to 2002; Preston cannot rely on stale complaints to claim anticipatory breach in 2008. Second, many of the items on the list are either trivial, or reflect genuine political questions, or both.⁶ The mere fact Council

⁶ For example, Preston contended that Cindy Wilson’s interference with his job included the following: “On January 21, 2003, Ms. Wilson complains that she thinks a campaign manager for a County Council candidate was working for the County.” (R. p. 2172 at ¶ 4(c).)

members clashed with a County Administrator does not entitle the Administrator to a lifetime retirement benefit. Preston testified that none of the “interference” that he cited as examples in his lawsuit against Wilson and Waldrep was so bad that it caused him to quit his job. (R. pp. 968-970) Indeed, Preston’s September 25, 2008 demand letter stated that, while “[c]ertain Council Members have hindered Mr. Preston’s ability to perform his duties as County Administrator for at least seven years,” Preston “has overcome the efforts [to] stymie him in the performance of his duties.” (R. p. 1914) The letter was clear that the anticipatory breach would arise from predicted events starting in January 2009, not past events. Thus, all of the prior conduct to which Preston now points could not offer a justification for paying him a severance.

Preston also suggests it was economically rational to pay him over a million dollars, because the County’s lawyer had given a worst case estimate of what litigation might cost that exceeded that amount, and because the County wanted an “amicable divorce.” Neither of these justifies the arbitrary act of settling a nonexistent claim. Attorney Tom Bright’s testimony was clear and credible that any number in this range that he might have mentioned was a “worst-case scenario,” not a valuation or a recommended settlement value. (R. pp. 462-463) Any lawyer, when asked about the worst thing that might happen, will provide a big number. However, it is not reasonable to use that nuclear scenario as a basis for settlement – especially when the only legal advice provided is that the claim itself does not have merit, and where the client has already decided to settle the case anyway. (R. pp. 458-460, 464-465, 471-472) Nor is “buying peace” a valid public purpose when the payments exceed the maximum possible recovery by six figures. While Preston has repeatedly suggested that the Severance Package is somehow justified because the County has spent a substantial amount of money investigating Preston and litigating

various issues concerning the Severance Agreement, that has no bearing on the propriety of the Package. If the Package was improperly approved by the use of tainted votes and if it represents arbitrary and capricious government action, then the County cannot be criticized for mounting a legal challenge to it. Indeed, it is equally plausible to argue that the 2008 majority caused these expenditures, by the cavalier way they handled the consideration of the Package.

Finally, Preston relies on the statement in the October 23, 2008 letter from his lawyer that “there also exist a number of causes of action which Mr. Preston will assert against two current Council Members as well as maybe one or more incoming Council Members. His additional causes of action will, obviously, include tort claims given the extreme malice and intentional nature of the actions of the subject Council Members over the past several years.” (R. p. 2026) This unspecific claim of “additional” claims against individual Council members – not the County – does not justify paying Mr. Preston a severance from *County* funds. A straightforward way to see this is to imagine a demand letter to the County with this simple language: “I have tort claims against two council members and several yet to take office. Please pay me.” Without a doubt, it would be arbitrary to spend County funds to resolve such unspecified and ambiguous claims. Preston’s supposed tort claims are not backed by any greater specificity.

The fact that – for whatever reason – Preston was ready to move on does not convert the sometimes rough-and-tumble nature of Anderson County politics into a wrong entitling Preston to over a million dollars.

6. *Rescission Is the Appropriate Remedy for Such an Arbitrary and Capricious Act.*

These facts paint a picture of gross disregard for the public welfare and the public purse. Rescission is appropriate in such a case. *See Moody*, 319 S.C. 184, 460 S.E.2d 374; *Piedmont Public Serv. Dist.*, 319 S.C. 124, 459 S.E.2d 876; *Berkeley Elec. Coop.*, 308 S.C. 205, 417 S.E.2d 579; *Business Lic. Opposition Comm.*, 311 S.C. 24, 426 S.E.2d 745.

A remarkably similar case was decided by the Supreme Court of New Jersey. That thoughtful opinion deserves careful consideration in this case. In *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007), the court concluded that rescission of a tainted agreement and restitution of its proceeds was the only appropriate remedy. *Atlantic City* involved a court challenge to a settlement of a lawsuit filed by the Mayor (before his election), because friends of the Mayor had negotiated and voted for the settlement. Lorenzo Langford had sued Atlantic City, alleging his city job had been eliminated in retaliation for his protected political activities. While that lawsuit was pending, Langford was elected Mayor of Atlantic City. After he assumed office, Langford allowed his political appointees to recommend a substantial settlement in his favor to the city council. At the time of the city council vote, moreover, one member of council had been promised a job by Langford, but still voted for the package.⁷ 921 A.2d at 438. The agreement was approved and signed, the proceeds were paid to Langford, and his lawsuit was dismissed.

The court rescinded the agreement. The court held that the “conflict-ridden actions” of the Mayor’s appointees could “hardly be viewed as disinterested or inspiring confidence in government,” and so the settlement agreement was “void as a matter of state

⁷ This council member resigned before the final vote. 921 A.2d at 438. Moreover, the final council vote on the settlement agreement was five to one, with one abstention. 921 A.2d at 432. Thus, the vote of the interested council member did not change the outcome; this did not prevent the court from finding an impermissible conflict of interest, however.

law.” 921 A.2d at 430. The court noted with approval the criticism one council member leveled at another who voted for the agreement: “you got a job from the Mayor and you’re voting to give him a million dollars.” 921 A.2d at 432. (Substituting “administrator” for “Mayor,” those words could easily have been uttered in this case.)

The court observed that “it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself.” 921 A.2d at 436. The “appearance of self-dealing . . . had the clear capacity to undermine public confidence in the integrity” of government, and thus violated public policy. 921 A.2d at 438. These “egregious” conflicts of interest rendered “the settlement itself void *ab initio*,” and justified the “equitable remedy [of] rescission of the settlement agreement and restitution of the ill-gotten settlement proceeds.” 921 A.2d at 441-42.

The *Atlantic City* court found that multiple sources of law invalidated the settlement, relying on “the conflict-of-interest doctrines embodied in the common law, statutory law, and municipal code.” 921 A.2d at 437. Here as well, the votes for Preston’s severance agreement were improper under the Ethics Act, the Anderson County Code, and the common law, including public policy and the other cases cited in this section.

This action is a virtual definition of caprice, fraud, unreason, and disregard for public policy. This Court is the only means of redress for these clear wrongs. Like the *Atlantic City* court, this Court should rescind the Settlement Package.

III. Tainted Votes Cast for the Severance Package Require Its Rescission

A. *Michael Thompson and Ron Wilson Should Not Have Voted for the Severance Package.*

It is indisputable that two critical proponents of the Severance Package had actual and apparent conflicts of interest that rendered their votes improper. Anderson County's first cause of action seeks rescission on the basis of these tainted votes. (R. pp. 129-133)

Both Chairman Thompson and Ron Wilson had disqualifying direct or indirect financial ties to Preston while they were leading the response to Preston's claims against the County, chairing both the Council (Thompson) and Personnel Committee (Wilson) in considering the matter, and voting for his \$1.1 million payout. Ron Wilson was characterized as the primary person giving guidance about the proposed agreement with Preston. (R. p. 471, lines 14-17) As noted earlier, Chairman Thompson was actively seeking County employment from Preston at the time and received significant personal benefits in the form of County-funded training approved by Preston. Councilman Wilson's daughter was given substantial – and inexplicable – enhancements from Preston in the terms of her consulting company's contract with the County just before the vote. As a matter of law, these financial ties nullify the Council's approval of the Package. *See Atlantic City*, 921 A.2d at 432, 437 (court quoting one councilman observing conflict: "you got a job from the Mayor and you're voting to give him a million dollars"; rescission was appropriate because "[t]he public had good reason to suspect that [those with financial ties to mayor] might not be able to exercise complete objectivity and independence in assessing the merits of the lawsuit" they were settling on behalf of city).

1. *The Votes by Thompson and Wilson Were Prohibited by the Anderson County Code.*

The Anderson County Code directly addresses, and expressly prohibits, votes like the ones cast by Thompson and Ron Wilson. It provides:

No member [of county council] shall vote on any matter in which he/she has a personal or financial interest Any member shall be deemed to have a personal or financial interest if: He/she has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or **direct descendant**) has such an interest. . . . He/she has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter He/she cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, **or his/her participation in the matter at hand would create a substantial appearance of impropriety.**

Anderson County Code of Ordinances § 2-37(g) (emphases added). This language shows Anderson County's clear public policy of prohibiting votes by those with a financial interest or where there is a substantial appearance of impropriety.

It is clear to anyone with any understanding of human nature that neither Thompson nor Wilson should ever have voted on the Package. Thompson was actively courting Preston for employment. Wilson's daughter – during precisely the period that Wilson was spearheading the effort to pay Preston severance – was given an unsolicited new contract by Preston.⁸ Both had financial dealings that depended on Preston, and their votes lacked “unbiased and impartial judgment” and created the “substantial appearance of impropriety.” Anderson County Code of Ordinances § 2-37(g).

Preston argued below that the County must prove an express *quid pro quo* arrangement in order to invalidate votes. This is not a correct reading of the Code provision. First, Section 2-37(g) forbids a vote if a Council member cannot for any reason

⁸ Wilson's daughter's financial interest is relevant here because she is a “member of his/her immediate family” – i.e., his “direct descendant,” as provided by § 2-37(g).

render a fair judgment on a matter, or if there is a substantial *appearance of impropriety*. Plainly, either of these standards can be met without an express agreement of the type Preston insists must be present. *See Atlantic City*, 921 A.2d at 436 (“it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself”). Second, the existence of a financial interest is clear here, even in the absence of an express deal. It simply ignores common human experience to assert that a Council member’s judgment would not be influenced in voting on a severance package for someone from whom he was seeking employment, or who had just given his daughter a substantial financial benefit. Such circumstances are laden with conflicts of interest, and these Council members plainly should never have voted on or debated Preston’s severance agreement.

With respect to the Ron Wilson vote, the fact that both he and his daughter deny that Mr. Wilson was aware of the new contract at the time of the vote on the Severance Package is not relevant (in addition to lacking credibility). *Preston* indisputably knew; he signed the contract. Despite this, he stood silently by while Wilson advocated and voted for the Package. The County is not making a claim against Ron Wilson, but against Preston. The appearance of impropriety existed, and Preston allowed it to exist. The Wilson vote should not have been cast.

2. *The Vote for the Package Also Violated the State Ethics Act.*

The South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991, S.C. Code Ann. §§ 8-13-100 *et seq.* (the “Ethics Act”) provides: “No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is

associated.” S.C. Code Ann. § 8-13-700(A). Preston and Thompson violated the Ethics Act by negotiating for post-election employment for Thompson at the same time that Preston was seeking Thompson’s vote in favor of Preston’s severance agreement. The approval of the Package thus violated the Act, and the appropriate remedy is rescission. *See Baird v. Charleston Cnty.*, 333 S.C. 519, 535, 511 S.E.2d 69, 77-78 (1999) (Ethics Act challenge to vote for ordinance states a claim to have the ordinance declared invalid).⁹

B. Even One Tainted Vote Mandates Rescission of the Severance Agreement.

The Circuit Court held that Preston could retain his \$1.1 million windfall, despite the impropriety of the Thompson and Ron Wilson votes, because not enough bad votes were cast to wipe out the margin of passage of the Package. This ruling should be reversed for several reasons.

1. The Series of Votes Leading to Enactment Included a 4-3 Vote.

Preston’s severance agreement was not subjected to just one up-or-down vote. Instead, it was the product of a planned series of votes, each of which was necessary to its ultimate passage. One of those votes passed by a single-vote margin. Thus – while we disagree (for reasons discussed in the next section) that the County is required to invalidate

⁹ *Baird* also undercuts Preston’s argument below that the Ethics Act does not give rise to a private right of action, at least without exhaustion of certain administrative remedies. In *Baird*, the Supreme Court allowed a suit by a group of doctors to enjoin issuance of county bonds to go forward on the theory that the vote in favor of the bond ordinance violated the Ethics Act, and therefore that the ordinance was invalid. It does not appear that the plaintiffs in *Baird* filed an ethics complaint before bringing suit. *Baird* stands squarely for the proposition that the Ethics Act provides a cause of action to invalidate actions taken in violation of that Act. Further, the Court in *Baird* underscored the provision in the Ethics Act which states that “[t]he provisions of this section are *in addition to* all other civil and administrative remedies against public officials, public members, or public employees which are provided by law.” S.C. Code Ann. § 8-13-780(A) (emphasis added). The Supreme Court explained, “[t]hus, the remedies outlined in section 8-13-780 are not exclusive.” 333 S.C. at 535 n.12, 511 S.E.2d at 77 n.12.

enough votes to wipe out the margin of passage – even if that were the applicable law the Package should be rescinded, as even one tainted vote is enough to undo the action.

At first, the Council approved the severance agreement by a vote of 5-2. (R. p. 1916; p. 1983) However, thereafter the Council invalidated that vote by voting to reconsider the matter. (R. p. 1974; p. 1983) After the Council voted to reconsider, Councilman McAbee was almost immediately given the floor by Thompson, and McAbee moved to cut off debate and proceed to a second vote. (R. p. 1974, line 10-p. 1976, line 9; p. 1983) That motion to end debate passed by a vote of only 4-3, with both Thompson and Wilson in the one-vote majority. (*Id.*) Thus, without the vote of either Thompson or Wilson, the Council would not have proceeded to the final vote on the Severance Agreement and its ultimate approval.

It cannot be assumed that the Council would have approved the Package – or that the margin of approval would have been the same – if debate and discussion had been allowed to continue; the purpose of debate is to attempt to change minds, and votes. The ultimate approval of the Package was dependent upon the prior 4-3 vote to terminate debate and proceed to the vote. Thus, each of the votes of Thompson and Ron Wilson – which were fatally tainted – was essential to the approval of the Package, and the invalidation of either one alone requires rescission.¹⁰

¹⁰ The Circuit Court's apparent concern over this issue led to that Court's extraordinary *sua sponte* holding that the votes of Cindy Wilson and Bob Waldrep should also be invalidated for unpled conflicts. (R. pp. 10-12) As we discuss hereinafter, that ruling introduces an additional complexity to this case, as it led the Circuit Court to uphold the Package on the basis of a 2-1 vote – a vote that is void on its face for lack of a quorum.

2. *Numerous Courts Have Recognized That, in the Particular Circumstances Presented Here, a Single Tainted Vote Is Fatal.*

The margin-of-passage rule applied by the Circuit Court is an appropriate standard where the enactment at issue is legislation of general application, and where there are no procedural irregularities. However, that rule cannot be slavishly applied where circumstances are dramatically different. The vote for the Package has numerous characteristics that make the margin-of-passage rule inapplicable. Because of those special circumstances, this Court should join numerous other courts that have considered the issue, and have concluded that one tainted vote is sufficient to overturn an outcome like this one.

We would emphasize that Anderson County is not advocating for a general rule that duly enacted legislation can be overturned by a single tainted vote. Cases with as many egregious circumstances as this one are going to be exceedingly rare. Accordingly, we urge the Court to follow courts that have recognized that cases like this one, which involve extreme irregularities, appropriately apply a one-tainted-vote rule. Courts have struck down enactments because of one tainted vote in the presence of only one or two of these factors; the Preston Severance Agreement is extraordinary in the sheer number of irregularities it presents.

Benefit to a Single Individual. First, the Package conferred a special benefit on one individual; it was not a law of general application. It thus did not have the dignity of generally applicable legislation that affects all, and that can be addressed in subsequent political cycles. *See Atlantic City*, 921 A.2d at 438 (invalidating settlement with mayor approved by 5-1-1 vote of city council, given conflict of single councilman who had been offered job by mayor, even though that councilman did not vote on reconsideration); *Appeal of City of Keene*, 693 A.2d 412, 415 (N.H. 1997) (one-tainted-vote rule is

appropriate where action does not have a “widely felt impact”); *Stevens ex rel. Kuberski v. Haussermann*, 172 A. 738, 741-42 (N.J. Super. 1934) (act of council in voting to accept or reject resignation of councilman is a “judicial act,” as distinguished from a “legislative act,” and necessitates lack of personal interest on part of each councilmember voting on such matter); *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 298 (Neb. 2003) (type of case where one-tainted-vote rule is not appropriate includes “making a law” of general applicability).

Simple Motion Rather Than an Ordinance. This “private benefit” rule is reinforced by the fact that the Package was passed by a simple motion – not in the form of an ordinance that would require public notice and three readings. A simple motion does not have the same procedural protections, and thus is more readily subject to abuse. *See generally Dep’t of Transp. v. Brooks*, 328 S.E.2d 705, 717 n.14 (Ga. 1985) (“Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly. In deference to the function of the General Assembly in state government, the standard of judicial review customarily has been ‘relatively relaxed.’ Ordinances are examined for reasonableness; acts of the General Assembly are reviewed for constitutionality.” (citations omitted)).

Procedural Irregularity. Courts apply the one-tainted-vote rule where the matter was not announced in advance or extensively debated, or the procedure surrounding enactment was otherwise suspect. That happened here. *See Dowling Realty v. City of Shawnee*, 85 P.3d 716, 719 (Kan. Ct. App. 2004) (court applying one-tainted-vote rule noted that tainted voter had “strategy to put [the interested vote] on at the end of the meeting” to ensure that fellow members would “be tired and sail right through” and a fellow member noted that the proceedings were “not exactly kosher” and that “the process

seemed hurried up.”); *Piggott v. Borough of Hopewell*, 91 A.2d 667, 670 (N. J. Super. Ct. Ch. Div. 1952) (“[a]s a result of this *special meeting*, the borough council adopted [the tainted resolution]” and “it is to be noted, too, that despite the solicitor’s recommendation made at the council meeting that action be deferred to a later period ... [tainted voter’s] counter-proposal paved the way for action forthwith” (emphasis added)). Preston’s proponents similarly hid the vote from the public, added it to the agenda at the last minute, and used procedural mechanisms to hurry consideration and to stifle dissent.

Hidden Conflicts of Interest. The one-tainted-vote rule has been applied where the conflicts of interest were kept hidden by the interested party. The most interested party on November 18, 2008 was Preston, and he was aware of the problems with the votes being cast. See *Griswold v. City of Homer*, 925 P.2d 1015, 1029 (Alaska 1996) (where a decision could have passed even without the support of a tainted voter, but “the interest is undisclosed, the ordinance will generally be invalid.”); *Dowling Realty* 85 P.3d at 721 (holding council would have to “redo the entire process since it was tainted from the very beginning” because a tainted voter “never filed a disclosure of interest form”); *Hanig v. City of Winner*, 692 N.W.2d 202, 210 (S.D. 2005) (“The basis of granting a new hearing is first and foremost that one of the council members had an indirect pecuniary interest” especially since tainted voter “did not disclose the conflict”; “the necessity to disclose a conflict cannot be over emphasized”). Preston’s promise of employment to Thompson, and his upgrade of the contract with Ron Wilson’s daughter, should have been disclosed during the debate. Preston is not entitled to an inference that full disclosure would not have affected the course of the debate.

Corrupt Leadership. One bad vote is enough where that bad vote comes from a key leader. In this case, two bad votes came from the Chair of County Council and the

chair of the Personnel Committee. *Buell v. City of Bremerton*, 495 P.2d 1358, 1362 (Wash. 1972) (tainted voter “in his role as chairman... could not be expected to hear the weak voices as well as the strong, and most certainly could not appear to the public to be able to do so”; accordingly the chairman’s self-interest “infected the action of the other members of the commission regardless of their disinterestedness.”); *Brooks*, 328 S.E.2d at 716 (fact that council member with conflict of interest chaired first planning commission hearing on the application was sufficient to support finding of fraud and to invalidate the action). Because of the behind-the-scenes maneuvering before the Package was brought to a vote, it is impossible to estimate what influence was exercised by these leaders outside of meetings. Further, it is obvious from the way that Chairman Thompson presided over the sham process to ramrod approval of the Severance Package that a tainted vote from a leader in the process infects the entire action beyond the impact of that single vote.

Insulation from the Political Process. The fact that approval of the Package was not subject to the normal process of political redress calls for application of the one-tainted-vote rule. A number of the majority’s parliamentary maneuvers were designed to insulate this vote from the political process: (i) the failure to put the Package on the published agenda prevented public debate; (ii) the immediate vote to reconsider – and the signing of the Severance Agreement immediately after passage – prevented any effective political redress; (iii) the Package was further insulated from the political process by the fact that many of those who voted for the Package (including all who received special benefits from Preston) were leaving office. *See Keene*, 693 A.2d at 415 (acts of general applicability not as likely to be subject to one-tainted-vote rule because their “widely felt impact” allows aggrieved persons to “find an appropriate remedy . . . at the polls” (internal quotation marks omitted; ellipsis in original)). No political remedy was available here.

The Package is a perfect storm of the factors on which courts have relied to allow a single bad vote to invalidate an action. Its substance was an arbitrary and unreasonable benefit to a single individual; it was not a full-blown ordinance subject to multiple readings; the debate was hurried and irregular; the Package was not placed on the agenda; the leaders of that debate should never have participated in it; Preston himself knew of those facts and said nothing; and parliamentary and other maneuvers ensured there was never a prospect of political redress. The one-tainted-vote rule applies here. *See generally Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114, 117 (N.H. 1984) (“mere participation by one disqualified member was sufficient to invalidate the tribunal’s decision because it was impossible to estimate the influence one member might have on his associates”); *Wilson v. Iowa City*, 165 N.W.2d 813, 820 (Iowa 1969) (“We hold a vote by a [conflicted] member of the council is void and that the result reached by the council in such a matter is also void, *whether such vote determined the issue before the council or not.*” (emphasis added)); *Griggs v. Borough of Princeton*, 162 A.2d 862, 869 (N.J. 1960) (“Nevertheless, it is the *existence of such interests which is decisive, not whether they were actually influential.*” (emphasis added)); *Keene*, 693 A.2d at 416 (action conferring specific benefit on one individual “is voidable if the disqualified member participates therein, *without reference to the fact whether the result is produced by his vote.*” (emphasis added)); *Piggott*, 91 A.2d at 669 (actions “which impose[] burdens or confer[] privileges in specific cases” are more closely scrutinized for conflicts of interest).¹¹

¹¹ As the *Piggott* court explained:

[T]he concurrence of an interested member in the action taken by the body taints it with illegality. The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable. This is the general rule. It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have

3. *The Supreme Court's Decision in Baird Is Not to the Contrary.*

No decided South Carolina case has rejected this one-tainted-vote rule in a case like this one. The Circuit Court relied on a passage from *Baird v. Charleston County*, 333 S.C. at 535, 511 S.E.2d at 77-78, in holding to the contrary, but *Baird* is not dispositive here.

Baird involved an appeal from a lower court order that dismissed a challenge to a county ordinance approving a bond issue. Among the arguments made by the parties challenging the ordinance was the contention that one council member should not have voted because of a conflict of interest. The issue before the Supreme Court was “whether invalidation of the bond ordinance is a proper remedy for a violation of the State Ethics Act.” 333 S.C. at 77, 511 S.E. 2d at 535. The Supreme Court concluded that invalidation of an ordinance was a proper remedy, and accordingly reversed dismissal of the lawsuit on that point and held that the challengers had stated a claim on which relief could be granted. In so holding, the Court noted in passing the “general” rule that a court may “invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.” 333 S.C. at 77-78, 511 S.E.2d at 535.

Baird is distinguishable from this case for several reasons. First and foremost, the question of whether one tainted vote could support invalidation when the margin is larger was not even presented in *Baird*. To the contrary, *Baird* involved a one-vote majority, so the issue could not have arisen. See 333 S.C. at 77, 511 S.E.2d at 534 (challenged voter cast the “tie-breaking vote”). Nor did *Baird* involve any of the special circumstances

influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. *It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product.*

91 A.2d at 670 (emphasis added; citations & brackets omitted).

involved here, where one vote is enough. *Baird* involved a law of general application – a bond ordinance – not a special benefit for a single individual. At issue, therefore, was true legislation – passed after multiple readings. 333 S.C. at 72, 511 S.E.2d at 524-25.

Because of the multiple readings, the ordinance at issue in *Baird* was not protected from prior public scrutiny, and it does not appear the conflict of interest at issue was kept secret. 333 S.C. at 77, 511 S.E.2d at 533-34 (council member obtained, but ignored, an informal ethics commission opinion on whether he should vote). Finally, unlike Thompson (council chair) and Ron Wilson (chair of Personnel Committee), it does not appear that the challenged voter in *Baird* had a place of special influence in the debate. In short, the precise factors that mean that Preston's Severance Package should be reviewed under the one-tainted-vote rule were absent from *Baird*. *Baird* does not address a situation like this one, and the one-tainted-vote rule was not presented or ruled on in *Baird*.

The County does not dispute the general rule stated by *Baird* that, with respect to full-blown legislation of general applicability, and absent the massive irregularities present here, one tainted vote may not be enough. But *Baird* does not hold that is the exclusive basis for invalidation, nor does it even consider any other possible basis.

Either of Thompson's or Ron Wilson's disqualifying interests is sufficient *by itself* to nullify approval of the Severance Agreement. Particularly given that Thompson was the chair of the entire Council and presided over the debate and vote, and that Wilson was the chair of the Personnel Committee that negotiated the Package, it is simply "impossible to estimate the influence" either member had "on his associates" who voted for the payout. *Winslow*, 480 A.2d at 117; *see Brooks*, 328 S.E.2d at 716 (influence of chair on debate). Indeed, it is apparent from the transcript and tape of the debate that others who voted for the Package (Greer, who had, in advance, found available public funds in the budget to pay

Preston, and Floyd, who plainly knew the motions to reconsider were planned and who had the contract for the new administrator with her) were in some fashion “in on” the planned vote. It is impossible to estimate the full scope of the impact of Ron Wilson’s and Thompson’s participation in that planning.

This case does not present a request to invalidate a law of general application. The concerns attendant on judicial infringement of the role of a legislative body are not present. To the contrary, in the absence of judicial intervention there is no prospect of a remedy. Instead, at issue is an extraordinary benefit voted to a single individual, in extraordinary fashion. The vote was presented surreptitiously, was completed in a matter of minutes, and involved procedural strong-arm tactics. In addition, the vote included key proponents who should have been disqualified – with the individual who benefited from the Package watching those improper votes being cast and saying nothing. Given all these factors, the one-vote rule makes sense here. The appearance of impropriety pervades the Package. In these particular circumstances, it is just to let Preston bear the burden of his own impropriety, and to apply the rule that a single tainted vote invalidates the Package.

IV. Preston’s Conduct Constituted Breach of Fiduciary Duty, Fraud, Constructive Fraud, and Negligent Misrepresentation

The County’s third through sixth causes of action all arise out of the inescapable fact that Preston knew the facts that made the votes for his Severance Package improper, yet sat silently by while those improper votes were cast. (R. pp. 134-138; pp. 1918-1959; p. 1983; pp. 997-998) Preston, as the highest ranking non-elected officer of Anderson County, owed the County the highest duty of loyalty. When he knowingly allowed Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes concerning his Severance Package, he breached that duty.

The Circuit Court erred in holding that Preston “did not possess a duty to disclose information about his employment claims to County Council.” (R. p. 25) In so holding, the Circuit Court confused Preston’s private and public roles. Certainly, Preston could negotiate with the County at arm’s length concerning his claims. But he remained employed by the County, and as County Administrator present at a vote affecting his own interest, Preston had a duty to make those conflicts known. This was not “information about his employment claims.” It was part of his job and his duty of loyalty as County Administrator.

As a high-ranking employee, Preston had a duty to disclose the facts that made the Thompson and Ron Wilson votes improper. *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) (“Nondisclosure is fraudulent when there is a duty to speak.”); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) (“Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.”). Preston’s silence in the face of that duty satisfies the elements of each of the County’s Third through Sixth Causes of Action, by breaching his fiduciary duty of loyalty, and by misleading the County concerning a material element of the Package vote. The elements of fraud are (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. *Ardis*, 314 S.C. at 515, 431 S.E.2d at 269. For constructive fraud, proof of fraudulent intent is not required. *O’Quinn v. Beach Assocs.*, 272 S.C. 95, 102-03, 249 S.E.2d 734, 737-38 (1978) (granting rescission on basis of constructive fraud). The

elements of negligent misrepresentation are: (1) false representation; (2) a pecuniary interest in making representation; (3) duty of care to communicate truthful information; (4) failure to exercise due care; (5) justifiable reliance; and (6) pecuniary loss as proximate result. *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011).

Rescission is available in the face of Preston's failure to speak. *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 473, 10 S.E.2d 3, 5 (1940) ("It is generally affirmed as a rule that fraud avoids all contracts."); *McDaniel v. Kendrick*, 386 S.C. 437, 444, 688 S.E.2d 852, 856 (Ct. App. 2009) ("A constructive trust ***results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty*** which gives rise to ***an obligation in equity to make restitution.***" (emphasis added)).

The Circuit Court's untroubled acceptance of Preston's silence in the face of blatantly improper votes should not be the law. Under the Circuit Court's view, an employee with a claim against his employer would no longer owe that employer any duties; that plainly is not the law. Preston was free to negotiate at arm's length, but his failure to speak when he had a duty to do so breached his duty of loyalty, and constituted fraud, constructive fraud, and negligent misrepresentation.

V. The Circuit Court's Invalidation of Four Votes Means There Was No Quorum, Rendering the Vote Void

In its Complaint and presentation of evidence, Anderson County challenged only three votes cast for the Severance Package. No other votes were challenged in the pleadings. Despite this – and in an apparent effort to deal with the 4-3 vote to end debate discussed hereinbefore – the Circuit Court found that a total of four Council members should not have voted on Preston's Severance Agreement. In addition to the votes of Thompson and Ron Wilson, the Circuit Court also held that the votes of Waldrep and

Cindy Wilson (both of whom opposed the Package) were improper because the Severance Agreement contained a general release in favor of *all* members of Council. The Order then finds the remaining three members of Council cast each of the series of votes required for passage of the Severance Package and related funding; the Order thus upheld the Severance Agreement on the strength of a series of 3-0 votes. (R. pp. 16-18)¹²

While Anderson County believes it was error to disqualify the votes of Cindy Wilson and Waldrep,¹³ if that ruling was correct then the Severance Package is void for an additional reason beyond those originally set forth by Anderson County. The County Council was powerless to act with only three members able to vote.

The Anderson County Code requires that four members be present to constitute a quorum. Anderson County Code of Ordinances § 2-37(d).¹⁴ Moreover, South Carolina law is clear that a member of the body who cannot participate because of a conflict of interest *is not counted toward the quorum*. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238,

¹² At one point the Circuit Court referred to a 3-0-1 vote, but this is incorrect on the Circuit Court's theory, as the one abstention was Mr. Waldrep who, according to the Circuit Court, should not be counted. (R. p. 18; pp. 1975-1976)

¹³ Because the release in the Severance Agreement benefited all Council members, its presence either disqualified all, or none. The fact that Preston had sued Waldrep and Cindy Wilson (in his official capacity) did not change this. That lawsuit was not ended by the release in the Settlement Agreement. Instead, it was passed along to Preston's successor as County Administrator, who was instructed by County Council to dismiss the action. (R. pp. 2640-2647; pp. 432-437) Moreover, Cindy Wilson and Waldrep voted *against* their purported interest in opposing the Package.

¹⁴ The provision provides in full:

Quorums. A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

153 S.E. 141 (1930), is on point here. In *Harby*, the South Carolina Supreme Court voided an action of the Sumter Cemetery Association, a state-created entity, upon determining that the authorizing vote of the committee was taken without the necessary quorum because committeemen later determined to be disqualified could not be counted toward the quorum. The Court held: “A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted. And likewise an interested director or committeeman cannot be counted in order to make up a quorum to pass upon any matter in which such director or committeeman is interested.” 156 S.C. at 247, 153 S.E. at 144 (internal quotation marks omitted). *See also Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (corporate director disqualified for interest “may not even be counted to make a quorum at a meeting where the matter is acted upon”); *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (“member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter”). If, as the Order holds, four members of Council had disqualifying interests, there was no quorum present and the matter could not have been acted upon.

Preston argued below that the quorum issue was not raised in a timely manner. This is incorrect, because the issue did not *exist* until the Circuit Court issued its Order invalidating four votes. Anderson County argued for the invalidation of only three votes, and Preston’s pleadings cannot reasonably be construed to have sought invalidation of *any* votes. Accordingly, the conclusion in the Order that four votes should not have been cast constitutes new matter in this case, an internal inconsistency, and relief that was not sought in the pleadings. In addition, the conclusion that a matter could be validly enacted by a 3-0

vote is a clear error of law. This ruling was therefore appropriately addressed in Anderson County's motion to alter or amend the Order. (R. pp. 3165-3168) *See* J. TOAL, S. VAFAI & R. MUCKENFUSS, *APPELLATE PROCEDURE IN SOUTH CAROLINA* at 60 (2d ed. 2002) (post-trial motion is appropriate vehicle to address relief not requested or inconsistencies in final order). Where a court rules on a matter not previously before it and to which the parties had not been given an adequate opportunity to address, any error in the ruling may be corrected on a Rule 59(e) motion. *See Moreau v. Allied Van Lines, Inc.*, Civil Action No. 1:07-3257-RBH, 2010 WL 2044663 (D.S.C. May 20, 2010) (vacating the court's *sua sponte* granting of summary judgment in favor of the plaintiff, where the only motion pending before the court concerned the defendant's request for summary judgment).¹⁵

The Circuit Court's conclusion that members disqualified for bias count toward a quorum – despite the rule of *Harby* – is incorrect. The Anderson County Code does not address this issue, and the Circuit Court's reliance on other statutes such as FOIA is misplaced. (R. pp. 47-48) FOIA governs only when a gathering of public officials must be open to the public. It does not concern when they have authority to act; if FOIA did sweep that broadly, all other rules concerning quorums would be preempted, and that plainly is not the purpose of FOIA.

The Circuit Court upheld the Severance Package on the basis of a 3-0 vote. Because such a vote is clearly illegal, this result is improper and must be reversed. If this Court agrees that four votes were improperly cast, the Severance Package must be voided.

¹⁵ Alternatively, the Circuit Court erred in denying Anderson County's motion to amend its Complaint post-trial to address the quorum issue. (R. pp. 44-49; pp. 3245-3270) That motion was timely because the issue did not exist until the Court itself disqualified four votes. Moreover, no prejudice would result from an amendment to address the purely legal effect of the disqualification of four votes. Preston cannot claim prejudice from the impact of his own urging that Waldrep and Cindy Wilson be disqualified. (R. pp. 1350-1353; pp. 1377-1383; pp. 1391-1394)

VI. Future Retirement System Benefits “Owed” to Preston Under the Severance Package Can Be Used to Fashion a Remedy

The Severance Package included a lump-sum payment of over \$350,000 to the South Carolina Retirement System (“SCRS”). This money was used to purchase additional service credit for Preston, allowing him to retire on a full pension – \$7,600 per month at the time of trial – at age 45. (R. pp. 1985-1989; p. 252 at ¶ 10)

The Circuit Court erred in holding that these funds are not available to a court fashioning a remedy in equity. In seeking to impose a constructive trust on these funds in its Tenth Cause of Action (R. p. 139 at ¶¶ 81-84), the County is not seeking any relief in this case that would harm SCRS. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay. Instead, the unrebutted testimony of SCRS itself makes it clear that the retirement benefits currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. (R. pp. 251-252 at ¶¶ 5-11; pp. 253-255 at ¶¶ 5-7, 11-14) In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. (*Id.*) The Court has readily available revenue from which to fashion an equitable remedy.

The relevant statute provides for precisely this relief. S.C. Code Ann. § 9-1-1680 provides in relevant part, “[S]ubject to the doctrine of constructive trust *ex maleficio* . . . , the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process” (Emphasis added.) Thus, the statute allows a constructive trust on retirement fund proceeds in the face of wrongdoing. This makes sense, as it would be remarkable if a court of equity were

powerless to undo an inappropriate purchase of service credit like the one at issue here. *See Matter of Loomer*, 198 B.R. 755, 762 (Bankr. D. Neb. 1996) (“[v]oid [ERISA] contributions are not protected by the alienation restraint and may be disgorged from the Plan”; “funds in the account may be recovered under the federal common law theory that fraud in the inducement allows rescission of the contract.”).

In its Tenth Cause of Action, consistent with the statutory language, the County seeks the imposition of a constructive trust with respect to the SCRS assets. The purpose of this constructive trust is to ensure the Court can fashion a remedy that does justice. Because Preston was complicit in securing retirement benefits to which he was not entitled, such a remedy is appropriate. At the time of trial, Preston was 49 years of age, and he will turn 60 on [REDACTED] Between January 2009 and the day he turns 60, Preston will receive monthly payments that will total approximately \$1,333,000 from SCRS, payments that would not have been available to him without the Severance Package. (R. pp. 2671-2681; p. 1290, lines 15-18) The statute and equitable principles allow the Court to fashion a remedy that includes the redirection of these funds to the County.

VII. Rescission Is the Appropriate Remedy Here

The Circuit Court held that rescission is unavailable because Preston does not have the ability to repay everything he received, and because he cannot be returned to the position of County Administrator of Anderson County. (R. pp. 29-31) This holding is incorrect for several reasons: first, where – as here – the party opposing rescission is himself at fault, he cannot rely on the “changed circumstances” rule to block rescission; second, equity is simply not so limited in fashioning remedies; and third, the Circuit Court ignored the public aspects of this case, and the fact that rescission is the remedy that must

be invoked when a governmental action like this one is determined to be improper; the considerations here are different from those that might apply in a purely private contractual setting.

It is long established that a defendant may not assert a change-of-circumstances defense to rescission where the defendant is at fault for inducing the initial wrongful payment. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011) (“The defense [of change of position] is therefore unavailable to a conscious wrongdoer or to a recipient who is primarily responsible for his own unjust enrichment.”); *Admiral Ins. Co. v. American Nat’l Sav. Bank, F.S.B.*, 918 F. Supp. 150, 156 (D. Md. 1996) (the change of circumstances defense is only available “if the recipient was no more at fault for its receipt of the payment than was the payor”); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002) (change of circumstances defense “will not be strictly enforced where the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing”). That is precisely the case here. It is Preston who provided benefits to those voting on his Severance Package, and Preston who sought far more than even his generous Employment Agreement provided. He cannot invoke changed circumstances.

In particular, the Circuit Court’s reliance on *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984), was misplaced. Reading the entire opinion reveals that the *King* court drew a distinction between rescission because of innocent mistake, and “fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission.” 282 S.C. at 313, 318 S.E.2d at 128. The court then repeats that list in holding that the party seeking rescission did not establish “fraud, misrepresentation, concealment, or imposition” before using the word “fraud” alone as shorthand (rather than repeating the

list yet again) in holding that the absence of such wrongdoing does require return to the status quo. The holding that this requires establishment of all the technical elements of fraud is incorrect. As makes sense with respect to equity, the holding of *King* is that if the party opposing rescission is not innocent – *i.e.*, what is at issue is not mere mistake – that party cannot prevent fashioning of an equitable remedy by complaining about a change in circumstances brought about by the contract obtained by that party’s conduct.

Even under the “technical fraud” standard applied by the Circuit Court – and still more under the proper equitable standard – Mr. Preston’s own culpability prevents him from relying on the fact the County did not hold his post open since 2009 to avoid any remedy. *See* 17B C.J.S. *Contracts* § 652 (“Complete restoration is not necessary if the party that is not fully restored was actually at fault”).

It also cannot be ignored here that Preston is able to return his ill-gotten gains. He is receiving a pension that is the direct result of the excessive payments that he received. Anderson County’s expert Charles Alford testified that the value of those payments was very close to the amount of Preston’s Severance Package. (R. pp. 2671-2681; p. 1290)

The fact that Preston cannot be returned to the position of County Administrator is also irrelevant. Courts have recognized that equity is flexible enough to allow rescission in a situation like this, even where a former position has been filled. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) (“in the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief”; court also recited unappealed ruling by district court that reinstatement would not be ordered because prior position was already filled); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007)

(where severance agreement was obtained by misrepresentation (and at a meeting with one commissioner absent), rescission appropriate even though fire chief argued he was not returned to status quo because he lost benefits when out of office). *See generally* 17B C.J.S. *Contracts* § 652 (“The parties, upon rescission of a contract, generally must be placed only in substantially the same condition or position as they were when the contract was executed, or as near to it as possible. The exact, absolute, or literal return of the parties to the status quo is not required, and such restoration as is practicable and demanded by the equities of the case is sufficient. The status quo rule requires practicality in adjusting the rights of the party.”). Simply, equity is not as strait-jacketed as the Circuit Court suggests. Especially given that it is now clear as a matter of law that Preston’s Employment Agreement was invalid, *see Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), it makes little sense to say that the inability to return Preston to that post should be a barrier to relief.

The Circuit Court’s conclusion that rescission is unavailable because the County has unclean hands is erroneous. (R. pp. 31-35) The law in South Carolina is that “a party will have unclean hands where *the party* behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Anderson v. Buonfonte*, 365 S.C. 482, 492, 617 S.E.2d 750, 756 (Ct. App. 2005) (emphasis added); *see also Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 228 (4th Cir. 2000) (“Unclean hands bars a party from receiving equitable relief *because of that party's own inequitable conduct.*” (emphasis added)). As we have emphasized, the County took no action at all concerning Preston’s employment. Preston’s complaint was over a political change that he predicted would result in future employment action. The Circuit Court confused the political rhetoric of primary winners with actual County conduct. The former will not support a

finding of unclean hands. *See Wedgewood Comm. Ass'n, Inc. v. Nash*, 789 N.E.2d 495, 496 (Ind. Ct. App. 2003) (rejecting attempt to impute unclean hands to plaintiff community association on the basis of alleged actions of the association's directors); 30A C.J.S. *Equity* § 118 ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible.").

The Circuit Court's holding that rescission was unavailable because the County could have brought a declaratory judgment action is equally incorrect. (R. pp. 34-35) Such an action would not have provided any concrete relief against Preston.

The ruling below ignores a key aspect of this case. What is sought here is not merely rescission of a private contract. Instead, this lawsuit invokes cases that recognize that rescission is required when a public act is improper. When a governmental body acts on the basis of tainted votes, and in an arbitrary and unreasonable manner, it is imperative that an appropriate remedy be fashioned. The public interest in avoiding such improper acts must be given substantial weight in such a circumstance. Again, the decision in *Atlantic City* is noteworthy. The beneficiary of the tainted settlement in that case argued, as does Preston, that his ill-gotten settlement money was gone and thus that rescission was unavailable. The *Atlantic City* court gave this argument short shrift:

We are not persuaded by Langford's or Marsh's argument that equity demands that they should keep their settlement monies because they have already spent them on, among other things, attorney fees and taxes. A basic equitable maxim is that 'he who seeks equity must do equity.' . . . [W]e conclude that the only appropriate remedy to vindicate the public trust is the immediate restoration of the funds to the City.

921 A.2d at 442. Given this Court's power to balance equities and fashion an appropriate remedy, and the important public concerns at issue here, we submit that a rigid and mechanical insistence on return to the exact, literal status quo should not bar a remedy.

VIII. Anderson County's Challenge to the Validity of the Severance Agreement Did Not Breach the Severance Agreement

The first and most obvious point to make about Preston's claim that this lawsuit itself violated the Severance Agreement is that if the Court invalidates the Severance Agreement, Preston cannot prevail on a claim for breach of that Agreement.

Beyond this, the covenant not to sue plainly was not intended to be some sort of "incontestability clause," and absent very clear intent in the language to create that kind of a barrier, one should not be inferred. Tom Bright, who drafted the language, testified that there was no discussion or contemplation of creating such an incontestability clause. (R. p. 472, lines 16-25) Nor does the language reflect such an intent. Courts have declined to treat covenants not to sue as preventing a challenge to the validity of the document itself. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966) ("[W]hen the very existence of a covenant is disputed in good faith that dispute must be resolved before the covenant can be recognized and allowance must be made for such resolution. . . . It cannot rationally be argued that the covenant, retroactively, denied the right to the very litigation which was necessary to establish its existence."); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985) (covenant not to sue "would go only to the merits of the controversy settled – not to the existence or terms of the Settlement Agreement itself"). Given the important public policy issues at stake here, a provision that would prevent the County from seeking a determination of whether approval of the Severance Package violated its conflict of interest rules or public policy generally would itself be a violation of public policy.

More generally, the covenant by its own terms is limited to claims "relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the

County.” (R. p. 1987 at ¶ 8) This lawsuit is not about Preston’s “employment” or his actions taken “on behalf of the County,” but instead about the terms of his Severance Package and the manner in which it was adopted.¹⁶ (R. pp. 133-140 at ¶¶ 34-87) To the extent the suit involves Preston’s actions, it involves the actions he took as the County’s *adversary* after he asserted a claim against the County, not his actions taken “on behalf of the County.” This lawsuit is about whether the Package as approved by Preston’s allies was arbitrary, in violation of public policy, and/or supported by tainted votes. These claims are outside the scope of the covenant.

Even if this Court were to conclude that the Severance Agreement should not be rescinded, the Circuit Court’s holding that the County’s challenge violated that Agreement should be reversed. It is undeniable that the circumstances of the Severance Agreement’s passage were extraordinary, and the County’s decision to challenge the validity of the Package was reasonable and appropriate. Indeed, the Circuit Court denied Preston’s motion for summary judgment. (R. pp. 82-83) For the same reasons, the Circuit Court should also be instructed that a fee award is not available in this case. The Circuit Court has indicated a willingness to entertain a fee petition, and a fee award against Anderson County would be unjust. (R. pp. 39-40) *See* S.C. Code Ann. § 15-77-300 (fee award

¹⁶ Although it is not pursuing this argument on appeal, the County did allege that Preston violated the Severance Agreement after it was signed by backdating official documents. (R. p. 1802) Preston argued below that these allegations concerned his “actions as an employee on behalf of the County.” While Preston’s “backdating” conduct took place while he was still employed, falsifying documents was not done “on behalf of the County” and this conduct took place *after* the execution of the Severance Agreement, taking it outside the scope of the covenant. Courts do not interpret releases or covenants not to sue to encompass future conduct. 66 AM. JUR. 2D *Releases* § 28 (a covenant not to sue “ordinarily covers all claims and demands *due at the time of its execution* that were within the contemplation of the parties” (emphasis added)); *Gardner v. City of Columbia Police Dept.*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) (“it is uniformly considered that a general release ... ordinarily covers all claims and demands *due at the time of its execution*, and within the contemplation of the parties” (emphasis added)).

against state not available where lawsuit is “substantially justified” or in the presence of “special circumstances” making a fee award unjust).

CONCLUSION

In 2008, the voters of Anderson County sent a clear message that they wanted closer scrutiny of County government. It was not unreasonable for Preston, faced with the loss of a pliable majority, to conclude life would be simpler if he left office. It was, however, unreasonable and improper for Preston to line his pockets on the way out the door. The “anticipatory breach” claim was a sheer and indefensible pretext to allow his allies to hand him unearned taxpayer funds.

The pertinent facts of this case are not disputable. No official action that could constitute “anticipatory breach” had been taken. Preston’s friends on Council had financial ties to Preston that made it utterly improper for them to vote for the Severance Package. The Package itself paid Preston far more than his claim was worth – including allowing him to retire with a full public pension at the age of 45. Preston knew of these improprieties and allowed the matter to proceed without pointing them out.

The Circuit Court erred when it said this was an acceptable transaction, and that the courts are powerless to remedy these clear wrongs. Anderson County asks this Court to reverse the holding below, including the finding that this lawsuit breached the Severance Agreement, and remand with instructions to the Circuit Court to direct Preston to make restitution to the County equal to the amounts paid to him or on his behalf pursuant to the Severance Agreement, plus interest, and to direct that that those pension benefits made possible by the Package and held by the South Carolina Retirement System for Preston be placed in a constructive trust for the benefit of Anderson County, as part of this remedy.

Respectfully submitted,

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October 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002499

Anderson County,.....Appellant,

v.

Joey Preston and the South Carolina Retirement System.....Respondents.

FINAL BRIEF OF RESPONDENT JOEY PRESTON

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STATEMENT OF ISSUES ON APPEAL

On November 18, 2008, the Anderson County Council ("2008 Council") hoped to end a demeaning and destructive chapter in its local politics. On that date, the 2008 Council voted to execute a severance agreement ("Severance Agreement") with County Administrator Joey R. Preston ("Preston") in hopes that the divisiveness surrounding him would abate. The incoming County Council in January of 2009, however, had no intention of honoring Preston's Severance Agreement. As a result, this lawsuit ensued and now presents the following questions:

- Did the Circuit Court err when it followed the decision of Baird v. Charleston County and refused to ignore binding precedent, as urged by Appellant?
- Did the Circuit Court err when it found Appellant failed to prove by clear and convincing evidence that the 2008 Council's actions were arbitrary and capricious?
- Did the Circuit Court err when it found Appellant failed to introduce evidence that Preston breached a fiduciary duty by violating the State Ethics Act or the County Code?
- Did the Circuit Court err when it found Appellant failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation due to a host of deficiencies?
- Did the Circuit Court err when it rejected Appellant's untimely quorum argument that otherwise factually and legally fails?
- Did the Circuit Court err in rejecting Appellant's constructive trust claim when the evidence failed to support the claim by clear and convincing evidence?
- Did the Circuit Court err in rejecting Appellant's rescission claims when the parties cannot return to their prior status quo and when Appellant has unclean hands?
- Did the Circuit Court err in finding Appellant breached an unambiguous covenant not to sue that it ignored when it filed this lawsuit?

STATEMENT OF THE CASE

Anderson County ("the County" or "Appellant") filed its Complaint on November 12, 2009. (R. p. 84-96). Preston filed an Answer and Counterclaim on August 10, 2010. (R. pp. 109-122). Anderson County filed its Reply to Counterclaim on September 7, 2010. (R. pp. 123-126.) On December 12, 2011, the case was designated as complex, and on February 28, 2012 it was assigned for all purposes to the Honorable Roger L. Couch. (R. pp. 80-81.) Anderson County filed its Reply on June 29, 2012. (R. pp. 229-237.)

Shortly before trial, the County settled Preston's false arrest counterclaim arising out of a DUI arrest by the Anderson County Sheriff's Department when his blood alcohol level was a 0.03. The County also settled Preston's abuse of process counterclaim arising out of Appellant's procuring a false affidavit against him. (R. pp. 247-248.) Preston's counterclaim for breach of a covenant not to sue was not settled. (R. pp. 247-248.)

The parties filed cross-motions for summary judgment, which were heard on October 16-17, 2012 and denied in all respects as to both parties by Order dated October 23, 2012. (R. pp. 82-83.) The matter was tried without a jury to Judge Couch from October 29, 2012 through November 5, 2012. (R. pp. 264-1890.) Judge Couch ruled against Appellant on May 3, 2013 on all claims. (R. pp. 1-43.)

Appellant filed a Motion to Alter or Amend the Judgment on May 13, 2013. (R. pp. 3163-3176.) Appellant also filed a post-trial motion to amend. (R. pp. 3245-3270.) Third-party, Richard Freemantle, filed a post-trial motion for intervention on June 28, 2013. (R. pp. 49-56.) Judge Couch denied all motions on November 8, 2013. (R. pp. 44-79.)

STATEMENT OF FACTS

I. Introduction

Long on rhetoric but short on facts, Appellant bandies about such terms as "fraud" and "corruption" so frequently, one might get the misimpression Anderson County proved its case below. It did not. This emperor has no clothes.

Appellant has spent five years and nearly \$2.4 Million Dollars seeking the rescission of a \$1.1 Million Dollar Severance Agreement. The County presses this case even though both law and fact belie its claims. That is because political payback fuels this case. As sitting Anderson County Council member, Gracie Floyd, describes this case: "It's a vendetta. It's a vendetta." (R. p. 1620, line 16.)

II. Factual Overview

An understanding of the instant dispute requires historical context.¹ Neither Party disputes the political climate in Anderson County leading up to the vote on Preston's Severance Agreement proved both toxic and sick.² Beginning back in 2000, a dispute arose between Joey Preston ("Preston") and now sitting Council member Cindy Wilson ("C. Wilson"). At the time, C. Wilson did not serve on Anderson County Council. The

¹ Appellant does not challenge any of the factual findings made by the lower court. (Compare 5/3/2013 Order *with* 11/08/2013 Order (The County "simply overlooks the numerous factual findings made by the Court...") *with* App. Brief.) (R. pp. 1-43 *c.f.* R. pp. 44-79.) Preston incorporates herein all of the factual findings and citations to the record made by the lower court in its 5/3/2013 Order and its 11/08/2013 Order, including the trial court's finding that the witnesses supporting the Severance Agreement were "the more credible witnesses"...while the opposing testimony "was evasive...not credible...[and]... untrustworthy." (R. pp. 40, 68.)

² "[T]oxic political environment did exist in Anderson County on the 18th day of November 2008"; "Plaintiff conceded [toxic political environment existed in Anderson County] both before and at trial." (R. pp. 57; *See also* R. pp. 620, lines 14-24; 627, lines 4-13; 623, lines 16-25; 653; 1264; 2922-2926; 2933.)

dispute concerned sewer right of ways for a County infrastructure project, which C. Wilson did not want to cross her property but for which no practical alternative existed.³

The dispute escalated between Preston and C. Wilson and, over time, degenerated into bitter political factions pitting supporters of C. Wilson against virtually anyone who appeared to support Preston.⁴ Repeated accusations and claims, concerning various matters, by C. Wilson and others surrounding her about Preston ensued.⁵ Eventually C. Wilson became a member of County Council heightening the visibility of the acrimony to new levels. Over the ensuing seven (7) years, the blood-sport (as former Council member Waldrep once called it) of Anderson County politics became unrivaled in ugliness. (R. pp. 505, lines 17-25; 517, line 18-p. 518, line 18.) Preston began to receive anonymous phone calls at his home. (R. p. 843, lines 13-24 (discussing call received by Preston's son).) Increasing threats were made against Preston. Anonymous letters were ... sent accusing Preston of all sorts of behavior, including one sent to the pastor of his church. (R. pp. 2916-2917.) Individuals began following Preston and the harassment grew so bad he had to have Anderson County's chief security officer follow him for protection. (R. pp. 842, lines 24-25.) And, Preston endured various political stunts to

³ R. pp. 3-4; 295; 636, lines 11-25; 1605, line 8-p. 1607, line 25; 2414-2416; 2428 (Attorney Tom Bright notes from 10/04/2008: "All related to Beaver Dam sewer line. This is payback for [C. Wilson].")

⁴ R. pp. 505, lines 5-11; 517, line 19-p. 518, line 18; 845, lines 1-25; R. p. 1607, lines 1-20; 1609, lines 19-22.

⁵ R. pp. 4; 295; 844, lines 7-18; 853, lines 3-18; 1607, lines 1-20; 1609, lines 19-22 (Preston "main object" of C. Wilson's baseless allegations); Def. Ex. 21 (Listing C. Wilson's unfounded accusations against Preston); 2425-2427 (Listing C. Wilson's unfounded accusations against Preston); 2428 (C. Wilson's "[A]llegations are unfounded"); 2896-2898 (SLED interview of C. Wilson where she falsely accused Preston of serial and outrageous acts; 1112, line 13-p. 1114, line 9.)

gain political advantage over him. (See R. p. 4 (citing R. pp. 2414-2416, 2421-2422, 2640-2647 at ¶22, 2760, 2832-2836, 2841-2842, 2850-2858.)

But, Preston alone did not encounter such harassment. The harassment was similarly leveled at Council members who endeavored to work cooperatively with Preston. Former Council member Bill McAbee testified that the political climate had grown so bad "from the people that supported [C.] Wilson and her group...that he felt threatened, other council members felt threatened..." (R. pp. 652, lines 13-19; see also R. pp. 868, line 25-p. 869 line 23.) By way of example, Council members (all except C. Wilson and Waldrep) received anonymous letters at their homes threatening sodomy and prison.⁶ A radio caller on WAIM radio made comments about his intentions "to take out" Michael Thompson and "spend the rest of his life in federal prison..." (R. pp. 1266, 2928.) Other verbal threats were made against Council member McAbee and his family. (R. p. 654, lines 14-16.)⁷ Indeed, matters had grown so bad that SLED commenced a criminal investigation. (R. p. 653 line 16-p. 654, line 8.) By 2008, the political environment in Anderson County had grown nothing short of toxic, with a top target –

⁶See R. pp. 650, line 12-p. 654, line 10 (McAbee testifying about letters to Preston and all council members except C. Wilson and Waldrep making threats including prison and sodomy); 653; 1265, lines 14-21; 840-841; 2922-2926; 2933.)

⁷ Such conduct also included less serious but nonetheless demeaning behavior. For example, on one occasion, C. Wilson's followers distributed toy ducks, would quack, and use "a duck caller" during a public Council meeting whenever Council member Floyd spoke. (R. p. 1613, lines 6-12.) On other occasions, C. Wilson's supporters—in open meetings—called Floyd a "clown," a "court jester," and the "Village Idiot." (R. p. 1623, lines 14-24.)

Joey Preston. (R. pp. 842 (frequent target of harassment); 1607, lines 1-20; 1609, lines 19-22.)⁸

III. Interference With Preston's Duties

The contentiousness between Preston and C. Wilson increasingly invaded Preston's professional life. Eventually, by 2008, the interference with his job became so oppressive, Preston, with the approval of then sitting Council filed a lawsuit against both C. Wilson and her ally, Bob Waldrep, due to their disregard of the Home Rule Act.⁹ Indeed, the Anderson County Court of Common Pleas eventually enjoined both Waldrep and C. Wilson from further interfering with Preston's official duties. (R. pp. 2640-2647.) Circuit Court Judge Nicholson's Order specifically found *inter alia*:

- Paragraph 24: "Exhibit 15 indicates as recently as August 5, 2008, Defendant Waldrep endorsed publicly alleged efforts of newly elected Council members who have not yet taken office to place a particular County employee on leave in January of 2009." (R. p. 2644.)
- Paragraph 25: "Per the County Personnel policies, only the County Administrator can place a County employee on leave." (*Id.*)
- Paragraph 10: "Previous attempts by the County Administrator, County Attorney and County Council members to stop Defendants from ordering and instructing County employees have been unsuccessful and ignored by [C. Wilson and Bob Waldrep]." (R. p. 2642.)

⁸ Appellant suggests the political atmosphere in Anderson County leading up to the Severance Agreement vote proves irrelevant. To the contrary, this Court cannot even begin to understand the behavior and decision-making process of the 2008 Council, without first understanding the extreme political atmosphere in existence during that snapshot in time. Appellant would rather the Court not recognize the November 18, 2008 Council meeting for what it was—the tearing off of a political band-aid in hopes the County could finally move forward.

⁹ See R. p. 4 (*Finding* "Council members disregarding the legal 'chain of command established by the Home Rule Act.'"); R. p. 2641 (*Finding* Action "filed with the approval of a majority of the members of Anderson County Council.")

- Paragraph 27: "The County Administrator's duty to supervise his employees is being intentionally thwarted by [C. Wilson and Bob Waldrep]." (R. p. 2644.)
- Paragraph 29: "The actions of [C. Wilson and Bob Waldrep] have interfered with the County Administrator's ability to do his job." (*Id.*)
- Paragraph 30: "The actions of [C. Wilson and Bob Waldrep] have adversely affected the morale of the County employees." (*Id.*)
- "Plaintiff has shown he is likely to prevail on the merits in this case." (R.

pp. 2640-2647).¹⁰ Importantly, after the Circuit Court made the findings against C. Wilson and Waldrep, Anderson County adopted Resolution 2009-63 ratifying their conduct as taken on behalf of Anderson County in their official capacities.¹¹ (R. pp. 32-33, bullet point 5; R. p. 57, FN 28; R. pp. 3300-3303; see also *infra*.)¹²

The testimony at trial unequivocally established that, after the primaries in June of 2008, and continuing through December of 2008, Councilman Waldrep, Councilwoman C. Wilson, and the three incoming Council members-elect (Eddie Moore, Tom Allen, and Tommy Dunn) began holding a series of meetings, on Sunday, at Bob Waldrep's office.

¹⁰ Preston filed the lawsuit against C. Wilson and Bob Waldrep and the original hearing occurred on September 24, 2008, the day before Preston gave notice to the County of his claims for constructive discharge and anticipatory breach of contract. (Compare Ex. 50, Order 12/29/08 (First page indicating hearing on 9/24/08 *with* Pl. Ex. 22). Later, after the County executed the Severance Agreement, Michael Cunningham, the new County Administrator, was substituted as the Plaintiff. However, the events referred to in the Order involved Preston, not Cunningham.

¹¹ The public meeting minutes, upon which they lower court relied, are found at: <http://www.andersoncountysc.org/Content/Council/Minutes/OCR/cc08182009.pdf> (pp. 13, lines 29-43, p. 17, line-20, line 37.)

¹² During an August 5, 2008 Audit Meeting, Waldrep publicly endorsed a plan to place: "the administrator and financial director" on paid leave and appoint "an acting administrator" in Preston's stead without the required public hearing. (R. pp. 292, 295, 1900-1913, 2633-2634.)

(R. pp. 5; 369, line 22-p. 370, line 22.) "The meeting participants excluded others on Council with whom they would be serving." (R. pp. 5; 371, line 18-p. 372, line 4.) During those meetings, the soon-to-be majority of Council laid out an intricate agenda including: firing the then County Attorney (the McNair Firm); hiring Nexsen Pruet as the new firm; hiring Bob Daniel as their investigator of sorts; designating the next Chairman (Eddie Moore); drafting resolutions for the first meeting in 2009; implementing a hiring freeze; compiling a list of employees (*i.e.*, political adversaries) they would fire; and how to get rid of Joey Preston. (R. pp. 372, line 5-p. 379, line 17; 2872-2873.)¹³ What the documentary evidence lays most plain, however, is the group's intent regarding Preston.¹⁴

IV. Preston's Claim for Anticipatory Breach

On this backdrop, Preston's tort claims and claim for anticipatory breach of contract arose. (R. pp. 2026-2028.) Preston first notified the County of the claim on September 25, 2008, after having retained counsel. (*Id.*) The County referred the claim to the personnel committee, which then hired Tom Bright of Ogletree Deakins, one of the

¹³ During cross-examination, Waldrep conceded the group meeting at his office discussed specific employees (*i.e.*, Michelle Ricketson, Bill Strewing, Brandon Grace). Curiously, none of them remained employed by Anderson County after the newly elected officials took office. (R. pp. 377-379, line 17.) Joey Preston was also specifically discussed (R. p. 380, lines 17-20) but his employment ended by operation of the Severance Agreement.

¹⁴(See R. pp. 2635 (8/14/08 E-mail from Moore to Waldrep stating, "[Joey Preston] is desperate and just wants to freeze everything **so we can't run him off**") (emphasis added); 2825 (8/04/08 E-mail from Moore to Jena Trammel: "Hopefully we can get [Joey Preston] **run out of Anderson County...**") (emphasis added); 2827 (8/13/08 E-mail from Reporter Stan Welch to E. Moore regarding the audit proposed: "Eddie, if you can get the **witch hunters** to understand what should be done, you are the man!") (emphasis added); 2831 (10/20/08 E-mail from Moore to Reporter Stan Welch: "Well, I told radio hog Saturday that they had been **trying to get rid of Joey for 10 years and we did it just by winning a primary.**") (emphasis added); 2422 (Bright Notes 10/13/08: "[H]e's heard [C. Wilson say 'let's fire him.'](emphasis added).)

largest employment firms in the United States. (R. pp. 803, line 17-p. 804, line 10.) Multiple witnesses testified that Bright had counseled them that if the County lost an ensuing lawsuit, it could cost the County over two million dollars (\$2,000,000.00). (R. pp. 461, line 8-p. 462, line 5; 623, line 22-p. 624, line 3; 1254, lines 17-25.) Shortly following his retention on October 8, 2008, Bright's notes reflect, that at Chairman Michael Thompson's instruction (see R. p. 498, lines 15-23), he interviewed all seven Council members (including C. Wilson and Waldrep) and the County Attorney to receive their input.¹⁵ Interestingly, Bright's notes reflect the exact sentiments—in October 2008—as were reflected by the Severance Agreement vote on November 18, 2008—five in favor, two against. (See FN. 14.)

Following two personnel committee meetings and a month's worth of negotiations, Tom Bright and Preston's lawyer reached a potential resolution of the dispute. (See R. pp. 2445-2456.) Correspondence between Bright and Preston's attorney confirms, contrary to Appellant's suggestions, that the proposed Severance Agreement was, in fact, still being negotiated until late in the afternoon on November 18, 2008. (Id.) On the evening of November 18, 2008, Anderson County Council approved the Severance Agreement by a vote of 5-1-1 mirroring the vote tally for almost all important decisions made in County government during this timeframe. (R. pp. 632 line 25-p. 633, line 8.)

¹⁵ See R. pp. 2414-2416 (Thompson), 2417-2420 (County Attorney), 2421-2422 (R. Wilson), 2423 (Greer), 2424 (Waldrep), 2425-2427 (C. Wilson), 2428 (McAbee), 2429-2431 (Thompson).

V. The Evidence Negating Appellant's Claims

The County now reduces all of its claims to 2 nuclei of facts. They include: (A) allegations regarding Allison Schaum ("Schaum Allegations"); (B) allegations regarding former council member Michael Thompson ("Thompson Allegations").¹⁶ The trial evidence regarding each is treated below:

A. The Schaum Allegations:

1. Anderson County's Allegations Concerning Allison Schaum.

Anderson County's allegations concerning the Contract with Allison Schaum appear in Paragraphs 25 through 28 of the Amended Complaint. (R. pp. 131-132, ¶¶25-28.) According to Amended Complaint, Anderson County and Allison Schaum's company, Palmetto Agricultural ("PAC"), amended an existing contract on November 1, 2008 ("Services Contract"). (R. p. 132, ¶28.) The Amended Complaint fails to allege any involvement or knowledge of the amended contract on the part of then council member, Ron Wilson. (*Id.*) Likewise, the Amended Complaint fails to allege any correlation between the PAC contract and the Severance Agreement executed between Preston and Anderson County. (*Id.*) Nor did any of the evidence at trial establish any

¹⁶ Appellant previously averred allegations involving Council member McAbee and Heather Jones. However, Anderson County has abandoned those allegations on appeal. (*See* App. Brief, p. 13, FN2 & p. 58, FN16.) Although the County abandons the same, it persists in citing to the record about the same presumably to provide the misimpression that the claims had merit. They did not. Both sets of allegations were proved demonstrably false at trial. The McAbee allegations were proved false. (R. pp. 7-8; 60-61; 637, line 17-p. 644, line 6; 642, lines 3-16; 1813, line 1-p. 1814, line 13; 1102, line 1-p. 1103, line 25; 654, line 22-p. 656, line 1; 1814, line 11-1816, line 25; 1817, line 18-p. 1818, line 13; 2686-2697.) The Jones allegations were likewise proved false. (*See* R. pp. 27-28; 73-74; 724, line 4-p. 728, line 7; 728, line 10-p. 737, line 3; 734, lines 1-5; 1802, line 1-p. 1811, line 18; 2692-2700; 2702-2712; 2933.) Nonetheless, Appellant continues to raise these issues, in sideways fashion, even though it never contested the evidence in this regard.

correlation to the same. (R. p. 9 (No evidence links Services Contract's extension and "[N]o evidence establishes R. Wilson knew of the Services Contract's extension when voted."))

2. The Actual Trial Evidence.

Schaum testified she never discussed the formation of PAC in 2004 with either her father or mother. (R. p. 1451, lines 9-17.)¹⁷ She similarly never discussed her contacting Anderson County with her father or mother before doing so in 2007. (R. p. 1719, lines 3-6.) Neither Schaum's mother nor R. Wilson ever gained any financial benefit from PAC. (R. p. 1714, lines 2-11.) Schaum testified that she had never met with Preston before initiating contact with Anderson County in 2007. (R. p. 1716, lines 10-11; see also R. p. 1048, lines 1-21.) And she never informed Preston's office that she was Ron Wilson's daughter when she initiated contact in that timeframe. (R. p. 1717, lines 10-14.) Preston asked Schaum to create a presentation that she could pitch to County representatives, Department of Agriculture representatives, School Board members, and local farming interests, which she did. (R. pp. 1716, line 19-p. 1717, line 9; 1050, line 15-p. 1051, line 19.)

Amongst other initiatives, Schaum testified she pitched to have PAC create a farm-to-school program in Anderson County where farmers would sell fresh produce directly to school lunch programs creating a win-win scenario for both. (R. pp. 1721, line 6-p. 1724, line 22.) Schaum gave the presentation to representatives from the Farm

¹⁷ Schaum's testimony in this regard is consistent with the general tenor of her relationship with her father, which was not particularly close. (See, e.g., R. pp. 1736, line 22-p. 1737, line 13 (Relationship with her father was not one where they discussed a lot, including their work.)

Bureau, the Farmer's Market, the Department of Agriculture, and various local farmers. (R. p. 1718, lines 6-15.) The feedback from the meeting proved "positive" and "everyone was excited about it." (R. p. 1718, lines 20-21.)¹⁸ Throughout this process, R. Wilson had no knowledge of Schaum's proposal or presentation. (R. pp. 1718, line 22-p. 1719, line 6.)

Interested in the local agricultural initiatives, Preston and Schaum began to discuss entering a contract to create a "trial program or a pilot program" on a month to month term with a topline budget, which would be cancelled if it did not prove fruitful. (R. pp. 1728, line 5-p. 1729, line 1; 1731, lines 4-9.) At the urging of the Farmer's Market Board and the Department of Agriculture, Preston and Schaum executed the original contract in September of 2007. (R. pp. 1052, lines 1-20; 2149-2152.) Preston agreed to "revisit [the contract in] about a year and see where [they] were." (R. p. 1728, lines 10-15; 1063, lines 5-8.)¹⁹

PAC proved successful. Schaum's initiatives landed Anderson County an eighty thousand (\$80,000.00) grant, which was double the amount of the top line number Preston had placed on the program's expenditures. (R. pp. 1730, line 6-p. 1731, line 9.) PAC spearheaded three conferences in Anderson County. (R. pp. 1731, line 10-p. 1732, line 3.) The third of these conferences, the Carolina Farm Stewardship Conference,

¹⁸ While Appellant attempts to spin Schaum as lacking experience in such a project, the truth is that no such pilot project had been attempted in South Carolina before. (R. p. 1719, lines 7-19.)

¹⁹ According to Schaum's testimony, her father did not know she was pursuing the contract, nor did she discuss it with him before its execution. (R. p. 1720, lines 1-6.) In fact, R. Wilson did not learn of the contract until after the fact and, "He wasn't very happy" about it. (R. p. 1736, lines 12-21.)

occurred during the last week in October of 2008 and hosted over 500 attendees. (R. pp. 1731, line 10-p. 1735, line 4; see also 2134.) On the heels of this conference and a little over a year after executing the pilot Services Contract, Schaum contacted Preston because she hoped the trial period would be over. (Id.; R. p. 1057, lines 19-20.)²⁰

Schaum drafted the amended Services Contract and proposed it to Preston. (R. pp. 1736, lines 21-25; 1063, lines 21-25.) Like the original Services Contract, Schaum testified she never discussed the amended Services Contract with her father. (R. p. 1736, lines 1-8.) Schaum noted she never spoke to her father about her work and he never spoke to her about his; the two did not have that type of relationship. (R. pp. 1736, line 1-p. 1737, line 13.)

Contrary to Appellant's portrayal, the amended Services Contract was not a "rich" agreement. While the amended Services Contract did have a term and a liquidated damages provision, the agreement contained no minimum hour requirement, meaning the County could reduce Schaum's weekly pay to virtually nothing if it so chose. (R. pp. 1735, lines 10-15; 1104, line 24-p. 1105, line 4; 1297, lines 8-22 (Appellant's economist agreeing the County could reduce Schaum's hours to one hour per week.))²¹

Schaum never discussed Preston's employment dispute with him. (R. pp. 1739, lines 4-7; R. pp. 1104, line 24-p. 1105, line 4.) Schaum never discussed Preston's Severance Agreement with him. (R. p. 1739, lines 8-10.) Schaum never discussed the

²⁰ Appellant mischaracterizes the amended PAC Services Contract as "unsolicited." (App. Brief, p. 34.) Yet, both Preston and Schaum testified that she contacted him about amending the agreement.

²¹ Schaum testified the purpose of the term and liquidated damages provision was to help sustain the program and protect the businesses that had made commitments to participate. (R. pp. 1737, line 16-p. 1738, line 15; see also 1060, line 24-1062, line 25.)

amended Services Contract with R. Wilson. (R. p. 1739, lines 15-20.) R. Wilson did not benefit from the amended Services Contract. (R. pp. 1739, line 24-p. 1477.) R. Wilson did not benefit from Preston's Severance Agreement. Schaum did not benefit from Preston's Severance Agreement. (R. p. 1740, lines 2-4.) Simply no relationship existed between the amended Services Contract and Preston's Severance Agreement. (R. p. 1740, lines 5-8; 1105, lines 7-9.) Indeed, no evidence even demonstrates Schaum knew of Preston's employment dispute, which, in fact, she did not. (R. pp. 1739, line 4-1740, line 4.) And, no evidence demonstrates R. Wilson even knew about the amended Services Contract when he voted in favor of Preston's Severance Agreement.

B. The Thompson Allegations:

1. The Allegations in the Amended Complaint:

According to the County, while Council was considering Preston's claims for anticipatory breach of his employment contract, "Preston was engaged in conversations with" Michael Thompson ("Thompson") "about hiring him as a county employee." (R. p. 129, ¶12.) The County further contends Preston "granted Thompson special consideration" in connection with his desire "to be hired as a county employee." (*Id.* at ¶13.)²²

²² The County also complained—in a seemingly abandoned allegation—that Preston failed to correct a statement made by Thompson to media from June of 2008 (nearly ninety days before Preston's employment dispute even arose) wherein Thompson apparently denied interest in becoming a County employee. (R. p. 130, ¶ 17.) Thompson explained that he viewed the matter as a personnel matter, which was not appropriate for public discussion. (R. p. 792, lines 1-5.) Citing other instances where they disseminated confidential information, Thompson feared C. Wilson and Waldrep would disseminate confidential information about him had he answered otherwise. (R. p. 864, lines 3-25.) In any event, Thompson testified that he did not believe it was the job or would be appropriate for the County Administrator to go behind elected officials and correct

2. The Actual Trial Evidence:

According to the testimony of both Thompson and Preston, Thompson first approached Preston in the beginning of March 2008 and inquired whether the County had any interest in hiring him after he rotated off County Council at the end of December 2008. (R. pp. 783, lines 20-23; 785, lines 6-9; 1819, lines 2-24.) Preston responded that he believed Thompson's background would be a good fit for the County. (R. pp. 785, lines 4-17; R. pp. 1820, line 1-p. 1821, line 24 Preston (Preston was interested in hiring Thompson because he was more credentialed than 95 to 98% of County employees, including many in management).) Thompson: had an MBA, had nine years of purchasing experience with the Bosch Corporation wherein he managed a fifty-six million dollar commodity portfolio, had a real estate license and a background in real estate, and was honorably discharged from the United States Navy where he held a top secret security clearance.²³ Preston informed Thompson he thought he would make a good fit with the assessor's office (R. pp. 785, lines 18-22; 1827, lines 1-6.)

Preston encouraged Thompson to pursue appraisal courses, which is confirmed by an e-mail dated March 4, 2008. (R. pp. 783, lines 12-19; 1109, line 11-p. 1110, line 13; see also 2067-2070.) Thus, by March of 2008 even before the Anderson County primaries and a full six (6) months before Preston's employment dispute even arose,

statements to media outlets. (R. p. 864, lines 3-25.) Thompson also testified he feared the same individuals who had been sending threatening letters and making threats against him and his family might misuse the personnel information about his pursuing a job. (R.p. 857, lines 3-20.)

²³ See R. pp. 1820, line 2-p. 1821, line 11, Preston; 770, lines 19-21; 863, lines 2-19; 865, lines 12-24; 2863-2865; see also 562, lines 12-21 (Thompson was a great candidate but for the political climate).

Thompson and Preston had already discussed Thompson's employment with the County and Preston had agreed to hire him even so far as encouraging him to take courses in connection with the same. (R. pp. 785, lines 4-17; 1820, line 1-1821, line 24.) Yet, given the chance, Appellant would lead this Court to believe Thompson parlayed his Severance Agreement vote in exchange for a job. Not so.

Thompson testified he contacted Preston about another opening with Anderson County in August of 2008. (R. pp. 794, line 19- p. 796, line 4; 1110, lines 23-25.) E-mail correspondence from Thompson confirms the fact. (R. p. 2076.) The position sought by Thompson was for a position as assistant purchasing manager. (R. p. 794, line 19- p. 796, line 4.) According to Thompson, he asked Preston about the position but Preston indicated another County employee was in line for the spot. (R. p. 794, line 19-p. 797, line 16; 798, line 12-p. 799, line 3.) However, Preston told Thompson the promotion of existing personnel would create an opening. (Id.) And Thompson would get the subsequent opening resulting from the internal promotion. (Id.) This conversation occurred nearly a month before Mr. Preston's employment dispute with the County ever arose. (Id.)

Interestingly, little debate can exist that Thompson far exceeded the credentials of the position identified by Preston in August of 2008. For example, the Buyer II job required a bachelor's degree in business, marketing, or accounting. (See R. pp. 2082-2083.) Thompson had an MBA. (R. pp. 863, lines 2-19; 865, lines 12-24.) The position required four years of progressively responsible supervisory work. (See R. pp. 2082-2083.) Thompson had 9 years at Bosch. (Id.) And Thompson was honorably discharged from the Navy. (Id.)

Like all other witnesses in the case, Thompson testified he received no benefit from the approval of Preston's severance agreement. (R. pp. 867, lines 19-21; 868, lines 2-5.) Preston received no benefit from his pursuit of a job from the County. (R. p. 867, lines 14-16.) No *quid pro quo* exchange existed between the severance agreement and his pursuit of a County job. (R. p. 867, lines 12-13.) Indeed, no relationship existed between the two whatsoever. (R. p. 866, lines 12-25.) Preston agreed to hire Thompson in August of 2008 for the position of Buyer, before the proposed Severance Agreement or employment dispute ever existed (R. p. 866, lines 12-25; 1111, lines 4-7) and Thompson testified he would have voted in favor of the Severance Agreement regardless. (R. p. 866, lines 16-24.)

Contrary to the County's suggestions, Thompson testified he favored the Severance Agreement because the political infighting over Preston had begun to threaten potential economic development initiatives. (R. pp. 859, line 13-p. 861, line 6.) Thompson did not believe it served the County's "best interest to go through a drawn out litigation process." (Id.) And Thompson confirmed he did not believe it served the County's best interests to spend two million dollars investigating Preston – as it has. (Id.)

ARGUMENT

I. STANDARD OF REVIEW

While the case before the Court is equitable in nature, and while Preston agrees this Court reviews the record *de novo*, it is likewise true that, as to "questions of credibility" (see, e.g., 5/3/2013 Order, p. 40), this Court should "defer to the good judgment of the trial court who heard and observed the witnesses. Costa and Sons Const. Co., Inc. v. Long, 306 S.C. 465, 468, 412 S.E.2d 450, 452 (Ct.App. 1991). Moreover, *de novo* review does not relax Appellant's evidentiary burden of clear and convincing proof as it applies to the County's claims for fraud, constructive fraud, rescission for arbitrary and capricious decision-making, constructive trust, and rescission for negligent misrepresentation. (See, generally, R. pp. 3099-3162 (Preston Closing).)

II. APPELLANT FAILED TO PROVE RESCISSION WAS WARRANTED UNDER THE STATE ETHICS ACT, APPELLANT'S CODE, OR THE COMMON LAW

Appellant's first claim alleged the 2008 Anderson County Council ("2008 Council") violated: the State Ethics Act, the County Code, and common law by approving Preston's Severance Agreement.²⁴ Under this claim, Appellant challenged the entire process of passing the Severance Agreement, not just particular votes. (R. p. 6 (citing R. p. 133, ¶35 ("The Severance Agreement was adopted by Anderson County

²⁴ In stating its grounds for appeal, Appellant collapses various portions of the lower court's order in order to gloss the evidentiary deficiencies in its case. In other instances, Appellant takes the lower court's analysis out of order for the same purpose. While responding in full to Appellant's arguments, Preston breaks down the issues on appeal in a manner consistent with the lower court's final order and judgment. In so doing, Preston hopes this Court will have an easier time following the sequential analysis of the lower court, as it relates to the issues on appeal.

Council in violation...”).²⁵ Consistent with the allegations put at issue by Appellant, the lower court analyzed all of the 2008 Council members’ votes. (R. p. 6.) After doing so, the Court correctly found in favor of Preston.²⁶

In analyzing the 2008 Council’s actions, the trial court correctly found Anderson County’s Code proves more restrictive than the State Ethics Act.²⁷ (R. p. 7.) Specifically, the State Ethics Act prohibits elected officials from participating in governmental decisions where an official or his family members derive a direct economic benefit. See, e.g., S.C. CODE ANN. § 8-13-700. By contrast, Anderson County Code (hereinafter “ACC”) § 2-37(g)(4)(e), titled when “members may not vote,” more broadly disallows Council members from participating in decisions where their involvement creates: “a substantial appearance of impropriety.” ACC § 2-37(g)(4)(e).

A. After Analyzing All of the Votes Cast, the Trial Court Disqualified the Votes of: Thompson, R. Wilson, C. Wilson, and Waldrep

With these principles in mind, the trial court analyzed the 2008 Council’s votes in relation to Preston’s Severance Agreement, as follows:

Larry Greer & Gracie Floyd

²⁵ The Ninth Affirmative Defense in Preston’s Answer to the Amended Complaint, which invokes application of the Supreme Court’s decision in Baird v. Charleston County, 333 S.C. 519 (1999), similarly compelled the lower court to analyze the votes of all Council members.

²⁶ All seven members of Anderson County Council attended the November 18, 2008 meeting of County Council. (R. p. 7.) All voted on Preston’s Severance Agreement. (Id.) The Council members in attendance included: Larry Greer (“Greer”), Gracie Floyd (“Floyd”), Bill McAbee (“McAbee”), Michael Thompson (“Thompson”), Ron Wilson (“R. Wilson”), Cindy Wilson (“C. Wilson”), and Bob Waldrep (“Waldrep”). (Id.)

²⁷ Preston notes that the State Ethics Act does not create a private right of action. (See R. pp. 3133-3134.) Preston incorporates the analysis from the same herein by reference.

No evidence of record called into question the propriety of the votes cast by Greer or Floyd. No party suggested any impropriety on the part of Greer and Floyd. As a result, the lower court found both the votes of Greer and Floyd as valid and proper.

Bill McAbee

Appellant initially questioned the propriety of McAbee's vote on the Severance Agreement but has since dropped the issue on appeal. (See App. Brief, p. 13, FN2.) Nonetheless, after considering all evidence of record, the Court found McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same. (R. pp. 7-8.) The trial court likewise found neither the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety. (Id.) Accordingly, the lower court found McAbee's vote was proper. (Id.) And, Appellant no longer substantively challenges the same.

Michael Thompson

The lower court found Thompson derived no financial benefit from Preston's Severance Agreement. But, because at the time he cast his vote Thompson continued to seek employment from Appellant, the lower court found, Thompson's vote ran afoul of ACC §2-37(g)(4)(e). (R. pp. 8-9.) The trial judge reasoned: "To a casual observer of the Severance Agreement vote...such facts and circumstances created a substantial appearance of impropriety." (Id.) Thus, "Thompson should have refrained from voting on Preston's Severance Agreement." (Id.)

Ronald Wilson

"R. Wilson similarly derived no financial benefit from the Severance Agreement vote." (R. p. 9.) Nor does Appellant argue to the contrary. (See App. Brief, pp. 14-15.)

But, like Thompson's, the lower court found R. Wilson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial appearance of impropriety prohibition because, "In the weeks before the Severance Agreement vote, R. Wilson's adult, emancipated daughter received an extension to her personal services contract ("Services Contract") with Anderson County." (R. p. 9.) "To a casual observer," the lower court concluded such facts and circumstances created a substantial appearance of impropriety. (*Id.*) Therefore, R. Wilson should have refrained from participating in the vote.²⁸ (*Id.*)

Wilson & Waldrep

The circumstances surrounding the respective votes of C. Wilson and Waldrep mirror each other and, as such, the Court treated them collectively. The trial court found both C. Wilson and Waldrep possessed direct financial interests in the Severance Agreement vote and their respective votes carried a substantial appearance of impropriety. As such, neither C. Wilson nor Waldrep should have participated in the Severance Agreement vote.

At the time of the Severance Agreement's adoption, C. Wilson and Waldrep were named, in their individual capacities, in a lawsuit brought by Preston. The complaint in that case sought costs and attorney's fees as well as injunctive relief. (R. p. 10.)²⁹ Preston alleged C. Wilson and Waldrep interfered with the execution of his job as County

²⁸ In so holding, the lower court found Appellant failed to introduce any evidence directly linking the Services Contract's extension to R. Wilson's Severance Agreement vote *and* R. Wilson received no direct benefit from the Services Contract's extension. Moreover, "no evidence establishe[d] R. Wilson knew of the Services Contract's extension when he voted." (R. p. 9.) Indeed, as the lower court found the evidence of record proved otherwise. (*Id.*; *see e.g.*, R. pp. 1473, lines 1-8; 1739, line 4-1740, lines 4-8.)

²⁹ Throughout the trial, the lower court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (*See e.g.*, R. pp. 2640-2647; *see also infra.*)

Administrator. (Id.) After the lawsuit commenced and well in advance of the Severance Agreement vote, Preston, by and through his personal attorney, also gave notice to County Council of both his claim for anticipatory breach of contract and tort claims he intended to pursue against C. Wilson and Waldrep personally, which both Council members acknowledged. (See FN29.)³⁰

Since Preston agreed not to pursue any further claims against any County Council member (see R. p. 1986, ¶6), the lower court found: "Waldrep and C. Wilson had a direct economic interest in the outcome of the vote regardless of the vote's outcome." (R. p. 12.)³¹ Applying the same standard as it applied to R. Wilson and Thompson, the trial court concluded: "[D]ue to a potential appearance of substantial impropriety, Waldrep and C. Wilson should not have participated in a vote on Preston's Severance Agreement while Preston maintained a lawsuit against them individually." (Id. (citing ACC §2-

³⁰ Appellant argues the release contained in the Severance Agreement conferred identical benefits upon all Council members. (App. Brief, p. 48, FN13.) According to Appellant, to the extent the release conferred benefits on all Council members, all votes were improper for the same reason. (App. Brief, p. 48, FN13.) The lower court correctly rejected this analysis since Anderson County Code §2-37(g) (4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." (R. p. 11, FN6.) The evidence at trial established: Preston had filed a lawsuit against C. Wilson and Waldrep individually, which remained pending at the time of the Severance Agreement vote (R. pp. 402, lines 16-24; 1679, lines 20-21; 1685, lines 10-23; 970, line 16-p. 972, line 3); and Preston had supplied notice of an intent to pursue tort claims against two Council members, which C. Wilson and Waldrep acknowledged referred to them (R. pp. 420, lines 13-21; R. p. 1679, line 11-p. 1680, p. 22). By contrast, at the time of the Severance Agreement vote, Preston had not filed a lawsuit nor given notice of his intent to pursue tort claims against any other member of the 2008 Council. Thus, the Severance Agreement conferred personal and financial benefits on C. Wilson and Waldrep greater than that of the general Anderson County public.

³¹ Having found Preston's Severance Agreement as a valid contract, as discussed below, the Court also found Paragraph 6 of the Severance Agreement establishes Preston's seventh affirmative defense of release.

37(g)(4).) The lower court continued: "Waldrep and C. Wilson [also] had personal and financial interests 'greater than that of the general Anderson County public' thereby prohibiting their participation and vote." (R. p. 12 (citing ACC §2-37(g)(4).)³² Accordingly, the lower court held Waldrep and C. Wilson should not have voted on the Severance Agreement or any related issues." (Id.)

B. The Trial Court Correctly Followed the Decision of Baird v. Charleston County

Having found the votes of Thompson, R. Wilson, C. Wilson, and Waldrep as improperly cast, the lower court next analyzed what impact flowed from such findings. (R. pp. 12-16.) In that regard, the trial court held the Supreme Court's holding in Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controlled. Adopting the majority view, the Baird Court held:

In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. See W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955). Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77-78 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955) ("[T]he

³² According to Appellant, the votes of Waldrep and C. Wilson should nonetheless be counted because they voted against Preston's Severance Agreement. (App. Brief, p.48, FN13.) In such instances, ACC §2-37(g)(4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." ACC §2-37(g)(4) The Ordinance contains no exception exists based upon how a Council member votes. (Id.; R. p. 12.)

Council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.”)³³

Relying upon a patchwork quilt of authority from other jurisdictions (see App. Brief, pp. 37-45), Appellant tries to side-step the plain holding of Baird arguing only one tainted vote sufficed to rescind the Severance Agreement.³⁴ (See App. Brief, pp. 36-45.) However, the lower court correctly relied upon the Baird decision in concluding the one tainted vote rule does not control in South Carolina.³⁵ Moreover, Baird does not indicate that South Carolina’s courts should consider the political position or relative strength of

³³ In following Baird, the lower court cited eighteen different opinions from around the country which accord with the Baird Court’s analysis and reject that of Appellant. (5/3/2013 Order, p. 13, FN 10 (citing cases from all over the United States).) Yet, Appellant simply ignores the authority cited by the lower court and fails to identify any error in the trial judge’s reliance upon the same.

³⁴ Had it not elected to follow the Baird holding, the trial court would "have had to consider what impact other tainted votes of Waldrep and C. Wilson had on the County’s ability to bring the instant lawsuit and the Court’s jurisdiction to hear Plaintiff’s claims." (R. p. 14, FN11.) "For example, votes approving the investigation of the Severance Agreement and to commence and maintain the instant lawsuit could prove void if, as [Appellant] urges, one tainted vote (such as those cast by C. Wilson and Waldrep) invalidated Council action." (See, e.g., R. p. 2933; Anderson County Meeting Minutes, Nov. 12, 2009 (publicly available at: http://www.andersoncountysc.org/web/Council_Minutes01.asp.) Due to the lower court’s findings, however, "further factual development and legal analysis, in this regard, prove[d] unnecessary to the...analysis." (R. p. 14, FN11.)

³⁵ Wholly ignored by Appellant, the lower court also noted: "[T]he superiority of the analytical framework established by the Baird Court." (R. p. 14, FN12.) Under Appellant’s urged approach, the "validity and finality of an otherwise valid action of a legislative body could be rendered uncertain by virtue of a judicial challenge arising out of an alleged appearance of impropriety, regardless of whether the challenged vote proved outcome determinative." Id. Like the lower court, this Court should reject "such [an] approach as inconsistent with the holding of Baird and the other authority discussed herein." (Id. citing Eways v. Reading Parking Authority, 385 Pa. 592, 604, 124 A.2d 92, 98 (1956).

elected officials advocating for one side or another when determining which votes to allow.³⁶ Indeed, such an enterprise would prove unworkable.

No South Carolina authority supports Appellant's premise wherein it argues South Carolina's courts should weigh the potential sway of individual officials when reviewing governmental decisions. (App. Brief, pp. 40-41.) The lower court correctly treated "each public official equally and [found] their respective votes warrant[ed] equal weight and independence."³⁷ (R. p. 14.) To hold otherwise would elevate one elected official's vote over another and cast South Carolina Courts into an unending pursuit of trying to appraise the respective political sway of various public officials.³⁸

The trial court's reasoning, in this regard, accords with substantial South Carolina precedent. As discussed below, South Carolina law disfavors substituting judicial

³⁶ Appellant continues to rely upon the decision of Thompson v. City of Atlantic City, 921 F.2d 427, 190 N.J. 359 (2007). The Thompson case proves wholly inapposite. Thompson arose under a peculiar set of facts under New Jersey's Faulkner Act. Indeed, Thompson nowhere discusses the treatment of votes of a legislative body when allegations of an interested transaction exists. (See R. pp. 3150-3151 (providing detailed analysis distinguishing Thompson.)

³⁷ Appellant mischaracterizes the Severance Agreement as conferring solely an "individual benefit." (See App. Brief, p. 38.) The lower court rejected this mischaracterization finding the evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. (R. pp. 15, FN13; 65-66; see also *infra* at FN 50.)

³⁸ Specifically, the lower court rejected Appellant's premise (which it repeats on appeal (see App. Brief, p. 40) that "because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence somehow overwhelmed the independent judgment of County Council's remaining elected officials." (R. p. 15.) As discussed below, each of the Council members whose votes the lower court "found as properly cast in favor of the Severance Agreement, articulated independent and lucid grounds supporting their respective votes." (See R. pp. 1254, lines 17-25; 1266, line 12-p. 1267, line 4; 616, line 17-p. 627, line 13; 660, line 7-663, line 19; 1614, line 16-1622, line 25.)

determinations for the decision-making of officials elected to make such judgments. (See R. p. 15 (discussing same).) Appellant simply ignores the lower court's citation to the decisions of Segars-Andrews v. Judicial Merit Selection Commission et al. and Bear Enterprises v. The County of Greenville et al., wherein South Carolina's appellate courts afforded "great deference to legislative bodies and their decision-making, both legislatively and judicially." (Id. citing Segars-Andrews, 387 S.C. 109, 130, 691 S.E. 2d 453, 469 (2010) (declining judicial intervention into political determinations conferred to a legislative body due to Separation of Powers constraints); Bear Enterprises, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("If the propriety of the Council's decision is even "fairly debatable," we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed."); S.C. CODE ANN. § 4-9-620 (conferring upon County Council the discretion to hire and remove County Administrators in Council-Administrator form of government).)³⁹

The Court next examined how many votes were necessary to approve the Severance Agreement. Pursuant to ACC § 2-37(g)(3), approval of the Severance Agreement required a simple majority of those members present and voting. (R. p. 16)

³⁹ Likewise ignored by Appellant, the lower court also relied upon the following cases: Griggs v. Hodge, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) ("As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency."); Schroeder v. O'Neill, 179 S.C. 310, 184 S.E.2d 679 (1936) ("The Court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious"); Plunkett v. Aiken, 159 S.C. 97, 108-09, 156 S.E. 245 (1931) ("The exercise of that discretion so long as it is not unreasonable or capricious, is a matter of policy with which the Courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the City Council, and we cannot sustain the decree of the Circuit Judge on this additional ground, as urged by the respondents."). (R. p. 16, FN14.)

(citing ACC § 2-37(g)(3) (“[A] majority vote of those members present and voting shall decide all questions, motions, and other votes.”). Upon applying the Baird holding and ACC § 2-37(g)(3) to the facts at bar, the trial court found a majority of votes of those present and properly voting approved Preston’s Severance Agreement.

The trial court then painstakingly analyzed each and every vote taken by the 2008 Council when approving Preston's Severance Agreement. (R. pp. 16-18.)⁴⁰ After doing so, the lower court correctly found: "After discounting the improper votes, the Court finds a majority of members present and voting duly passed Preston’s Severance Agreement." (R. p. 18.)⁴¹

⁴⁰ With respect to such analysis, Preston does not go through each and every vote analyzed by the lower court but instead incorporates the analysis from pages 16 through 18 of the lower court's order herein by reference. (R. pp. 16-18.)

⁴¹ Of all the votes leading up to the approval of the Severance Agreement, only the parliamentary vote to call for the question on the motion to reconsider was close. (See R. p. 17.) However, the lower court found, and Appellant does not contest, "that even if Waldrep and C. Wilson could have voted, no change in outcome would have manifested." (*Id.* at 17, FN15.) First, under Robert’s Rules of Order Article 1, §7, debate would have eventually expired regardless of the outcome on the subject vote to call for the question. Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (See, e.g., R. pp. 450, line 21-p. 451, line 8; 632, line 25-633, line 8; 1243, lines 16-20; 1268, lines 20-23; R. p. 1351, line 16-p. 1622, line 25.) Appellant failed to introduce "any evidence to the contrary," nor does it cite any on appeal. (R. p. 17, FN15.) Moreover, as the lower court found, "[H]ad such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement." (*Id.*) This did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. (See R. pp. 17, FN15; 18.) "Third, adverse parliamentary rulings can be appealed under the Anderson County Code." (R. p. 17, FN15 citing ACC § 2-37(g).) Here, as the lower court held, no appeal occurred. (See R. pp. 1918-1959.) Finally, South Carolina Courts do not review the parliamentary processes of legislative bodies. See State v. Lewis, 181 S.C. 10, 186 S.E. 625, 631 (1936) (“That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself.”); Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) (Same); see also MASON’S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975) (“[C]ourts will not disturb a ruling on a

III. THE 2008 COUNCIL'S APPROVAL OF THE SEVERANCE AGREEMENT DID NOT CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION

As noted by the trial court, "[i]t is not the prerogative of the courts to pass upon the wisdom of [a] County Council's decision."⁴² (R. p. 19 (citing Bear Enterprises v. County of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995).) "If the propriety of the Council's decision is even 'fairly debatable,' [South Carolina courts] cannot inject [their] judgment into a review of [County Council's decision], but must leave that decision undisturbed." Bear Enters., 319 S.C. at 141, 459 S.E.2d at 885. "The party challenging a governmental body's decision bears the burden of proving the decision [was] arbitrary."⁴³ Pressley v. Lancaster Cnty., 343 S.C. 696, 704, 542 S.E.2d 366, 370.(Ct. App. 2001). (R. p. 19.) Thus, Appellant was required, but as the lower court ruled, did not prove the arbitrariness of County Council's action "by clear and

parliamentary question made by a legislative . . . body having authority necessary to make rules for its government . . ."). Importantly, Appellant does not challenge any of the lower court's findings in this regard.

⁴² Appellant's seventh cause of action sought rescission based upon arbitrary and capricious decision-making as discussed herein.

⁴³ As to Appellant's second cause of action seeking rescission due to a violation of public policy, the lower court found: "[P]aragraphs 37 through 39 of the Amended Complaint never specif[ied] how the Severance Agreement's approval violated public policy..." (R. pp. 18-19.) But, in any event, the lower court found "greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body" since a "strong public policy [exists] in this state [whereby] South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute." (Id. citation omitted.) Appellant fails to address this finding altogether.

convincing evidence." (R. pp. 19-22 (citing Bear Enters., 319 S.C. at 141, 459 S.E.2d at 886.)⁴⁴

The lower court correctly found: "The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious."⁴⁵ (R. p. 20.) According to Appellant, the financial value of the Severance Agreement rendered Council's vote approving the same arbitrary and capricious because the amount paid under the Severance Agreement exceeded amounts owed under the strict operation of Preston's Master Employment Agreement. (See App. Brief, p. 24.) But the lower court expressly rejected this contention and made numerous factual findings, none

⁴⁴ Importantly, Appellant does not challenge any of the lower court's legal findings regarding the correct legal standards and burden of proof. In fact, Appellant simply ignores the same. (See App. Brief, pp. 20-32; R. p. 67 ("The [5/3/2013] Order analyzed the trial evidence through the correct legal standards for evaluating whether the 2008 County Council's decision-making was arbitrary and capricious, which the County does not contest or cite any authority to the contrary.) & FN45 (outlining factual findings uncontested by Anderson County).) R. pp. 2686-2697.) Moreover, until this appeal, Appellant never once challenged the legal standards employed in the lower court's decision and cannot do so for the first time now. (See R. p. 67 ("[T]he County does not contest or cite any authority to the contrary.)

⁴⁵ Appellant complains about the process under which the Severance Agreement was approved. However, what the Appellant really complains about is that a majority of the 2008 Council had sufficient votes to approve the Severance Agreement notwithstanding the vocal dissents of C. Wilson and Waldrep. What Appellant omits is that Anderson County had, as of November 18, 2008, passed almost all important decisions by a vote of 5 to 2, including the one before the Court. (R. pp. 632, line 25-p. 633, line 8.) Indeed, when Tom Bright first interviewed all 2008 Council members, his notes reflect that 5 members of the 2008 Council desired to end the blood feud between Waldrep, C. Wilson, and Preston and two (C. Wilson and Waldrep) opposed any mention of negotiating a severance. (R. p. 486, line 15-p. 487, line 25; 507 line 23-p. 508, line 13; 2413; 2424.) Moreover, Bright's notes further reflect that Waldrep and C. Wilson both knew about a potential severance over a month before the November 18, 2008 meeting. (*Id.*; R. pp. 509, line 13-p. 511, line 3; 2425-2427.) In fact, C. Wilson and Waldrep attended at least one of the personnel committee meetings in advance of November 18, 2008 where settlement with Preston was discussed. (R. p. 515, lines 1-21.)

of which Appellant challenged below or here. (C.f. R. pp. 20 *with* R. p. 24 & FN45 *with* R. pp. 3163-3176 *with* App. Brief, pp. 21-32.)⁴⁶

The 2008 Council's decision-making, as found by the lower court, proved reasonable in light of the steps the Council-elect had repeatedly leaked to the public as their intended course.⁴⁷ "Based on what the members of County Council knew at the time, such actions could very well have violated Preston's legal and contractual rights," as Preston's Master Employment Contract and South Carolina statute provided for a hearing before dismissal or suspension without cause. (R. pp. 20-21 (citing R. p. 1897, ¶13 & S.C. Code §4-9-620.) The evidence at trial clearly demonstrated that, by November of 2008, the issue of whether to suspend and dismiss Preston had already been made by

⁴⁶ First, the lower court found the approval of the Severance Agreement fell within the advice of counsel, Tom Bright, who conceded one of the options he gave the personnel committee was to settle with Preston (see R. pp. 525, line 18-p. 526, line 9) and also who opined a potential downside risk of two million dollars or more. (R. pp. 462, line 8-p. 463, line 12, Bright ("[T]his could certainly clear two million-dollars in exposure..."; 495, lines 19-21.) The lower court found: "Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement. " (R. pp. 20, FN16 citing 2026-2028; 454, lines 9-13; 490, lines 1-25 ("[Preston's attorney] specifically was identifying tort claims against individual council members...").) In addition, the Court found the release contained in the Severance Agreement exceeded the scope of the release contemplated by Preston's Master Employment Agreement. (Id. comparing R. pp. 1894, ¶E *with* 1986 ¶6; 527, line 11-p. 529, line 20.) And, Preston's Master Employment Agreement also contained an indemnity provision, which survived the Agreement, but was terminated under the Severance Agreement. (Id. comparing R. pp. 8 §14 *with* 1986 ¶6.) The lower court concluded: "Thus, contrary to Plaintiff's suggestions, county Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious. (Id.) Yet, Appellant ignores all of the lower court's findings in this regard.

⁴⁷ See R. p. 20; see also R. pp. 647, line 15-p. 648, line 11; 1788, lines 12-25; 2429-2434, 2635, 2825, 2826, 2831.)

Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. (R. p. 21 ("It is clear to this Court that the matter had been prejudged...").)⁴⁸ "To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer...who: "[E]stimated potential exposure, including attorneys's fees and costs, of up to two million dollars (\$2,000,000.00)."⁴⁹ (R. p. 21.)

The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious. In light of the information

⁴⁸ See also R. pp. 520, lines 8-19; 1260, line 10-p. 1261, line 1; 1788, lines 12-25; 1260, line 10-p. 1261, line 1; 2429-2434; 2635; 2825; 2827-2828; 2831.) While it is incorrect that the County did not have immediate exposure to Preston's potential claims, Appellant never explains why it is arbitrary or capricious for a sitting Council "to safeguard against imminent litigation, for which they had received notice and for which their employment attorney opined would expose the County of "estimated potential exposure, including attorney's fees and costs, of up to two million dollars (\$2,000,000.00.) (R. pp. 68-69 ("No authority exists to support the notion that elected officials must standby and idly watch as the County becomes entrenched in litigation. Legislative bodies routinely address issues in prospective fashion."); see also R. p. 484, lines 5-20 (concerned about claims particularly when new council arrived.) And, while Appellant downplays the validity of Preston's claims, Anderson County ignores the fact that a lawsuit was—at that very time—already pending against C. Wilson and Waldrep for interfering with his job functions. Moreover, as the lower court found, "If potential liability proved as speculative as [Appellant] suggests (see, e.g., App. Brief, pp. 21-23), the "County's employment attorney would not have identified a potential downside risk of up to two million dollars (\$2,000,000.00)." (R. pp. 22, FN19; 69, FN47.)

⁴⁹ See R. p. 462, lines 8-25 ("[T]his could certainly clear two million dollars in exposure..."); R. pp. 623, line 22-p. 624, line 3; see also 1254, lines 17-25; 1614, line 16-p. 1622, line 25. Of course, in hindsight, the 2008 Council's decision-making and analysis proved prescient even by the time of trial, since Anderson County had already spent more than two million dollars (\$2,000,000.00) in pursuing Joey Preston. (R. p. 1410, lines 2-21; 661, line 17-p. 662, line 6.) To date, that amount now approximates two million three hundred eighty-nine thousand two hundred and two dollars and twenty cents (\$2,389,202.20). (See R. p. 3244.) Ironically, the decision to spend nearly double the value of the Severance Agreement to rescind the Agreement in and of itself raises the specter of the arbitrary and capricious expenditure of public funds.

available to County Council when it approved the Severance Agreement, and in light of events occurring since, the lower court found Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice. (See R. p. 525, line 18-p. 526, line 9) (Conceding advice to Personnel Committee included several potential options including settling with Preston; conceding he informed Personnel Committee of potential downside of litigation); see also R. p. 2440, ¶F.)

By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It was clear to the trial court that the matter had been prejudged by the majority of Council-elect. (See supra.) To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million (\$2,000,000.00) dollars. (See R. p. 616, line 17-p. 617, line 22; 623, line 22-624, line 3; 1254, lines 17-25, Greer; 462, lines 8-25.)⁵⁰

During trial, each of the 2008 Council members, who the Court found properly voted for the Severance Agreement, provided independent and lucid reasons supporting their votes.⁵¹ Certainly their decisions were unpopular with segments of the community

⁵⁰ Appellant tries to downplay the potential risks to the County as opined by Tom Bright as a "worst case scenario." (See App. Brief, p. 29.) Yet, the evidence at trial showed Bright never supplied potential percentages as to likely outcomes. (See, e.g., R. p. 617, lines 15-22.)

⁵¹R. pp. 1-43 (citing R. pp. 1254, lines 17-25; 1260, line 10-p. 1261, line 1; 1266, line 2-p. 1267, line 4; 1614, line 16-p. 1622, line 25; 616, line 17-p. 617, line 17; 618, line 15-p. 619, line 2; 620, lines 14-24; 623, line 22-624, line 3; 627, lines 4-13; 660, line 7- p. 665, line 19; 2423.)

and with Council-elect. However, as the lower court found, Courts should not weigh the decisions of legislative bodies based upon the popularity of their decisions. (R. p. 22.) South Carolina's courts must instead judge whether a reasonable basis existed for making the decision in question. (Id.) Reasonable decisions can often be unpopular when they are made. (Id.)

As was stated in the Bear Enterprises case, if the decision made by the 2008 Council was “fairly debatable” the decision must remain undisturbed. 319 S.C. at 140, 459 S.E.2d at 885. Here, the lower court found the decision to approve the Severance Agreement was “fairly debatable.” (Id.) Moreover, upon taking office, Council-elect tellingly initiated this lawsuit presenting substantially the same issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this litigation and the underlying investigation have exceeded the County employment attorney’s 2008 estimate of two million (\$2,000,000.00) dollars. (See e.g., *supra* at FN48; R. p. 1410, lines 2-21, Allen (Testifying the instant litigation was already nearing two million dollars (\$2,000,000.00) in January of 2012); R. pp. 661, line 17-p. 662, line 6.) Therefore, this Court should affirm the lower court, as the 2008 Council’s decision to enter into Preston’s Severance Agreement was neither arbitrary nor capricious.⁵²

⁵² The County raised subsequent precedent to the trial court regarding the potential unenforceability of Preston’s Master Employment Agreement. Such precedent, however, did not change the lower court’s decision. At the time of the Severance Agreement’s approval, no such precedent existed. Legislative bodies do not have to foresee what an appellate court may decide five (5) years later. The question before the lower court was whether, based upon the information then available, County Council’s decision-making was fairly debatable. The lower court found that it was. Again, if the issue was so clear,

IV. PRESTON DID NOT BREACH HIS FIDUCIARY DUTY TO ANDERSON COUNTY

Appellant's third cause of action sought rescission of the Severance Agreement due to Preston's alleged breach of fiduciary duty resulting from violations of the State Ethics Act and Anderson County Code. (R. pp. 134-135, ¶¶40-46.) As an initial matter, the lower court found no evidence supported Appellant's contention that Preston breached a fiduciary duty by violating the State Ethics Act or Anderson County Code.⁵³ (*See infra* (discussing County Council members as those individuals who owed disclosure duties, to the extent applicable). As discussed above, the lower court discounted the favorable votes of Thompson and R. Wilson as contrary to the Anderson County Code inasmuch as such votes carried a substantial "appearance of impropriety." (*See supra*.) After doing so, the lower court found in favor of Preston in relation to the County's third cause of action.

The analysis applied by the lower court followed the Supreme Court's holding in Baird, 333 S.C. at 519, 511 S.E.2d at 69. In Baird, the State Ethics Commission advised the tainted voter not to vote on a Bond Ordinance. When the tainted voter ignored the State Ethics Commission and nonetheless voted, the remedy, as determined by the Baird Court, was to invalidate the tainted vote "in determining the necessary majority for valid action." Id. at 535, 511 S.E.2d at 77. The remedy was not to overturn the entire vote. Id.

the County's employment attorney would not have identified a potential downside risk of up to two million (\$2,000,000.00) dollars. (R. pp. 22, FN19; 69, FN47.)

⁵³ As to the specific nuclei of remaining allegations (*i.e.*, Thompson and R. Wilson), the lower court set out additional analysis discussed below.

Thus, the lower court found the correct remedy in this case "should be no greater than in Baird." (R. p. 23.)

Pursuant to the Supreme Court's holding in Baird, then, the lower court discounted the tainted votes and then determined "whether County Council would have still adopted the Severance Agreement." Baird, 511 S.E.2d at 78 (The court has jurisdiction to undo legislative action if the requisite number of votes "would not [have] exist[ed] but for the improper vote[s].") Unlike in Baird, however, when the trial court discounted the tainted votes in this case, the resulting vote remained unchanged.⁵⁴ Accordingly, Anderson County Council still approved Preston's Severance Agreement. The lower court, therefore, found in favor of Preston as to Plaintiff's third cause of action.

V. APPELLANT FAILED TO PROVE ITS CLAIMS FOR FRAUD, CONSTRUCTIVE FRAUD, AND NEGLIGENT MISREPRESENTATION

As to the fourth, fifth, and sixth causes of action, Appellant respectively alleged Preston committed fraud, constructive fraud, and negligent misrepresentation warranting the Severance Agreement's rescission. (R. pp. 134-138, ¶¶40-70.) The lower court found Appellant failed to prove the necessary elements of such claims.⁵⁵ Accordingly,

⁵⁴ Unchallenged by Appellant, the lower court similarly found: "No evidence of record establishe[d] any of the remaining votes of County Council would have changed had such Council members known the information about which Plaintiff complains." (R. p. 24, FN20.) In fact, the lower court found the opposite was true. Id. Moreover, as noted above, Anderson County failed to prove any connection linking the Thompson Allegations and R. Wilson Allegations to the Severance Agreement. Id. The Court instead discounted Thompson's vote and R. Wilson's vote due to the appearance of impropriety. Id.

⁵⁵ R. pp. 24-27 (citations omitted.)

the lower court found in favor of Preston as to Appellant's fourth, fifth, and sixth causes of action.

Appellant now reduces the factual bases for its fourth, fifth, and sixth claims to the Thompson and R. Wilson allegations. As discussed above, regarding Thompson and R. Wilson, Appellant "failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement." (R. p. 25.) "Moreover, to the extent duties of disclosure existed, the impacted *elected officials* possessed positive legal duties to disclose any issues implicating ethical matters." (*Id.*)⁵⁶ But, in any event, Appellant "failed to prove such disclosures were material to the outcome, as Plaintiff has not shown such disclosures, even if made, would have changed the votes of McAbee, Greer, and Floyd." (*Id.*) Indeed, as found by the lower court, "the evidence of record supports an opposite conclusion." (*Id.*) Appellant fails to address any of the lower court's findings in this regard.

Moreover, by November 18, 2008, the Court found "Preston did not possess a duty to disclose information about his employment claims to County Council." (R. p. 25.) "It [was] clear to [the lower court] that by October and November of 2008, Preston and County Council had assumed positions adverse to each other." (*Id.*) By that time, Preston

⁵⁶ The lower court also found: "[T]he County's [argument] improperly attempts to convert factual knowledge into knowledge of a 'legal conclusion.'" (R. p. 19.) "Misrepresentations as to matters of law cannot support claims for constructive fraud or fraud." (*Id.* at FN39 (citation omitted.) Moreover, "the County presented no evidence showing Preston knew Thompson's and Wilson's votes warranted disqualification due to legal constraints." (*Id.*) With respect to such matters, the Anderson County Code "expressly confers such duty, first on the individual Council member, and then if doubts persist, on the County Attorney." (*Id.*) "Simultaneously, the County seeks to transfer a duty conferred to the County Attorney on Preston under factual circumstances where Preston was represented by counsel and openly adverse to the County." (*Id.*)

had already sued two Council members individually, asserting claims for injunctive relief, payment of costs, and attorney's fees. (See, e.g., R. pp. 2640-2647.)

Preston had further employed personal counsel to advance a claim of anticipatory breach of his employment contract by Council and the Council-elect. (See, e.g., R. pp. 2029-2032.) Preston had likewise given notice of tort claims he intended to bring against individual Council members and Council-elect. (Id.) By this time, the County and the individual Council members each had retained their own attorneys to protect their interests.⁵⁷ "It [was, therefore," clear to [the lower Court], that at that time, the Parties were in adversarial positions...concerning the continued employment of Joey Preston." (Id.)

As to the Schaum issues, the Court found "the Services Contract was a public file and Preston had no duty to inform Council of public information." (R. pp. 1-43, see, e.g., S.C. CODE ANN. § 30-4-40(a)(5)(A).) "It had been widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County." (Id.) "Schaum's relationship with R. Wilson was likewise known." (Id.) "No evidence proved the Services Contract's renewal was in any way material or related to County Council's decision to approve Preston's Severance Agreement." (Id.) "The evidence further failed to prove [the 2008 County Council] would not have approved the Severance Agreement, regardless. (Id.) Indeed, the lower court found the evidence of

⁵⁷ The lower court further explained that—during the material time period—"Preston was a claimant against certain Council members and Council itself." (R. pp. 25-26.) As a result, the lower court found: "Preston did not owe County Council a duty to furnish information adverse to his claim: when both parties had employed attorneys, when both parties were preparing for litigation, and when the affected Council members themselves possessed positive legal duties to disclose the ethics issues cited by Plaintiff." (R. pp. 25-26.)

record proved otherwise. (Id.; see also R. pp. 1243, lines 16-20; 1268, lines 20-23.) Appellant has not challenged any of the lower court's findings in this regard.

As a result, the lower court correctly found in favor of Preston on Appellant's fourth, fifth, and sixth causes of action because: "no fraud, constructive fraud, or negligent misrepresentation arose by virtue of Preston's remaining quiet during the Severance Agreement vote...[and] the Severance Agreement was not the product of fraud nor was it an abuse of power." (R. p. 27.) Accordingly, this Court should affirm the lower court.

VI. APPELLANT FAILED TO TIMELY RAISE ITS OTHERWISE LEGALLY AND FACTUALLY INCORRECT QUORUM ARGUMENT

According to Appellant, the lower court erred because the disqualification of Waldrep's and C. Wilson's votes deprived the County of a quorum ("Quorum Argument"). (See App. Brief, pp. 47-50.)⁵⁸ Appellant's Quorum Argument fails due to the following reasons:

⁵⁸ Appellant errantly states: "Anderson County challenged only three votes cast for the Severance Package. No other votes were challenged in the pleadings." (App. Brief, p. 47.) Not so. Ignored by Appellant, the lower court found both the County's Complaint and Preston's Answer required the trial court to analyze the votes of all Council members. (R. pp. 6 & FN4; 133, ¶35; 59-60 & FN29-35.) As the lower court also found, "The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims Appellant alleged in seeking to invalidate Council's action." (R. p. 59.) Finally, Appellant never interposed a challenge to the lower court's finding where it held: "The Parties otherwise tried the issue of disqualifying Waldrep's and C. Wilson's votes pursuant to Rule 15(b), SCRCF...The court allowed the evidence at trial and addressed the same on page 6 of its Order." (Id.) Thus, the County errs by suggesting the issue was not adequately raised at trial because it clearly was.

A. Having Never Raised the Issue at Trial, Appellant Waived the Quorum Issue

First, as the lower court correctly found, the County failed to preserve the quorum issue "as the issue was never presented to the Court" during trial. (R. pp. 44-49; 58.)⁵⁹ Instead, Appellant impermissibly raised the issue—for the first time in its Motion to Reconsider—*after* evidence closed and *after* the lower court spent nearly five (5) months authoring its final order. (R. p. 58 & FN30-32.)

It is axiomatic: "A party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial." MailSource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct.App. 2003) Here, during the trial phase, the disqualification of Waldrep's and C. Wilson's votes arose *inter alia*: during Waldrep's cross-examination (see R. pp. 419, line 422, line 4), during Preston's directed verdict motion (see R. p. 1351, lines 13-21 ("[T]he Court should discount both the votes of Cindy Wilson and Bob Waldrep"), and in both Parties' closings (see R. pp. 3068-3069 *with* Preston's Closing, 3125-3126 & 3152).⁶⁰ Moreover, as the trial court

⁵⁹ The lower court also noted, "At trial, Plaintiff actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (R. p. 44.)

⁶⁰ The lower court correctly distinguished between the issue concerning the disqualification of C. Wilson's and Waldrep's votes under ethics provisions with the issue of whether a quorum existed. While related, the issues are legally and factually distinct involving different provisions of Anderson County's Code and different factual inquiries. (R. pp. 48-49 & FN8.) Thus, the two issues are not the same. If Appellant desired to raise the latter, it had ample opportunity to do so but for tactical reasons it did not. (See infra.)

found, "the evidence of record reflects the issue had arisen and was factually developed during the discovery phase." (R. p. 60, FN35.)⁶¹

Appellant implausibly suggests it lacked an opportunity to raise the quorum issue—until after the lower court entered judgment and it filed its Reconsideration Motion. Not so. During trial, what the County *did* was to pursue a discrepant legal and factual theory than what it advances on appeal. (R. p. 45.) As discussed above, the issue of

⁶¹ The County also off-handedly implies the general release contained in the Severance Agreement did not disqualify C. Wilson and Waldrep because: the release generally released *all* Council members (see App. Brief p. 47), C. Wilson and Waldrep voted against the Severance Agreement (see App. Brief p. 48, FN13), and the pending claims against C. Wilson and Waldrep were in their *official capacities*, not their individual capacities (Id.). The County both misstates and omits material facts supporting the lower court's ruling. First, the lower court specifically addressed all the issues now rehashed by Appellant without addressing the trial court's actual findings. The Court explained that the pending lawsuit and specific claims asserted against C. Wilson and Waldrep conferred upon them a greater benefit than that of the general Anderson County public in violation of Anderson County Code §2-37(g)(4). (R. p. 11, FN6.) The County just pretends as if the lower court never ruled upon the issue. Second, contrary to the County's brief (see App. Brief, p. 47), C. Wilson and Waldrep *were* named in their individual capacities, not their official capacities in the lawsuit of Preston v. Waldrep & C. Wilson, 2008-CP-04-2776. (See R. p. 10 ("C. Wilson and Waldrep were named, in their individual capacities."); 2640-2647 (caption identifying suit brought against C. Wilson and Waldrep in their "individual capacities"); 1679, lines 20-22 (C. Wilson testifying: Q. "And what capacity did Mr. Preston sue you? A. In our individual capacities.")) Appellant also ignores that the lower court found Preston, at the time of the Severance Agreement vote, had furnished formal notice of an intention to pursue "tort claims...against...C. Wilson and Waldrep." (R. pp. 10; 2026-2028 ("[T]here also exist a number of causes of action which Mr. Preston will assert against two current Council members..."); 1679, line 11-p. 1680, line 22, C. Wilson (It was clear Pl. Ex. 22 – R. pp. 2026-2028 - referred to C. Wilson and Waldrep.); 419, line 12-21 (Waldrep confirming Pl. Ex. 22 – R. pp. 2026-2028 - refers to him and C. Wilson.) Contrary to the County's statements, the Severance Agreement did release Waldrep and C. Wilson of personal liability and the pending lawsuit was dropped shortly thereafter. Finally, the County also failed to reference the lower court's rejection of its arguments concerning Waldrep's and C. Wilson's voting against their interests. (Compare R. p. 12 (Finding Waldrep's and C. Wilson's votes violated County Code and noting "No exception exists based upon how a Council member votes.") *with* App. Brief, p. 48 (FN 13: C. Wilson and Waldrep voted against the Severance Agreement.)

disqualifying Waldrep's and C. Wilson's votes clearly arose at trial. Appellant made a tactical decision not to raise the quorum issue but instead argued Waldrep and C. Wilson had no conflict of interest. (See, e.g., R. pp. 3068-3069.)

After having litigated and lost, the County sought a legal mulligan by way of a Rule 59(e) Motion—or alternatively—through a contemporaneous, post-trial Motion to Amend.⁶² (R. pp. 44-49; 58-59.) However, as the trial court found and as Appellant does not challenge, allowing Appellant to interject the quorum argument after judgment would highly prejudice Preston.⁶³

A. Appellant's Quorum Argument Fails Under the Anderson County Code, the County's Own Prior Usage, and State Law

Altogether ignored by Appellant and thus conceded, the lower court made detailed findings why Appellant's quorum argument otherwise fails. (Compare App. Brief *with* 11/08/2013 Order, R. pp. 46-49 & 58, FN29 *with* App. Brief, pp. 47-50.) The trial court first quoted language from the decision of Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998), which Appellant had omitted in its filing below and *again* tellingly omits in its brief to this Court. (R. p. 47, FN2 ("The County's Motion omitted the following operative language

⁶² Appellant's filing of the post-judgment motion to amend tacitly underscores that the County knows its choice in legal strategy waived the quorum issue foreclosing the ability to raise it in a Reconsideration Order.

⁶³ Unchallenged by Appellant, Preston incorporates herein by reference all of the factual findings of prejudice made by the lower court, which Appellant does not challenge. (R. pp. 45-46, 58 & FN29.)

from Garris...) with App. Brief, p. 49.)⁶⁴ The omitted language from the Garris decision stated:

In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum.

Garris, 333 S.C. at 453 (emphasis added). In turn, as is common with local government bodies, the lower court noted a series of "statutory" and "controlling provisions" modifying application of the common law rule as pertaining to boards in general. Thus, applying the twice omitted language from Garris to facts at bar sinks Appellant's quorum argument, as it well knows.

First, as the trial court found, the Anderson County Code itself establishes what constitutes a quorum based upon presence at the meeting site, not voting eligibility. (R. pp. 46-47.) For example, Anderson County Code §2-37(d) states: "Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum." ACC § 2-37(d).⁶⁵ Thus, the trial court correctly concluded

⁶⁴ The County's Brief cites a series of cases to support the common law proposition that "an interested director or committeeman cannot be counted in order to make up a quorum." (See App. Brief, pp. 48-51. The County simply ignores the lower court's actual ruling wherein it examined various statutory or other controlling provisions altering the common law default, as referenced by the omitted language from Garris. (R. pp. 46-49.) Importantly, re-tooling common law quorum formulations is the norm, not the exception, at the local government level due to council sizes and the necessity to make public decisions. As explained *infra*, the trial court found positive law, controlling provisions (*i.e.*, the Anderson County Code, FOIA, and the State Ethics Act) existed with respect to defining a quorum of Anderson County Council rendering the decisions cited by Plaintiff inapposite.

⁶⁵ The provision also states: "Members of county council may excuse themselves briefly during a meeting without loss of a quorum, however, no vote may be taken during the temporary absence of quorum." (*Id.*) Thus, it is clear the provision uses physical presence at the voting site as the touchstone for determining a quorum.

that consistent with the other provisions cited below, the only instances wherein the Anderson County Code contemplates the loss of a quorum relate to the physical absence of members, not their voting qualification or recusal issues.⁶⁶

Second, as to Preston's Severance Agreement, the County Code did not require a majority of Council to vote on the issue for the vote to be valid, but rather simply a majority of those present and voting to carry the question. (R. p. 47 & FN4.) Anderson County Code §2-37(g) states: "[A] majority vote of those members present and voting shall decide all questions, motions, and other votes." ACC §2-37(g)(3). As the trial court correctly found, the inclusion of this less onerous voting formula evidences an intent to permit governmental action on a vote less than a *majority of a quorum*, a formulation the Anderson County Code elsewhere uses for other types of Council action. See, e.g., ACC §2-36 ("All elections shall be by majority vote of the quorum present.").

Third, Appellant's *own* prior interpretation and usage of the Anderson County Code mirrors the lower court's findings. For example, during a meeting on August 19, 2009, substantially the same facts as those *sub judice* arose. After analyzing the Anderson County Code, the County Attorney opined--on the record--that the Anderson County Code required *only* the *physical* presence of a majority of Council to establish a quorum. (R. p. 47 & FN5; <http://www.andersoncountysc.org/Content/Council/Minutes/OCR/cc08182009.pdf> (pp. 13, lines 29-43, p. 17, line-20, line 37 (Council "ratifying" conduct); R. pp. 32-33, bullet point 5; R. p. 57, FN 28; 3296, lines 33-40; Id. at lines 33-

⁶⁶ See also Rainey v. Haley, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (Discussing the canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*).

36) (County Attorney: "Under the County Code it...requires a majority of the council members to be present for there to be a quorum.")

The County Attorney specifically concluded that two members, who had already recused themselves, could physically return to Council Chambers so as to re-establish a quorum but refrain from voting. (*Id.* at lines 38-40) ("Mr. Waldrep and Mr. Moore could certainly still be present and...we would have quorum of council at that point...") Notwithstanding those members' disqualification from voting, then, their *physical presence* permitted them, under the Anderson County Code, to be counted for purposes of a quorum. (*Id.* at lines 40-41.)⁶⁷ Indeed, this was Appellant's prior interpretation and usage of its own Code—at least until the case at bar prompted Appellant to about-face and argue the exact opposite.

However, Appellant's interpretation and usage of its Code cannot just blow hot and cold, depending on the most convenient legal position at any given time. This is because Anderson County Code §2-37(g)(12) mandates the interpretation of the County's Code "**shall** be guided by the previous usage of county council..." ACC §2-37(g)(12) (emphasis added).⁶⁸ As a result, the lower court correctly rejected Appellant's newly minted quorum argument for yet another reason—it violated the prior usage mandate of the Anderson County Code.

⁶⁷ Although Appellant spent four pages of its brief discussing its Quorum Argument, it never disclosed that its urged position contradicts the County's prior usage under its own Code. (App. Brief, pp. 47-51.) Appellant made the same omission below. (R. pp. 3177-3244.)

⁶⁸ See also ACC § 1-2 (Defining the term shall: "The word "shall" is mandatory.")

Finally, the Anderson County Code expressly incorporated the Freedom of Information Act ("FOIA") and the State Ethics Act into its meeting procedures. Both FOIA and the State Ethics Act define quorum without reference to voting disqualification. (Compare ACC §2-37(d) ("A quorum shall consist of a majority of the council"), ACC § 2-37(a) ("County council will conduct its meetings in accordance with the South Carolina Freedom of Information Act, as amended, and the state ethics laws, as amended, and the requirements of those acts and laws, as amended, shall apply to all notices, agenda, minutes, and other aspects of such meetings."); ACC § 2-676 (Mandating compliance with FOIA); ACC §2-352 ("[S]hall comply with the provisions of the South Carolina Freedom of Information Act") *with* S.C. CODE ANN. § 30-4-20(e) ("‘Quorum’ unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body."); see also South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997) (Analyzing substantially similar facts and concluding: "[D]isqualification under the Ethics Reform Act **does not affect the existence of a quorum.**") (emphasis added); Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 500, 685 S.E.2d 600 (2009) (South Carolina courts accord substantial deference to the State Ethics Commission's interpretation of its own enabling legislation.) For the foregoing reasons, the lower court correctly rejected Appellant's Quorum Argument.⁶⁹

⁶⁹ The County argues in a footnote that the Circuit Court erred in denying Appellant's Motion to Amend. (App. Brief, p. 50, FN15.) Having never raised this issue to the trial court in a Motion to Reconsider the Order denying its Motion to Amend, Appellant failed to preserve the issue for appeal. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 780–81 (2004). Second, Appellant fails to challenge any of the analysis contained in the lower court's order denying its Motion to Amend. Preston incorporates all such unanswered analysis herein by reference. (R. pp. 44-49.) Third, the lower court

VII. APPELLANT SEEKS A REMEDY FOR CONSTRUCTIVE TRUST WHEN THE EVIDENCE FAILED TO SUPPORT THE CLAIM

Appellant next argues the Circuit Court erred by foreclosing a remedy for a claim the County never proved. (App. Brief, pp. 51-52.) According to Appellant, the trial court erred by finding the County could not seize Preston's retirement benefits through a constructive trust theory.⁷⁰ Appellant's analysis lacks merit.

First, and as noted by the South Carolina Retirement System's ("SCRS") Brief (see SCRS Brief, pp. 8-9), the SCRS anti-alienation provision broadly exempts a member's retirements benefits from garnishment, attachment, or other legal process, with extremely limited exceptions. (See S.C. CODE ANN. § 9-1-1680.) Here, as the County concedes, the only possible exception applicable to the case *sub judice* arises under "the doctrine of constructive trust *ex maleficio*," which mirrors Appellant's tenth cause of action. (See App. Brief, pp. 51-52.)

As to Appellant's constructive trust claim, the lower court found Appellant failed to establish a constructive trust by "clear, definite, and unequivocal" evidence. (5/3/2013 Order, p. 30; 11/08/2013 Order, pp. 31-32) (citing Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559 (1987).) The trial court correctly found that fraud constituted an "essential element" to establish a constructive trust. (Id.) With respect to the same, the trial court

also denied Appellant's Motion to Amend under Rule 15(b), SCRCp, which also are not challenged by Appellant and cannot be upset on appeal.

⁷⁰Preston incorporates by reference his prior discussion regarding Appellant's failure to prove its case and the lower court's findings pertaining to the same. (See *supra*.)

wrote, "The County failed to introduce any evidence establishing fraud let alone by "clear, definite, unequivocal, and satisfactory evidence." (Id.)⁷¹

Appellant's Brief never challenges and, therefore, concedes the lower court's ruling regarding Appellant's failure to prove its constructive trust claim. Instead, Appellant argues: "The Circuit Court erred in holding that [SCRS] funds are not available to a court fashioning a remedy in equity." (App. Brief, p. 51.) Appellant's argument fails in internal logic because it leap-frogs the trial court's actual findings concerning the County's failure to prove its constructive trust claim in order to challenge the general legal availability of a remedy for a claim Appellant failed to prove. (App. Brief, pp. 51-52.) If allowed, Appellant's analysis would wag the dog by the argument's tail.

Second, Appellant simply misstates the lower court's ruling about imposing a constructive trust over SCRS-held retirement monies. The Court did not address if and when an equitable court had the power to re-direct SCRS retirement funds. (R. pp. 30; 74-75.) The issue proved moot because Appellant never proved the claim. (Id.)

Third, even if Appellant had proved its constructive trust claim, which it did not, the remedy advanced by the County still fails. Appellant ignores a crucial fact: the vast majority of Preston's retirement benefits have nothing to do with the instant dispute and do not even arguably fall within the exceptions to the anti-alienation statute. (R. p. 251, ¶¶4 & 5.) Yet, the County would have this court illegally redirect Preston's retirement funds. (App. Brief, p. 52.) Moreover, as SCRS points out, the funds "the County

⁷¹ The lower court cited Singleton v. Mullins Lumber Co., 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); see also Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979)(Evidence must leave "no reasonable doubt as to the existence of the trust."); McNair v. Rainsford, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct. App. 1998)

initially sought to recover from SCRS in its complaint have now been entirely" paid to Preston as "retirement benefits." (SCRS Brief, p. 6.) Finally, as SCRS correctly notes, the relief the County now urges—on appeal--was never even pled by the County. (See SCRS Brief, pp. 5-6; R. p. 139, ¶¶82-83.) Accordingly, this Court should affirm the trial court's ruling in favor of Preston.

VIII. THE LOWER COURT CORRECTLY FOUND RESCISSION UNAVAILABLE AS A REMEDY.

The lower court correctly ruled the County could not invoke rescission as a remedy for two reasons: (A) the Court could not restore the Parties to their prior subject positions (see R. pp. 29-31; 75-77) and (B) due to the County's unclean hands, Appellant could not invoke the lower court's equitable powers (see R. pp. 31-35; 57-58.).⁷² Both findings prove correct.

A. Rescission Proved Unavailable Because the Court Could Not Return the Parties to the *Status Quo* Before the Severance Agreement's Formation

Appellant once again claims "error" but ignores the lower court's actual rulings. In its final judgment, the lower court correctly found: "In order to invoke its equitable powers to rescind a contract, and in the absence of fraud, the Court must be able to return the parties to their *status quo* before the contract's formation." (R. p. 30 (citing King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct.App. 1984); Rice and Santos, Inc. v. Jones, 279 S.C. 201, 305 S.E.2d 74 (1983). The lower court further found the County

⁷² *Nothing* required Appellant to assert only equitable claims. Appellant chose to do so in order to deprive Preston of an insurance defense and coverage.

failed to prove any species of fraud whether actual, constructive, or otherwise. (R. pp. 24-27.)⁷³

Never explaining why the lower court erred, the County simply rehashes the errant analysis from its Reconsideration Motion wherein Appellant contended the lower court failed to address the availability of rescission due to "Preston's own culpability." (R. p. 3174.) Yet, the trial court expressly held: "[T]he Court rejects the County's premise, as it failed to prove any of its claims and, thus, failed to prove the 'culpability' it directs at Preston. The Court, therefore, rejects the County's twelfth ground as it again errantly assumes a conclusion it failed to prove." (R. p. 75.) Appellant nonetheless seeks reversal of the lower court arguing the Oxford Court did not really mean "fraud" when it said "fraud" and further urging this Court to disregard controlling precedent by allowing rescission—despite an irreversible change of circumstances—so long as one party utters the word "fraud" despite altogether lacking any proof.⁷⁴

Appellant misstates South Carolina precedent only to misdirect the Appellate Court to the law of other jurisdictions, which it then misstates.⁷⁵ Appellant argues the

⁷³ Preston notes that the lower court also found that, "[A]n adequate remedy at law...exist[ed]. Generally, in South Carolina, 'equitable relief is unnecessary when an adequate remedy...is available at law.'" (R. p. 35 (citations omitted).) Appellant never challenged this finding and it is now the law of the case.

⁷⁴ Appellant recycles (now for a third time) the same argument never bothering to explain how or why the lower court's factual findings prove incorrect. (App. Brief, pp. 52-55.) Appellant improperly asks the Court to substitute its own weighing of the evidence over the that of an experienced trial judge who presided over the instant case for years.

⁷⁵ Appellant misstates the authority cited in its brief. (App. Brief, pp. 53-54.) First, Appellant cites Admiral Ins. Co. v. Am. Nat'l Sav. Bank, F.S.B., 918 F.Supp. 150, 156 (D. Md. 1996). The Admiral decision analyzes a restitution claim for funds mistakenly paid under an insurance contract where the parties agreed no coverage actually existed. The Court examined whether under Maryland law the Bank had established change of

Circuit Court "misplaced" its reliance on King v. Oxford. (App. Brief, p. 53.) Specifically, according to Appellant, the Oxford Court did not really mean what it held when it wrote: "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the *status quo* prior to the contract." Id. Apparently, when citing the King decision in 2009, the South Carolina Supreme Court likewise did not mean to restate the identical holding in Brazell v. Windsor, 384 S.C. 512, 517 (2009)("In the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract.") Appellant conspicuously omitted the Brazell decision when attributing error to the lower court's holding.⁷⁶

Appellant again cites the decision of Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 452 (4th Cir. 2004) but again ignores the lower court's analysis regarding Griggs. As the lower court explained, Griggs was an ERISA case and had no "bearing on

circumstances, not for purposes of rescinding a contract, but for purposes of whether repayment was required. The Court found the defense had not been properly pled and that the Bank had not actually changed its circumstances so as to support the defense. Id. Appellant then cites Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441, 447 (N.Y. App. Div. 2002). Unlike the Admiral decision, Sokolow *did* involve a rescission claim. The Sokolow Court found summary judgment should not have been granted because the case involved a fraudulent inducement, which if proven at trial, might justify rescission of the Agreement notwithstanding SDMC's change of position. Id. In addition, also omitted by Appellant, the Sokolow opinion relied upon the decision of Butler v. Prentiss, 158 N.Y. 49, 64 (N.Y. 1899) which held: "When, without fault on the part of the one defrauded, seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied." (Id.) Thus, the opinions cited by Appellant accord with the lower court's ruling and not Appellant's arguments.

⁷⁶ The fraud, misrepresentation, concealment and imposition reference different species of fraud. Appellant's argument makes a distinction without a difference.

South Carolina law." (*Id.* at 33.) Moreover, Griggs actually supports the trial court's ruling as it confirms rescission is generally disallowed unless the parties can be restored to their prior positions. (*Id.*) (*citing* DAN B. DOBBS, HANDBOOK ON REMEDIES § 9.4 at 622 (West 1973) ("The general rule . . . is that the adult plaintiff must make restoration of what he got under the contract in order to get rescission, and his inability to do so will not excuse such restoration. In such a case, he may be permitted to recover damages, but rescission will be barred by his inability to make restoration to the defendant.")).⁷⁷

Third, the Griggs decision states: "rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief." *Id.* Yet, precisely for the reasons stated in the May 3, 2013 Order on pages 30 and 31, rescission (even if Plaintiff had proved its non-fraud based claims) cannot be granted in this case in a manner that does equity to both parties.⁷⁸

⁷⁷ Appellant cannot reconcile its argument with the South Carolina precedent requiring parties seeking to invalidate a settlement agreement or release to tender the consideration of whatever has been received under such compromise. *See, e.g., Taylor v. Palmetto State Life Ins. Co.*, 196 S.C. 195, 12 S.E.2d 708, 710 (1940); *Dunaway v. United Ins. Co. of Am.*, 293 S.C. 407, 410, 123 S.E.2d 353, 354 (1962) (same); *Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 749 (D.S.C. 2001); *Adams v. Moore Bus. Forms, Inc.*, 224 F.3d 324, 331 (4th Cir. 2000). Furthermore, Appellant is required to affirm the entire settlement agreement or rescind it in its entirety. 28 S.C. JUR. *Fraud* § 17; *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 497, 386 S.E.2d 245, 249 (1989) ("A defrauded party is not allowed to rescind in part and affirm in part – he must do one or the other."). Here, Appellant never tendered Preston his position back to him. Indeed, Appellant admits it cannot. (App. Brief, p. 54.) Yet, the County seeks to undo the Severance Agreement--in part--while retaining all of the benefits inuring to its favor. By contrast, South Carolina law firmly supports the lower court's ruling.

⁷⁸ Appellant does not contest any of the lower court's factual findings as to why the Parties cannot be returned to their prior positions, which Preston incorporates herein by reference. (R. pp. 30-31.)

Nor has Appellant ever explained how rescission could occur and do equity to both parties.⁷⁹

Finally, Appellant repeats rescission as appropriate due to the public nature of the contract. The County cites no South Carolina authority supporting its assertion that a Court in equity should place a County's contracts on unequal footing with those of private citizens. In its brief and below, the County cited the inapposite decision of Thompson v. City of Atlantic City, 921 A.2d 427 (N.J. 2007), bottomed on unique aspects of New Jersey law, for the proposition that rescission is the proper remedy when "a public act has been taken improperly."⁸⁰ (App. Brief, p. 56.) As noted *supra* and incorporated herein, however, the lower court found—for a wide number of reasons (yet again ignored by Appellant)—the Baird decision controlled. (See R. pp. 12-14; *see also supra*.) As a result, this Court should affirm the lower court.⁸¹

B. . . Appellant's Unclean Hands Barred Anderson County From Invoking the Equitable Remedy of Rescission

⁷⁹ Appellant also challenges the lower court's observation that Appellant could have filed a declaratory judgment action, which would have avoided the problematic approach of solely seeking rescission in a case where the pursuit of such relief would prove improper. (R. pp. 34-35; *see also* App. Brief, p. 56.) As the lower court held, S.C. CODE ANN. §15-53-20 authorizes South Carolina courts to grant "further relief" based upon a judicial declaration "whenever necessary or proper." (R. p. 77.) Yet, Appellant elected to pursue rescission as a remedy only to complain about the constraints accompanying the sole remedy it chose.

⁸⁰ The Thompson decision involved unique issues under New Jersey's Faulkner Act, which have no application to the case at bar or under South Carolina law. *Id.* at 42.

⁸¹ The County disingenuously suggests that Preston's retirement funds can be taken so as to support rescission as a remedy. (See App. Brief, p. 54.) As discussed above, such a result would violate South Carolina law. *See supra*.

Without ever addressing the lower court's findings, Appellant questions whether the lower court's unclean hands analysis properly distinguished Anderson County from its Council members. (See, e.g., R. p. 3165.) But, as the lower court found, pages 32-34 of its May 3, 2013 Order contained eight bullet points setting forth the factual basis supporting the unclean hands finding. (R. p. 57.) By contrast, bullet point nine listed actions the lower court did not find as properly attributable to Appellant. Id. Appellant never contests the accuracy of any of the factual findings made by the lower court.⁸² Nor does Anderson County explain how the lower court erred in attributing the conduct outlined in bullet points one through eight to Appellant.

Moreover, in relation to Bullet Point 5 in the lower court's May 3, 2013 Order, Appellant expressly ratified the improper conduct in Anderson County Council Resolution 2009-63. (See R. pp. 3180; 57 FN. 28 (Finding: "Notably, Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63.") The lower court found sitting County Council members, C. Wilson and Bob Waldrep, "intentionally thwarted [and]...interfered with [Preston's] ability to do his job..." (R. p. 33 (citing R. pp. 2460-2647, ¶¶27 & 29 and 1686, line 5-1687, line 8 (C. Wilson suggesting Ex. 50 constituted judicial misconduct).) And, the lower court correctly found Anderson County expressly ratified the conduct.⁸³

⁸² Preston incorporates herein by reference all of the factual findings made by the lower court in support of the unclean hands findings—none of which Appellant challenges on appeal. (R. pp. 32-34.)

⁸³ See R. pp. 32-33, bullet point 5; R. p. 57, FN 28; 3296, lines 33-40; Id. at lines 33-36) (County Attorney: "Under the County Code it...requires a majority of the council members to be present for there to be a quorum."); <http://www.andersoncountysc.org/Content/Council/Minutes/OCR/cc08182009.pdf> (pp. 13, lines 29-43, p. 17, line-20, line 37 (Council "ratifying" conduct); see also R. pp. 3300-

The County's brief advances no effort to deny the stark underhandedness of certain of its Council members, all while acting in concert with Council-elect. As noted by the Florida Supreme Court, governmental entities, like Anderson County, must abide by the same equitable contours as private citizens: "If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'" Daniell v. Sherrill, 48 So.2d 736, 739 (Fla. 1950). In this instance, the lower court correctly held Anderson County to a like standard of rectangular rectitude. This Court should affirm.

IX. APPELLANT BREACHED PRESTON'S SEVERANCE AGREEMENT

The lower court correctly found the lawsuit brought against Preston violated the unambiguous terms of Paragraph Eight of the Severance Agreement. (R. pp. 35; 1987, ¶8.) Appellant now improperly challenges this finding for the first time on appeal, as it appears nowhere in Anderson County's Motion for Reconsideration. (R. pp. 3163-3176.) As a result, the lower court's finding in this regard cannot be challenged by the County. See Ion, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716 (2000).

3303 publishing Resolution 2009-63: "This is a resolution authorizing and ratifying payment of legal expenses incurred by Bob Waldrep..." and "Waldrep incurred those legal fees in defending" a lawsuit challenging the "actions taken by Mr. Waldrep and Ms. Wilson as member of council." (emphasis added.) To clarify, Preston sued Wilson and Waldrep individually for intentional acts of misconduct which Judge Nicholson found to interfere with his job duties in violation of Home Rule. In an effort to justify paying Waldrep's legal fees on the 'public dime,' the County passed Resolution 2009-63, *after* public monies had already been expended to pay Waldrep's legal expenses. Nonetheless, the County is simply being disingenuous if it means to suggest that it did not formally ratify C. Wilson and Waldrep's misconduct from the fall of 2008.

The lower court nonetheless did not err in finding the County breached the Severance Agreement. According to the County, the instant lawsuit merely attacks the Severance Agreement, not Preston's actions while County Administrator.⁸⁴ Not so. The lower court expressly rejected this contention. (R. p. 36.)⁸⁵ The lower court found: "It is clear the County based the instant lawsuit upon actions taken by Preston while performing his job as Administrator."⁸⁶ (*Id.*) The lower court also ruled that: "[S]everal of [Appellant's] causes of action attempt, albeit unsuccessfully, to invoke Preston's employment as a predicate to stating a claim."⁸⁷ (*Id.*) Appellant never challenged any of these factual findings below and indeed does not challenge them on appeal.⁸⁸

⁸⁴ While the County generally raised issues concerning Preston's breach of contract counterclaim in its closing, *see* R. p. 3142, Appellant never challenged the lower court's factual findings and legal analysis from the May 3, 2013 Order. (*See* R. pp. 3163-3176.) The lower court's legal analysis and factual findings were detailed and thorough. Yet, Appellant has never before suggested such findings erred.

⁸⁵ It is plain that Anderson County never had any intention of simply challenging the Severance Agreement's validity. For three (3) years, the County conducted unending discovery into and introduced evidence at trial that had nothing to do with the Severance Agreement. The entire objective of the lawsuit was to publicly embarrass Preston and his family including his children.

⁸⁶ *See* R. p. 36 (citing R. pp. 129-130, ¶¶12, 13, & 17 (Preston's attempted hiring of Thompson); *Id.* at 131-132, ¶¶25-28 (renewing Services Contract with R. Wilson's daughter); *Id.* at 132-133, ¶¶30-33 (challenging temporally remote travel reimbursements of McAbee); *Id.* at 129, ¶¶11(a)-(c) (Preston's supposed "back-dating" of Jones' employment memos, which were shown as not back-dating at all.)

⁸⁷ *See* R. p. 36 (citing Am. Compl., Fifth Cause of Action (Constructive Fraud); Sixth Cause of Action (Negligent Misrepresentation); Seventh Cause of Action (Breach of Fiduciary Duty); Ninth Cause of Action (Breach of Fiduciary Duty on other grounds.)

⁸⁸ Appellant attempts to cite the testimony of Attorney Tom Bright to establish the intent of the provision. (*See* App. Brief, p. 57 (citing R. p. 472).) First, such testimony constitutes improper parol evidence since the County never challenged the Court's finding that the covenant to sue was unambiguous. Second, the County omits Bright's

Moreover, the lower court cited numerous decisions holding "that obvious breaches of covenants not to sue support the award of damages in the amount of attorney's fees incurred as a result of the breach." (R. p. 37.)⁸⁹ The County never challenged any of the authority cited by the lower court below, nor does it do so now.⁹⁰ Appellant further ignores the lower court's analysis of this Court's decision in Benedict College v. National Credit Systems, Inc. v. Ford, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012), which stands for the proposition that attorney's fees "can form an element of recoverable damages—if—as in this case, they flow from the complained of wrong." (R.

testimony where he testified the intent of the provision was "a no fault divorce" and the Parties were not "gonna have anything to do with each other." (R. p. 473, lines 1-4.)

⁸⁹ Specifically, the lower court cited cases from eight other jurisdictions which Appellant simply ignores and Preston incorporates herein by reference. (R. p. 37 (for case citations). Appellant never moved to reconsider the lower court's reliance on any of the authority cited in its May 3, 2013 Order. Nor does the County presently provide any analysis why the cases cited by the lower court prove inapplicable.

⁹⁰ Appellant does cite two inapposite cases. First, Appellant cites the decision of Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp., 358 F.2d 1007, 1016 (D.C. Cir. 1985). Unlike here, Winchester involved an oral covenant not to sue and its validity was challenged under the California Statute of Frauds. Moreover, in Winchester, the parties disputed whether construction of the oral covenant not to sue extended to one or two disputes. Contrary to Appellant's arguments, the Winchester Court noted: "[A]ttorney fees necessarily incurred in defense of suit are a proper item of damages." Id. at 436. Thus, in Winchester, the Parties had a *bona fide* dispute over the breadth of the covenant not to sue and whether it embraced the specific lawsuit before the Court. Here, the covenant not to sue unambiguously embraces all conduct during Preston's employment, which the County clearly integrated into its claims for rescission. Second, Appellant cites the decision of Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1016 (D.C. Cir. 1985). Anderson County misstates the holding of Schneider, a decision that actually supports the lower court's ruling. Id. at 1016 ("A settlement agreement is, of course, a contract... and litigation in defiance of a promise not to sue could constitute a breach. But no such situation presents itself here. The August 4 Settlement Agreement contains no explicit covenant not to sue.")

p. 38.) Appellant likewise never challenged this analysis and continues to ignore the same on appeal.

As with all of the County's arguments, Appellant assumes the conclusion—a conclusion it never proved. Appellant argues: "Even if this Court were to conclude the Severance Agreement should not be rescinded, the Circuit Court's holding that the County's challenge violated that Agreement should be reversed...[because] the circumstances of the Severance Agreement's passage were extraordinary..." (App. Brief, p. 58.) Yet, Appellant failed to prove any of its eleven causes of action supporting rescission of the Severance Agreement. No legitimate basis existed to pursue the instant lawsuit and—after hearing all of the evidence and weighing the credibility of all the witnesses—the lower court correctly found Appellant's lawsuit breached the covenant not to sue in the Severance Agreement.⁹¹

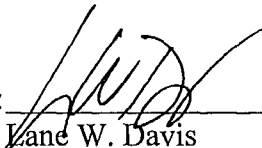
Appellant also improperly asks this Court to issue an advisory opinion on whether attorney's fees prove available pursuant to S.C. CODE ANN. § 15-77-300. Anderson County never raised this issue in its Motion to Reconsider. (R. pp. 3163-3176.) Moreover, the lower court has not yet ruled on the availability of attorney's fees under the statute. (R. p. 40.) Advisory opinions are disallowed and the Court should refuse such a request. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

⁹¹ The lower court also correctly found: "The covenant not to sue does not...contain an exception to challenge the actions taken by Preston while County Administrator, so long as those challenges are raised in contesting the Severance Agreement's validity... To hold otherwise would render the provision meaningless." (R. p. 37.)

CONCLUSION

For the reasons set forth above, this Court should affirm the lower court's final judgment.

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October 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No.: 2013-002499

Anderson County, ...Appellant,

v.

Joey Preston and the South Carolina Retirement System, ...Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA RETIREMENT SYSTEM

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STATEMENT OF THE ISSUE ON APPEAL

MUST ANY REQUEST FOR RELIEF AGAINST A RETIRED MEMBER OF THE SOUTH CAROLINA RETIREMENT SYSTEM THAT WOULD ATTACH OR OTHERWISE REDIRECT HIS RETIREMENT BENEFITS FROM THE SYSTEM COMPLY WITH THE ANTI-ALIENATION AND OTHER BENEFIT DISTRIBUTION PROVISIONS OF THE RETIREMENT CODE?

STATEMENT OF THE CASE

By a complaint filed on November 12, 2009, Appellant Anderson County (“County”) initiated this matter, in which it seeks to rescind a severance agreement entered into between the County and Respondent Joey Preston (“Preston”) in connection with the termination of Preston’s employment as the county administrator for the County in November 2008. (R. pp. 84-96.) As part of that severance agreement, the County agreed to, and did, pay a sum of money to Respondent South Carolina Retirement System (“SCRS” or “System”) to purchase service credit for Preston in the System. The County has not alleged that SCRS acted improperly or was otherwise responsible for any wrongdoing in connection with that service purchase, but has named SCRS as a defendant in this matter “only for the purposes of recovering funds paid to it by Anderson County on behalf of the defendant Preston.” (R. p. 84, Compl. ¶ 3.) On January 14, 2010, SCRS filed an Answer and Cross-Claim Against Defendant Preston in response to the County’s complaint. (R. pp. 97-108.) The County subsequently filed an Amended Complaint on March 30, 2012, which did not materially change any of the County’s allegations related to SCRS. (R. pp. 127-159.)

On September 14, 2012, SCRS filed a Motion for Summary Judgment, in which it contended that there were no genuine issues of material fact regarding the claims asserted against SCRS in this matter, and that, as a matter of law, (1) the extent of any potential

liability of SCRS to the County is limited to the amount of the County's service purchase payment that has not been exhausted through the payment of retirement benefits to Preston, and (2) once that amount is exhausted in its entirety, SCRS should be dismissed as a party from this case because it would no longer be a stakeholder of the funds in dispute. (R. pp. 238-246.) By an Order filed October 23, 2012, the Honorable Roger L. Couch denied the System's motion for summary judgment. (R. pp. 82-83.) Although the court "determined the South Carolina Retirement System's liability should be limited," the court further found that there were remaining questions of fact regarding the exact amount of the remaining liability, such that the System's motion for summary judgment should be denied. (R. p. 83.)

This case was tried without a jury before Judge Couch from October 29, 2012, through November 2, 2012. Because SCRS did not have a position on the underlying merits of the dispute between the County and Preston regarding whether his severance package should be rescinded, SCRS requested to be, and was, excused from appearing at the trial of this case. In lieu of an appearance by SCRS and any witnesses from the System, the parties submitted written stipulations to the court for the admissibility of certain evidence related to SCRS, including two affidavits executed by SCRS employees regarding Preston's retirement benefits. (R. pp. 249-263.) By a Final Order and Judgment dated May 3, 2013, Judge Couch ruled in favor of Respondent Preston as to all causes of action asserted by the County. (R. pp. 1-43.) In particular, because the court did not find that the severance package should be rescinded or otherwise invalidated, it concluded that the County's cause of action seeking to impose a constructive trust upon

Preston's retirement benefits "no longer remain[ed] viable" and ruled in Preston's favor on that cause of action. (R. p. 29.)

Appellant Anderson County filed a Motion to Alter or Amend Judgment on May 13, 2013 (R. pp. 3163-3176), and a post-trial Motion to Amend Complaint on July 15, 2013 (R. pp. 3245-3270). By an Order dated November 7, 2013, Judge Couch denied both of the County's post-trial motions. (R. pp. 44-79.) Notably, the court found that the County "was required [to], but did not, prove fraud, as an 'essential element' to establish a constructive trust" on Preston's retirement benefits. (R. p. 74.) By a Notice of Appeal filed on November 22, 2013, the County appealed Judge Couch's Final Order and Judgment and his Post-Trial Order to this Court, resulting in the instant proceeding.

FACTS

Respondent Joey Preston was employed by Appellant Anderson County as county administrator between 1996 and 2008. At a county council meeting on November 18, 2008, the County approved a Severance Agreement and Release of All Claims between the County and Preston under which the County awarded Preston a \$1.1 million severance package in return for Preston relinquishing his position as county administrator as of November 30, 2008. As part of the severance agreement, the County agreed to pay \$359,258.00 to SCRS in order to purchase service credit in the System for Preston so that he could retire. The retirement benefits obtained by Preston in connection with the severance agreement, and the County's claims against those retirement benefits, are set out in detail below.

I. Preston's Retirement Benefits

At the time of the termination of his employment with the County on December 30, 2008, Preston had accrued 21 years, 9 months, and 2 days of earned service credit in SCRS as a result of his employment with the County and several other local governmental entities, beginning with his enrollment in the System in April 1987. (R. p. 251, Nichols Aff. ¶¶ 4, 5.) By checks dated November 19, 2008, and December 11, 2008, the County paid a total of \$355,848.95 to SCRS to purchase 7 years, 7 months, and 23 days of additional service credit in the System for Preston. (R. p. 251, Nichols Aff. ¶ 6.) With the combination of his earned service, the service purchased for him by the County, and 4 months and 15 days of service credit for his unused sick leave, Preston had a total of 29 years, 9 months, and 10 days of credited service in SCRS as of the end of December 2008. (R. pp. 251-252, Nichols Aff. ¶ 7.) Based upon that service credit, Preston was eligible to, and did, retire from the System on a service retirement allowance on January 3, 2009, at the age of 45. (R. p. 251, Nichols Aff. ¶ 3.) Notably, without the service credit purchased for Preston by the County, Preston would not have been eligible to retire in January 2009, because he would not have had the 28 years of credited service required for retirement under SCRS at his age. (R. p. 252, Nichols Aff. ¶ 8.)

As the result of the County's service purchase on Preston's behalf and his subsequent retirement, SCRS became legally obligated to pay a monthly retirement annuity to Preston for the rest of his life. (R. p. 252, Nichols Aff. ¶ 9.) Upon his retirement in January 2009, Preston's monthly retirement benefit was \$7,371.16, and, by the time of trial, that monthly retirement benefit had increased to \$7,688.07 as the result of cost-of-living adjustments awarded in the intervening years. (R. p. 252, Nichols Aff. ¶

10.) Consequently, by October 2012, SCRS had paid Preston accumulated monthly benefits totaling \$344,937.38. (R. p. 250, Stipulations as to Evidence Related to Defendant South Carolina Retirement System ¶ 4.) Those benefits would not have been payable at that time and in that amount if not for the service credit purchased by the County for Preston. (R. p. 252, Nichols Aff. ¶ 8.) Further, with the issuance of Preston's monthly benefit check for December 2012, SCRS had paid more in retirement benefits to Preston than the County paid to SCRS for the service purchase that made him eligible to retire. (R. p. 252, Nichols Aff. ¶ 11.)

II. The County's Claim Against Preston's Retirement Benefits

In the first through ninth and the eleventh causes of action stated in the County's amended complaint, the County alleges that the severance agreement between the County and Preston should be invalidated and rescinded based upon various forms of alleged misconduct committed by members of the county council and Preston and that all monies paid to Preston and SCRS pursuant to the severance agreement should be returned to the County. (R. pp. 133-140, Am. Compl. ¶¶ 35-36, 38-39, 45-46, 52-53, 60-61, 69-70, 73-74, 76-77, 79-80, 86-87.) In the tenth cause of action, the County alleges that "[t]he amounts paid to [SCRS] pursuant to the Severance Agreement were wrongfully paid" by the County and that "[i]t would therefore be inequitable for those amounts to remain in the possession of the System, or to be held for the benefit of Preston." (R. p. 139, Am. Compl. ¶¶ 82-83.) As relief for this cause of action, the County requests that a constructive trust be imposed on the amounts paid by the County to SCRS on Preston's behalf and that those amounts be repaid to the County. (R. p. 139, Am. Compl. ¶ 84.) It is important to note that the County has not alleged that SCRS acted improperly or is

otherwise responsible for any wrongdoing in connection with these transactions. To the contrary, in its complaint the County emphasizes that it has named SCRS as a defendant in this matter “only for the purposes of recovering funds paid to it by Anderson County on behalf of the defendant Preston.” (R. p. 127, Am. Compl. ¶ 3.)

However, because the funds that the County initially sought to recover from SCRS in its complaint have now been entirely transferred to Preston through the payment of his monthly retirement benefits (R. p. 252, Nichols Aff. ¶ 11), the County is no longer seeking the immediate return of the funds paid to SCRS by the County on Preston’s behalf in a lump sum. In fact, the County has consistently stated that it is not seeking any relief in this matter that would harm SCRS, such as the fiscal harm that would result if SCRS were required to refund monies to the County that had already been expended in paying a retirement benefit to Preston. (R. p. 3089, Plaintiff’s Post-Trial Memorandum at 37 (“The County is not seeking any relief in this case that would put SCRS in a worse position than it is currently in. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay.”); Initial Brief of Appellant at 51 (“None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay.”).) In lieu of such an immediate return of the service purchase amounts, the County is now seeking to have Preston’s monthly retirement benefit from SCRS placed in a constructive trust to be paid to the County as a means for Preston to make restitution to the County for the amounts paid to him or on his behalf pursuant to the severance agreement. (R. p. 3090, Plaintiff’s Post-Trial Memorandum at 38; Initial Brief of Appellant at 59-60.)

Respondent SCRS takes no position in this matter on the underlying merits of the dispute between the County and Preston regarding whether Preston's severance package should be rescinded. Rather, the sole concern of SCRS in this matter is to ensure that any relief awarded to the County with regard to Preston's retirement benefits does not violate the provisions of applicable state law pertaining to the distribution of his benefits. Specifically, if the County prevails on its claim against Preston and seeks to attach or otherwise redirect Preston's retirement benefits as relief for its claim, SCRS contends that any such relief must be consistent with the anti-alienation provisions of S.C. Code Ann. § 9-1-1680 (Supp. 2013) and the other distribution provisions of Chapter 1 of Title 9 of the South Carolina Code of Laws.

ARGUMENT

ANY REQUEST FOR RELIEF AGAINST A RETIRED MEMBER OF THE SOUTH CAROLINA RETIREMENT SYSTEM THAT WOULD ATTACH OR OTHERWISE REDIRECT HIS RETIREMENT BENEFITS FROM THE SYSTEM MUST COMPLY WITH THE ANTI-ALIENATION AND OTHER BENEFIT DISTRIBUTION PROVISIONS OF THE RETIREMENT CODE

As noted above, Respondent SCRS takes no position in this matter on the underlying merits of the dispute between Appellant Anderson County and Respondent Joey Preston regarding whether Preston's severance package should be rescinded. Nevertheless, although SCRS has no position on the merits of the underlying dispute in this matter, if the County prevails on its claims against Preston, SCRS has two concerns regarding any relief that may be awarded on those claims related to SCRS. First, as set out in its Motion for Summary Judgment, SCRS contends that, if the County prevails on its claim that the severance agreement between the County and Preston should be rescinded, SCRS no longer has any liability *as a stakeholder* to return funds to the

County because the full amount of the County's service purchase payment made to SCRS on Preston's behalf has now been exhausted through the payment of retirement benefits to Preston. Second, if the County prevails on its claim against Preston and seeks to attach or otherwise redirect Preston's retirement benefits as relief for its claim, SCRS contends that any such relief must be consistent with the anti-alienation provisions of S.C. Code Ann. § 9-1-1680 (Supp. 2013) and the other distribution provisions of Chapter 1 of Title 9 of the South Carolina Code of Laws. Because the County is no longer seeking the immediate, lump-sum return of the amount of the service purchase payment made to SCRS, but is now only seeking the imposition of a constructive trust upon Preston's monthly retirement benefit as means of collecting restitution from Preston, this Brief will only address the second of these two concerns.

As part of its requested relief in this matter, the County seeks to have Preston's monthly retirement benefit from SCRS placed in constructive trust and redirected to the County in order recoup the amounts paid to Preston or on his behalf pursuant to the disputed severance agreement. (R. pp. 3088-3090, Plaintiff's Post-Trial Memorandum at 36-38; Initial Brief of Appellant at 51-52, 60.) However, as explained below, any relief against Preston that would attach or otherwise redirect his retirement benefits from SCRS must comply with the anti-alienation and other benefit distribution provisions of the Retirement Code.

As a general matter, retirement benefits payable under SCRS are statutorily exempt from being attached by legal process. The SCRS anti-alienation provision, found at Section 9-1-1680 of the Retirement Code, broadly exempts a member's retirement benefits, including "the right . . . to an annuity or a retirement allowance," from levy,

garnishment, attachment, or any other legal process and prohibits the assignment of any such benefits. See S.C. Code Ann. § 9-1-1680 (Supp. 2013). And, although there are certain exceptions to this general anti-alienation provision for matters such as domestic relations orders, child support obligations, and income tax levies, the only such exception that might be applicable in this matter is the portion of the statute that provides that the right of a member to a benefit under SCRS may be “subject to the doctrine of constructive trust ex maleficio.” Id. South Carolina courts have defined a “trust ex maleficio” as

a trust by operation of law which arises against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience to hold and enjoy.

Briggs v. Richardson, 288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986). Because such trusts are based essentially upon a finding of fraudulent activity, the burden of proof for establishing a constructive trust ex maleficio is one of clear and convincing evidence, not merely a preponderance of the evidence. Id.

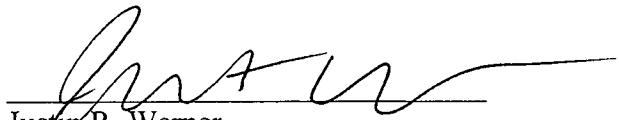
Therefore, in the matter at hand, even if a court finds for the County on its claims against Preston and rescinds the severance agreement, it cannot attach or otherwise redirect Preston’s retirement benefits from SCRS, unless it makes a further finding, by clear and convincing evidence, that his right to receive those benefits should be subject to a constructive trust ex maleficio. S.C. Code Ann. § 9-1-1680. Moreover, if a court does

make such a finding and imposes a constructive trust upon Preston's retirement benefits from SCRS, any redirected payments made to the County from Preston's retirement benefits must still comply with the other distribution provisions of the Retirement Code. For example, the County would not be entitled to any lump-sum distribution of the present value of Preston's benefits or any other special distribution, but would be required to receive monthly payments in the same form and same manner as such benefits were payable to Preston pursuant to his retirement. See generally S.C. Code Ann. §§ 9-1-1510, 9-1-1550(B), 9-1-1615, 9-1-1620 (Supp. 2013). Put simply, any payments to the County under such a constructive trust would have to come out of the monthly benefit amount that would otherwise be payable to Preston pursuant to his retirement under the SCRS pension plan.

CONCLUSION

In sum, SCRS takes no position on the underlying merits of the dispute between the County and Preston regarding whether the severance agreement executed by those parties in November 2008 should be rescinded. Rather, as described above, it only requests that, if the Court finds in favor of the County on its claims, any relief awarded to the County does not require SCRS to return any funds that it no longer holds and does not violate the anti-alienation and distribution provisions of the Retirement Code.

Respectfully submitted,



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October 7, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

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I. The Record Is Clear, and It Leads Ineluctably to the Conclusion That the Severance Package Should Be Rescinded

In one of its final acts, the outgoing Anderson County Council introduced, purported to debate, passed, reconsidered, and passed again a \$1.1 million severance agreement for Joey Preston. The debate did not touch on either the substance of the Severance Agreement or the merits of approving it. Instead, proponents of the Severance Package engaged in a highly orchestrated series of parliamentary maneuvers designed to insulate the Package from public scrutiny or later reconsideration. (R. pp. 1918-1959; p. 1983)

The Package's terms were arbitrary and unjustifiable. The Package purported to be offered in settlement of Preston's claim of "anticipatory breach" of his Employment Agreement. But the actions that constituted this supposed anticipatory breach were not actions of Anderson County at all. Instead, Preston's attorney cited to *expected future* actions of the incoming majority of Council – a group which had no authority to act or speak for Anderson County at the time of the vote. (R. pp. 1914-1915)

Beyond this, the Severance Package paid Preston more than he could have recovered, even if his Employment Agreement had been breached. Preston's attorney's reference to unspecified tort claims against certain individuals was not sufficient to justify paying Preston more than the severance provided in his Employment Agreement. It is also a continuation of Preston's theme – still being sounded to this Court – of trying to confuse actions and statements of individuals with actual official actions and positions of Anderson County. Preston's friends on County Council paid him what they wanted to, because they wanted to – not on the basis of an evaluation of actual legal responsibility *of the County*.

Besides being substantively indefensible, the Severance Package was procedurally corrupt. The debate was run by a Chair who was actively courting Preston for employment. And the Severance Package was negotiated and sponsored by the Chair of the Personnel Committee, whose daughter's consulting firm had just received from Preston an inexplicable and substantial enhancement to its contract with Anderson County. It is also indisputable that Preston was aware of the facts that made those votes improper. Yet he – while still serving as County Administrator – sat silently by while those votes were cast in favor of a \$1.1 million benefit for him.

All of the foregoing is established on the record. Accordingly, this case presents a clear question: May a public official retain a severance package, paid with public funds: (i) whose value substantially exceeds the severance provided by contract; (ii) when there was no breach that would justify any severance at all; (iii) where the vote was choreographed and run by officials who should not have voted or participated at all; and (iv) where the beneficiary, himself a non-elected official of the County, sat silently with the knowledge the vote was improper.

Despite finding two of the votes in favor of the Severance Package were tainted and improperly cast, the Circuit Court concluded that that there was nothing wrong with any of this, that the courts are powerless to address this circumstance, and that Anderson County breached Preston's Severance Package by even questioning its validity in Court. This was error. This Court – which is reviewing both the facts and the law *de novo* and thus is not bound by any aspect of the decision below – should rescind this improper bargain.

II. Preston's Anticipatory Breach Claim Was a Legal Impossibility, and It Would Not Support Damages of \$1.1 Million

A. The "Council-Elect" Could Not Breach Preston's Agreement

The entire premise for Preston's Severance Agreement was that Preston had a valid claim for "anticipatory breach" of his Employment Agreement that justified settlement. Without that cornerstone, the entire \$1.1 million edifice crumbles. That cornerstone was at all times completely fictional. The demand letter written on Preston's behalf admits as much when it acknowledged that his claim was based on what "newly elected Council Members intend, after January 2009." (R. p. 1914) Indeed, Preston's own brief makes this same admission, revealing the core fallacy of Preston's argument. Preston's brief argues that "the issue of whether to suspend and dismiss Preston had already been made [*sic*] by *Council-elect* without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council." (Resp. Br. pp. 31-32 and 33; emphasis added) That is, Preston relies for his anticipatory breach claim on predicted future actions of persons not yet in office. Political rhetoric is one thing; genuine acts by a political body are another. Those not yet in office cannot speak or act for the County; a "Council-elect" is not a political entity. There was no anticipatory breach of Preston's Employment Agreement, because his friends remained in control. When they undertook to pay him for what they predicted the next Council might do, they acted capriciously.

Respondent invites this Court to join the trial court in combing through all of the slights and insults directed at Preston by anonymous citizens and Councilmembers-elect. But none of this will support an anticipatory breach claim, because Preston's Employment Agreement was with Anderson County, and only Anderson County could anticipatorily breach that contract. *See* RESTATEMENT (SECOND) CONTRACTS § 250 (1981) ("a

repudiation is a statement *by the obligor to the obligee* indicating that the obligor will commit a breach” (emphasis added)). And Anderson County did not breach.

It may be that Preston faced – and might continue to face – political opposition. That comes with a political position, and it can be unpleasant. But avoiding unpleasantness is not a sound basis for paying a public official a settlement. (Preston’s brief admits on page 1 that this was the true motivation, stating the Package was approved “in hopes that the divisiveness surrounding [Preston] would abate.” Resp. Br. p. 1) It was capricious to give Preston a golden parachute to allow him to avoid the forecast unpleasantness. Preston was free to resign if he did not want to face further political scrutiny and opposition. But he was not entitled to a million-dollar payout that included a lifetime pension, on the basis of an impossible legal theory. The Severance Package was a political exit strategy, not a settlement of a valid legal claim.

B. The Total Value of the Package Is Unjustifiable

Even if the “Council-elect” had somehow acted on behalf of Anderson County to terminate Preston, the most to which he could have been entitled was the severance provided in his Employment Agreement. That Agreement expressly notes – as is required by law – that he served “at the pleasure of [County] Council.” (R. p. 1892 at 2.A; S.C. Code Ann. § 4-9-620 (“the term of employment of the administrator shall be at the pleasure of the council”)) This means that he could be terminated and that if the termination were without cause he would be entitled – at most¹ – to the severance provided in that Agreement, and no more.

¹ This Court has recently reiterated that a county council cannot enter into an employment contract that extends beyond the term of that council; under this principle, the severance agreement in Preston’s Employment Agreement was invalid. *See Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013).

It is clear that the \$1.1 million paid to Preston far exceeded the severance amount in his Employment Agreement. Again, Preston's own demand letter acknowledges this. (R. pp. 2026-2028) Clear testimony at trial reiterated this point. (E.g., R. pp. 356-357; pp. 453-456; pp. 999-1002; p. 1270; pp. 1287-1292) In particular, the Package provided for a lump sum payment to the Retirement System of over \$350,000 – an amount calculated to purchase a State pension for Preston at the age of 45.

Preston's justifications for this largesse fail under scrutiny. First, he argues that the threat in the demand letter that Preston might assert other unspecified tort claims against certain individual Council members means that his potential recovery was not capped by the severance provision in his Employment Agreement. This contention is incorrect for several reasons. First and most simply, the threat was wholly unspecific. Nothing in the letter would have allowed County Council to place any value on these purported claims. Yet the County paid Preston over \$350,000 to secure for him a benefit worth *at least* \$984,131 (the excess value of the Severance Agreement over the severance amount in his Employment Agreement) for these claimed torts. (R. p. 1289) If Preston's demand letter had sought only a tort recovery, without specifying any torts, a settlement with him would have been capricious on its face. Attempting to justify paying him an enhancement to his severance for exactly the same claim – though paired with an equally meritless claim for anticipatory breach – is equally capricious.

The second reason Preston's purported tort claims would not support an enhancement of his severance was that he had already sued the two Council members in question – Bob Waldrep and Cindy Wilson – for every purported wrong they had done to him, in a lawsuit hereinafter referred to as "*Preston v. Waldrep*". (R. pp. 968-978 (Preston asserted all claims he knew of in that lawsuit); pp. 2170-2226) Preston, and the Circuit

Court, reasoned that *Preston v. Waldrep* meant that Waldrep and Cindy Wilson should not have voted on the Severance Package because it contained a release of particular benefit to them, because of that pending lawsuit. Without conceding that argument, the filing of *Preston v. Waldrep* also meant that Preston had *already* sued on the facts underlying his tort claims, and so could not assert them a second time.

Finally, it is noteworthy that *Preston v. Waldrep* did not seek damages – and it certainly did not seek damages against Anderson County. Preston sued only the two individual Council members, and Preston admitted that he filed the lawsuit with the County Council’s blessing and approval. (R. pp. 968, 973; pp. 2162-2169) Here again, the unspecific nature of the claim and the facts surrounding the initiation of the lawsuit of *Preston v. Waldrep* – all well known to County Council, which approved that very lawsuit – made it impossible for the County Council to conclude that *the County* had six-figure liability for the alleged acts of two individual Council members.

Preston also points to the testimony that Tom Bright, legal counsel retained by the County to deal with Preston, stated that the “worst-case scenario” was that the cost of litigation could exceed the settlement amount. (R. pp. 462-463) This one statement cannot be yanked from the entire context of the legal advice provided by Tom Bright, and used to justify an otherwise arbitrary settlement. Mr. Bright also testified that he advised that Preston’s claim did not have substantial merit. (R. pp. 458-460, 462-463, 471-472, 477-479) He also testified that it was clear to him that Ron Wilson and others directing Mr. Bright had decided to settle with Preston regardless of the merits, and to “try and get the best deal you can.” (R. pp. 464-465) This direction is consistent with a decision to give Preston a political gift, and not with reasoned stewardship of County funds. Thus, if Mr.

Bright's opinion is to be invoked to measure the reasonableness of the Severance Package, then the Severance Package falls short.

Finally, Preston points to the overall cost of the investigation into the entire Preston regime as evidence that it was rational to settle with Preston for \$1.1 million. This is, of course, a *non sequitur*. This investigation cost (of which the costs of this litigation form only a part) bears no relationship to the merits of Preston's claim. It is again easy to see this if one imagines a demand letter on Preston's behalf that dispensed with legal claims, and argued only that future political peace would be so valuable that the County should purchase it by paying Preston to leave office. "If Preston stays in office," the letter might read, "the political battles will cost millions. So Mr. Preston will leave office if you agree to pay him only \$1 million." Such a deal would be an utterly improper use of public funds. And it is precisely this calculus that Preston urges this Court to adopt.

It is true that seeking to undo the Severance Package has cost money. But Anderson County has made a judgment that the events of November 18, 2008 were fundamentally wrong, and that seeking judicial redress for that wrong serves an important public purpose. Anderson County says that it is Preston's fault – for seeking and obtaining from political allies an utterly unjustified public payout – that this litigation has occurred.

C. The Approval of the Package Was the Antithesis of Reasoned Debate

The capricious nature of the vote to give Preston a \$1.1 million severance is cemented by the nature of the Council proceeding. Only by viewing the videotape of the debate can the Court gain a full appreciation for the absence of actual deliberation, and the clear evidence of choreography. Anderson County described in its opening brief how every step of the process was plainly planned in advance. Chair Michael Thompson knew whom to recognize to keep the process moving. Council member Bill McAbee was visibly

proud of his maneuvers to end debate and to reconsider the just-passed approval, so that it could not be brought up again later. (R. pp. 1940-1945, 1950-1953; p. 1983) Almost comically, Council member Gracie Floyd at one point reminded her colleagues to make a motion for reconsideration. (R. p. 1949, lines 2-3; p. 1983) Similarly, Council member Larry Greer had already determined what budget line items could be shifted to pay the Severance Package. (R. p. 1946; p. 1983; pp. 1990-1992; p. 2044; pp. 2047-2048) And Council member Floyd somehow, conveniently, had with her a proposed employment agreement for Preston's successor as County Administrator. (R. p. 1953, lines 12-35; p. 1983)

It is also important, though, to point out what is missing from this debate. There was no discussion of the propriety of the settlement amount. There was no discussion of the merits of Preston's legal claim. There was no discussion of the value of Preston's contractual severance. The only justification offered on the floor was Ron Wilson's statement that the County was in a "detrimental situation" and he would like to "get beyond this and move on." (R. pp. 1941-1942) But as we have already pointed out, buying political peace for or from Preston, by paying him to take a full retirement, was neither an appropriate nor a reasonable use of public money. Preston's brief offers no defense of this parliamentary travesty, nor could it.

The Severance Package involved "fraud" [and] "clear abuse of power," and it was "unreasonable" and "capricious." Under *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995), these facts mean that it can and should be rescinded.²

² The Circuit Court applied, and Preston's Brief argues for, a "fairly debatable" standard that they find in *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). *Bear Enterprises* involved a challenge to a zoning decision. Observing that zoning was inherently a "legislative matter" and that courts have "no power" to zone

III. The Improper Participation and Votes of the Severance Package's Primary Proponents Render It Void

The integrity of the votes cast by public officials is critical to our political institutions. For Preston to prevail in this case, the Court must conclude that two egregious violations of that trust did not matter. We submit that such a conclusion is impossible.

A. Michael Thompson and Ron Wilson Should Not Have Voted on the Package

Michael Thompson was Chair of County Council, and he presided over the November 18 debate. He was integral to passage of the Package. Yet, at that very time he was actively courting Joey Preston for employment. It is hard to imagine a more blatant conflict of interest. *See Thompson v. Atlantic City*, 921 A.2d 427, 432, 437 (N.J. 2007) (court quoting one councilman observing conflict: “you got a job from the Mayor and you're voting to give him a million dollars”; rescission was appropriate because “[t]he public had good reason to suspect that [those with financial ties to mayor] might not be able to exercise complete objectivity and independence in assessing the merits of the lawsuit” they were settling on behalf of city).

Ron Wilson was Chair of the Personnel Committee and the acknowledged leader of the settlement discussions with Preston. (R. p. 471) He made the motion to bring the Severance Package up for a vote, and he stated that he was the only Council member who had seen the proposed agreement. He, too, was a central figure in approval of the Package. And he, too, should never have participated in the debate. On November 1, 2008 – 17 days

property, the *Bear Enterprises* court looked only to other zoning cases for the “fairly debatable” standard. *See id.* at 140-41, 459 S.E.2d at 885-86. Accordingly, Anderson County believes that *Moody* provides the applicable standard. However, use of the “fairly debatable” standard would not yield a different result. Whether or not Anderson County could justifiably pay \$1.1 million for a nonexistent claim, and one that would in any event be capped at a considerably lower figure, is not “fairly debatable.” And, as a purely factual matter, the videotape reveals that there was no “fair debate.”

before the vote, and about a week after Preston's October 23 demand letter – Preston signed a consulting contract with Ron Wilson's daughter's consulting company. (R. pp. 2158-2161) That company was already under contract with the County (R. pp. 2149-2152), and the revised agreement was on its face indefensibly favorable to the company. It raised the hourly rate, provided for an annual increase in rates, created a definite term, and gave the right to "liquidated damages" if the contract were terminated. All of these increases were given to a company with no other consulting jobs at the time.³ (R. p. 1750) The conclusion that Preston acted to curry favor with Ron Wilson is inescapable.

Preston's primary response to this clear skullduggery is to insist that it is inconsequential because both Ron Wilson and his daughter testified that she never mentioned the contract upgrade to Councilman Wilson. This argument does not save Ron Wilson's vote on the Severance Package, for several reasons. First, Preston's own brief to this Court argues strenuously that Wilson's daughter's contract was a matter of public record and thus that knowledge of it was imputable to County Council. (Resp. Br. p. 39) If this is so, then knowledge of the contract was imputable to Ron Wilson as well, and the idea that his improper vote was "innocent" evaporates. Ron Wilson lacked innocence in another respect as well. When subpoenaed to testify in this case, he invoked his Fifth Amendment right to avoid incriminating himself, and he declined to testify.⁴ (R. pp. 685-687) This only strengthens the conclusion that Ron Wilson and his daughter were not credible when they claimed he was unaware of the windfall brought her by Joey Preston.

³ Preston's attempts to defend the Schaum contract are meritless. How she performed under her initial contract is irrelevant, as her contract was in no way on a trial basis, but to the extent her performance is considered at all, it is dramatically overstated by Preston. (See, e.g., R. pp. 1731, 1733, 1763-1769, 1774-1780)

⁴ In a civil case, an adverse inference may be drawn from an invocation of the Fifth Amendment privilege against self-incrimination. See *Griffith v. Griffith*, 332 S.C. 630, 640-41, 506 S.E.2d 526, 531-32 (Ct. App. 1998).

In addition, Preston admits that he invested around \$200,000 in Ron Wilson's Atlantic Bullion Ponzi scheme in 2009, using money he received from the Severance Package. (R. pp. 1861-1862) Preston also admits he sent other investors to Wilson's business and was compensated for such referrals. (R. p. 1862) From his \$200,000 investment, Preston admits he received at least \$600,000 from Atlantic Bullion. (R. pp. 1862-1863) Such investments and referrals benefited Ron Wilson. It is rational to infer that Preston was close enough to Wilson and had communicated with him about such investments at or around the time of the Severance Package. Further, the point here is that Preston himself was aware of the facts that made Ron Wilson's vote improper, and that is the knowledge that mattered.

But the overarching problem with Preston's protestations in favor of Ron Wilson's vote is that the Anderson County Code makes improper votes that "create a substantial appearance of impropriety." Anderson County Code of Ordinances § 2-37(g). Given Preston's recent generosity to his daughter, Ron Wilson should not have voted, and his vote has (at least) the appearance of impropriety. That appearance was created, and allowed to exist, by Preston's own acts and his subsequent silence.

B. On the Particular Facts of This Case, One Bad Vote Is One Too Many

While the Circuit Court agreed with Anderson County that the Thompson and Ron Wilson votes were improper, that court held that this did not matter. This was error. This case falls within a substantial body of law, applied by numerous courts, recognizing that in certain circumstances a single tainted vote is enough to justify rescission of a political act, even where the margin of passage was more than a single vote. The Circuit Court held this line of cases is inconsistent with *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69

(1999). This line of cases was not presented or considered in *Baird*, and *Baird* does not prevent applying this line of cases where, as here, it plainly applies.

Courts have applied the one-tainted-vote rule where a vote is on a benefit for a single individual, rather than a law of general application; where there is less procedural rigor and formality (a simple motion rather than an ordinance); where there are procedural irregularities that render the entire process suspect; where the conflicts of interest are known and kept hidden; where those in key positions in the body have a conflict; and where the action is insulated from the political process. (*See App. Br. pp. 37-42*)

This case does not present only one or two of these circumstances – any one of which could be sufficient to apply the one-tainted-vote rule. Instead, it possesses all of them. The Package was for the benefit of Preston alone, not the public at large. It was passed on a simple motion, not as an ordinance that would require multiple readings. The process by which the Package was introduced, swiftly debated, voted on, reconsidered, and passed again rendered the entire process suspect. Each of Preston and Thompson and Ron Wilson knew, or should have known, of the conflicts. The process was run, overseen, and heavily influenced by the two Councilmen with clear conflicts of interest. And the surprise introduction of the motion (it was added to the agenda moments before it was voted on (*R. pp. 1940-1941; p. 1983*)) and the process of reconsideration prevented public debate or comment and served to insulate the decision from normal political redress.

Anderson County is not advocating for a general rule that one bad vote would be sufficient to undo legislative acts. But a narrowly tailored rule, drawing on this body of authority, makes sense for circumstances like this one. When the political process has been distorted by interest, affinity, and cynical maneuvering, the courts cannot be helpless to provide a tailored remedy. What is at issue here is *not* a carefully considered piece of

general legislation. Instead, this is a hastily passed sweetheart deal for a single individual, whose proponents did everything in their power to shield it from public scrutiny or debate. This deal is not due the same kind of deference that is due a true legislative act.

Baird is not to the contrary. In reciting the “general” rule that a court may “invalidate an *ordinance*” if “the requisite number of votes to pass the ordinance would not exist but for the improper vote,” 333 S.C. at 77-78, 511 S.E.2d at 535 (emphasis added), the Supreme Court said nothing about other circumstances that would justify invalidation. The Court did not consider such an argument. And *Baird* did not present the circumstances present here, that justify application of the one-tainted-vote rule. *Baird* involved an ordinance, requiring multiple readings, that would lead to a law of general application. There is no evidence in the opinion of any procedural irregularities, any attempt to hide conflicts of interest, or impropriety on the part of persons with special influence over the vote. Beyond all this, *Baird* involved a one-vote margin – which means that the one-tainted-vote rule and the margin-of-victory rule merge as a practical matter.

In short, *Baird* is a very different case from this one in every important respect. And because the issue simply is not addressed, *Baird* does not preclude adoption of the one-tainted-vote rule. See, e.g., *Hutto v. Southern Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) (“It is, of course, settled law that ‘a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.’”). The decision below, and Preston’s argument, overread *Baird* and extend it far beyond the bounds of what it actually decided.

Preston likewise overreads the holdings of *Bear Enterprises* and *Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 691 S.E.2d 453 (2010). Neither of those cases suggests that a court is compelled to stay its hand in the face of capriciousness

and corruption for the sake of deference to the decision making of other branches of government. In *Bear Enterprises* a property owner upset with a county council's refusal to rezone his property brought suit against the County. The property owner at no time suggested improprieties or corruption or conflicts of interest led to the council's decision; he just did not agree with that decision. *See* 319 S.C. at 141-42, 459 S.E.2d at 886. Similarly, in *Segars-Andrews*, a family court judge dissatisfied with a decision of the Judicial Merit Selection Commission foreclosing her candidacy for re-election challenged the legality of the Commission under the South Carolina Constitution. Again, there were no allegations of bad faith or public corruption in the Commission's decision making, and the Court's observation that it would "not intervene in . . . political determinations" came in the context of rejecting the judge's contention that the Commission violated judicial independence. 387 S.C. at 130, 691 S.E.2d at 464.

Relying on inapposite cases, Preston does not contest the County's key point – that numerous courts throughout the country have recognized and applied the one-tainted-vote rule in situations like this. Indeed, most of these courts applied the rule on the basis of only one or two factors, not the entire laundry list present here. The decisions in *Baird*, *Segars-Andrews*, and *Bear Enterprises* are not an obstacle to adoption of such a rule.

There is a second reason one bad vote is enough to invalidate the Package. Because of the highly orchestrated set of steps by which the Severance Package was passed and insulated from further review by reconsideration, the Package was passed by a series of related votes, not just one. Preston's allies intentionally carried out a series of steps on the road to final approval. This resolve to shield their work from later revision had an unintended consequence: the entire series of votes was an integral part of the plan and final approval, and that series of votes included a motion to end debate that carried by only a

single vote. (R. p. 1951, line 10-p. 1953, line 9; p. 1983) Thus, even under a margin-of-victory analysis, the vote for the Package was invalid.

Preston's Brief, in one of its extended footnotes, resists this conclusion by citation to authorities holding that rulings on parliamentary procedure are not subject to appeal. (Resp. Br. p. 28 n.40) This misses the point. The County is not asking for reversal of a ruling from the Chair that a particular motion was out of order; *that* would be a question of parliamentary procedure. Instead, the County points out that the chain of votes that led to approval of the Severance Package – a chain specifically designed to protect the Package from scrutiny – contained a vote by Council that passed by one vote. Ultimate approval of the Package was dependent on that vote, and without it the final approval becomes void.

IV. Preston Knew Tainted Votes Were Being Cast, and Sat Silently By

Preston knew Michael Thompson was actively courting him for a job. Preston also knew that he had signed a substantial enrichment of Ron Wilson's daughter's contract with the County while Ron Wilson was overseeing negotiation of Preston's Severance Package. Yet, as Councilmen Thompson and Wilson prepared to vote on that Package, Preston sat silent. Because he was still an employee of the County at that moment, he owed the County a fiduciary duty, and so was obligated to speak up to point out those disqualifying facts. His failure to do so means that the Severance Package was colored by breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation.

Preston's suggestion that this high duty disappeared because Preston had asserted a claim against the County goes too far. While Preston could certainly negotiate regarding his own claim in his own interest, he retained his other obligations to the County.

Preston also incorrectly argues that his clear factual knowledge of these improprieties was insufficient to trigger his obligation to speak. First, as a legal matter, a

defendant's duty does not arise only if he knows that he is committing fraud or another breach of duty. Instead, the obligation to speak – or to avoid misrepresentation – springs from the combination of a fiduciary relationship and factual knowledge. See *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) (“Parties in a fiduciary relationship must fully disclose to each other ***all known information that is significant and material***, and when this duty to disclose is triggered, silence may constitute fraud.” (emphasis added)). Preston knew of his improper dealings with Thompson and with Wilson’s daughter, and like any person of common understanding knew that those circumstances could affect their votes. This gave rise to his duty to speak.

Preston finally suggests that the outcome of the vote would have been the same even if the interest of those two key players had been publicly announced, and that the County has therefore not proved the necessary elements of its claims for fraud, constructive fraud, and negligent misrepresentation. Preston is wrong on both the facts and the law. As for the facts, Ron Wilson had the only copy of the Agreement and announced he was the only Council member to have seen it. Thompson was the Chair. Without their crucial participation, the Agreement could not even have been introduced. By allowing Thompson and Wilson to participate, Preston’s silence caused passage of the Package.

More fundamentally, however, Preston misconstrues the appropriate legal analysis and burden of proof in a case of fraudulent concealment. Black letter law provides that “when there is nondisclosure of a material fact, the courts permit inferences of inducement and reliance.” 37 AM. JUR. 2D *Fraud and Deceit* § 238. That only makes sense, given the difficulty of providing proof about “what might have been” had a fraudulent concealment not occurred. See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971) (“The fact of reliance upon alleged false representations may be inferred from the circumstances

attending the transaction . . .”). The burden upon the County, in other words, is to show the materiality of the information Preston concealed, and materiality is clear here.

Importantly too, in discussing the element of causation in a fraud claim, the Restatement makes clear that a misrepresentation need not be “the sole or even the predominant or decisive factor” in influencing a plaintiff’s conduct, nor is it necessary for a plaintiff to show that he “would not have acted or refrained from acting as he did unless he had relied on the misrepresentation.” RESTATEMENT (SECOND) OF TORTS § 546 cmt.

(b). Instead, the inquiry is whether the representation “played a substantial part, and so has been a substantial factor, in influencing [the plaintiff’s] decision.” *Id.*

Without question, the roles that Councilmen Thompson and Wilson played in passing the Severance Package, and their votes, were a “substantial factor” in the Council making the decision it did. That is enough to support the County’s claims of breach of duty, fraud, constructive fraud, and negligent misrepresentation.

V. When the Circuit Court Reached Out to Invalidate Other, Unchallenged Votes, It Injected a New Issue in the Case and Destroyed the Quorum for the Vote on the Severance Package

Anderson County’s Complaint alleged improprieties with respect to only three Council members – Thompson, Ron Wilson, and McAbee. (R. pp. 129-133) Anderson County offered proof and made arguments for impropriety only concerning those three. Despite this, the Circuit Court reached out on its own to invalidate two other votes – those of Bob Waldrep and Cindy Wilson, who opposed the Severance Package. This extraordinary action by the Circuit Court created an extraordinary situation in this case – when the Circuit Court issued its opinion, for the first time in the case there was a prospect of disqualification of four votes, with the effect of destroying the County Council’s quorum and thus voiding approval of the Severance Agreement.

The Circuit Court's conclusion that these votes were challenged in the pleadings is not sound. The statement that Anderson County "challenges the entire process of passing the Severance Agreement, not just particular votes," (R. p. 6) is entirely conclusory and incorrect. In fact, Anderson County did challenge only "particular votes." The assertion that Preston's Ninth Affirmative Defense – which simply asserts that some or all of the County's claims are barred by the holding in *Baird* – served to challenge those votes is also visibly incorrect. In short, the Cindy Wilson and Bob Waldrep votes became an issue only when the Court made them an issue in its written opinion.

Anderson County's response to that turn of events has been proper. Once the issue was injected for the first time, Anderson County – while maintaining that the Waldrep and Cindy Wilson votes were in fact proper – noted in a motion to alter or amend the judgment that if four votes were improper, then no quorum was present and the Severance Package was void. This was the earliest point at which this argument could be made, and the motion to alter or amend was the proper vehicle for doing so.⁵ See J. TOAL, S. VAFI & R. MUCKENFUSS, *APPELLATE PROCEDURE IN SOUTH CAROLINA* at 60 (2d ed. 2002) (post-trial motion is appropriate vehicle to address relief not requested or inconsistencies in final order). In addition, because these votes had never been challenged in the pleadings, Anderson County moved to amend its Complaint to address the issue. Again, this motion was timely because the issue did not previously exist.⁶

⁵ Preston argued to the Court that the Waldrep and Cindy Wilson votes should be invalidated (R. pp. 1351-1353), and both the Court itself and Anderson County made note of the fact that this had not been pled. (R. pp. 1377-1379, 1382-1383) When pressed on this theory, Preston's counsel could not point to any pleadings to support it, but simply pressed the argument, effectively urging the Court to reach beyond the pleadings to make this ruling (R. pp. 1389-1394), and cannot now complain about the ramifications of that action.

⁶ Preston's statement that Anderson County's appeal on of the denial of its motion to

If this Court agrees that four improper votes were cast, it is inescapable that a quorum was not present, and that the Severance Package is void. The law is clear: Section 2-37(d) of the Anderson County Code requires four members to constitute a quorum, and South Carolina law holds that a member of a body who cannot participate because of a conflict is not counted toward the quorum. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238, 153 S.E. 141 (1930); *see generally* App. Br. pp. 48-49; *see also* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 143 (“While a law on conflict of interest may leave quorum requirements undisturbed, recused members are not counted in determining the presence of a quorum, and action taken when, as a result, a quorum is not present, is invalid.”).

Preston’s arguments that disqualification of four votes would not destroy a quorum are without merit.⁷ First, Anderson County did not omit operative language from *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998), because there is no “statutory or other controlling provision” that answers the question of what to do when a quorum has been removed by disqualifications. Preston’s claim that the Anderson County Code “establishes what constitutes a quorum based upon

amend is not preserved because the County did not file a motion to reconsider, Resp. Br. p. 47 n.68, is obviously incorrect. A motion to reconsider is not required, where the issue to be appealed has been ruled on. *See discussion infra* p. 24.

⁷ Preston suggests that Anderson County “conceded” the Circuit Court’s decision on this point. This is incorrect, as Anderson County plainly argued in its opening brief that the disqualification of four votes means a quorum was destroyed. This preserves this issue. Preston’s position dramatically overreads what is required in this regard. Findings of fact that fall within the scope of the issues raised on appeal are preserved for review. *Cf. Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (noting that findings of fact and law in an administrative hearing are law of the case “unless within the scope of the appellant’s exception . . . and its notice to the respondent”). In addition, even where an issue is not “specifically set out” in the statement of issues on appeal, an appellate court may nevertheless consider the issue if it is “reasonably clear” from the appellant’s arguments. *TOAL, supra*, at 75. Especially in an equitable action like this one, where review is *de novo*, Preston’s contention that the County has “conceded” any unchallenged sentence in the Circuit Court’s opinion is plainly incorrect.

presence at the meeting site, not voting eligibility,” Resp. Br. p. 44, is a pure misstatement. Section 2-37(d) says in relevant part that “a quorum shall consist of a majority of the council.” It does not tie this to presence. And while § 2-37(d) does address what happens when members leave and thereby destroy the quorum, it is silent on what happens when they are disqualified. The County Code provides no guidance on this point.

Preston’s next argument – that § 2-37(g) eviscerates the quorum requirement by allowing action by a majority of those present, without regard to the presence of a quorum – is self-evidently wrong. The two provisions must be read together; Council can act only when there is a quorum.

Preston’s contention that the County is now somehow estopped from arguing that disqualified members do not count toward a quorum is wrong. A single ruling, “on the fly,” by a County Attorney is not a binding usage. Even the language of the County Code cited by Preston says only that the County should be “guided” by prior usage – not bound.

Preston’s reliance on FOIA is also misplaced. FOIA has nothing to say about what constitutes a quorum of County Council *for purposes of conducting business*, nor about whether a member disqualified for bias counts toward that quorum. FOIA is concerned only with whether a meeting must be open to the public. A meeting might be open to the public under FOIA, yet at the same time it could lack the quorum required take a given action under the law governing that body. FOIA neither expressly nor impliedly preempts a county from determining what constitutes a quorum necessary to take action.

Preston’s reliance on an opinion of the South Carolina Ethics Commission is also unavailing. That advisory opinion is not binding authority, but the Supreme Court’s decisions in *Fidelity Fire* and the other cases cited in our opening brief are. Second, the Ethics Commission failed even to mention these binding Supreme Court decisions. Third,

the Commission's decision is in conflict with other administrative decisions, which recognize and follow the *Fidelity Fire* line of cases. *See, e.g.* 1975 S.C. Op. Att'y Gen. No. 4018 (April 14, 1975). The law is clear. If four votes were improper, the Package is void.

VI. Imposition of a Constructive Trust on the Excess Pension Payments Generated by the Severance Package Is an Appropriate Part of the Remedy in This Case

As discussed above, the clearest extracontractual excess in the Severance Package was the payment of over \$350,000 to the South Carolina Retirement System ("SCRS") to allow Preston to begin drawing a full pension at age 45. At trial, Anderson County presented un rebutted expert testimony that, along with the un rebutted testimony from SCRS, demonstrates how the excess payments that Preston stands to receive from January 1, 2009 through the day he turns 60 (the amount of which will total approximately \$1,333,000) could be redirected from Preston to the County as part of a remedy upon rescission of the Severance Package. (R. pp. 251-252 at ¶¶ 5-11; pp.253-255 at ¶¶ 5-7, 11-14; pp. 2671-2681; p. 1290) This can be accomplished without harming SCRS. As the affidavits submitted by SCRS demonstrate (R. pp. 249-263), the lump sum payment from the Severance Package allowed Preston to receive payments he would not have received otherwise before age 60, and also increased his prospective benefits after that time. In its brief, SCRS expresses concern that any remedy not harm the retirement fund by making it worse off than it would have been had the Package never been adopted. The County recognizes this concern, and its proposed remedy of imposing a constructive trust on any future excess payments to Preston (as compared to retirement funds he would have received in the absence of the Severance Package) would satisfy SCRS. SCRS also notes that, under the combined requirements of S.C. Code Ann. § 9-1-1680 and *Briggs v. Richardson*, 288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986), a constructive trust

may be imposed on retirement benefits if Preston holds those retirement benefits “by fraud, actual or constructive, by duress or abuse of confidence, by *commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience.*” *Id.* (emphasis added). This standard is broader than Preston’s contention that a constructive trust requires “fraud,” and the facts of this case satisfy it.

The conduct of both Preston and of those on County Council who voted in his presence and with his knowledge to pay him for a claim that could not exist, while they had financial ties to him, easily justifies a constructive trust on the benefits generated by that deal. The Severance Package caused Anderson County to deposit over \$350,000 of public funds with SCRS for Preston’s benefit. Upon rescission of the Package – and to the extent that the improper payments are not made up in some other way – the only sensible outcome would be to redirect the incremental benefit generated by that deposit.

VII. Rescission Is the Correct Response to a Void Public Act

In arguing rescission is not available, Preston continues his efforts to conflate the conduct of individuals with the conduct of Anderson County. This Court should reject this sleight of hand. Just as Anderson County did not do any act that anticipatorily breached Preston’s Employment Agreement, the County also did nothing that would constitute unclean hands and thus bar an equitable remedy. While Preston invokes the “eight bullet points” relied on by the Circuit Court as evidence of unclean hands, the Circuit Court’s own description of those actions undermines this argument. The Circuit Court stated that “[e]ach bullet point outlines conduct involving either *sitting County Council members acting alone* or in *concert with Council-elect.*” (R. p. 57; emphases added) Actions of Council members “acting alone” and actions of the “Council-elect” are not actions of

Anderson County. Nothing in the record supports a finding of any action constituting unclean hands on the part of *the County itself*.⁸

Nor, for the reasons set forth in our opening brief, is Preston shielded from equity because some of the money paid to him has already been spent. Because of Preston's own fault in this matter, the change-of-circumstances defense is not available to him. See *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007); see generally 17B C.J.S. *Contracts* § 652. The perceptive court in *Atlantic City* recognized this principle. 921 A.2d at 442 ("We are not persuaded . . . that equity demands that they should keep their settlement monies because they have already spent them [W]e conclude that the only appropriate remedy to vindicate the public trust is the immediate restoration of the funds to the City.").

Beyond all this, it is clear that where a public act was improper, the courts have the power to rescind it. See *Baird*, 333 S.C. at 535, 511 S.E.2d at 77-78 (recognizing in the absence of "direct authority" preventing a court from invalidating a bond ordinance based on a violation of the state ethics act that a court has jurisdiction to do so); *Atlantic City*, 921 A.2d at 441-42 ("strong remedies must be employed to deter improper conduct by public officials" (internal quotation marks omitted)). Because of the public nature of the

⁸ Preston tries to avoid this problem by arguing that a post-Preston resolution that approved of the payment of legal expenses for Bob Waldrep constituted ratification of particular conduct. Given that this resolution occurred long after the transactions at issue here, it can have no bearing on the County's right to equitable relief. Moreover, the point of the ordinance did was ratify payment of Waldrep's legal fees. It made no finding regarding his conduct.

wrong at issue here, rescission was the appropriate remedy, and it would be error to take the crabbed view of the Court's equitable power to fashion a remedy that Preston urges.⁹

VIII. Anderson County's Challenge to the Validity of the Severance Agreement Did Not Breach the Severance Agreement

Preston's lead-off contention that Anderson County may not appeal the Circuit Court's ruling that this lawsuit breached Preston's Severance Agreement, because the County did not address this in its Motion to Alter or Amend the Judgment, is plainly wrong. A motion to reconsider is required to preserve a matter for appeal only where the matter has not been addressed. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial."). The Circuit Court's ruling was in error, but there was no need for a motion for reconsideration.

Preston is equally incorrect in claiming that Anderson County does not contest the Circuit Court's conclusion that this lawsuit was based on Preston's employment and thus fell within the terms of the covenant not to sue. This is addressed expressly at page 58 of our opening brief, and is generally subsumed within the question presented on this point. Here again, and especially in an equitable matter involving *de novo* review, Preston's view of the scope of review is indefensibly narrow. *See supra* note 7. This lawsuit is about the terms of the Severance Package and the manner in which it was approved. Preston has argued vigorously that he owed the County no duties because he was not acting as an

⁹ In an extraordinary footnote, n. 71, that offers no citation, Preston's brief accuses the County of seeking rescission "in order to deprive Preston of an insurance defense and coverage." This is baseless and untrue. Other examples of Preston's reckless attempts to further his case by impugning the County's motives, baselessly, include his footnotes 80 (accusing us of disingenuous argument) and 84 (contending County did not bring lawsuit for purpose of obtaining relief against Preston).

employee with respect to the Severance Package. He cannot now do an about-face and insist that a challenge to the terms of the Severance Package relates to his employment.

More generally, the Severance Agreement's covenant not to sue was intended as a standard reinforcement, common in such documents, that no lawsuit could be brought on claims released by the Severance Agreement. It was not an "incontestability clause," forbidding any question of the validity of the Agreement itself. (R. p. 472) Such a clause would be extraordinary, and such an intent would have to be manifested in very clear language; there is no such language in this clause. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985). And while Anderson County believes that it is clear that the language is not an incontestability clause, if this Court believes the matter is ambiguous it is entitled to rely on the testimony of drafting attorney Tom Bright to conclude no such meaning was intended. (R. p. 472, line 5-p. 473, line 4)

This Court also has authority to address the Circuit Court's stated willingness to entertain a fee petition from Preston on the basis of S.C. Code Ann. § 15-77-300. For all the reasons set forth in the County's briefs, its decision to challenge the extraordinary Severance Package awarded to Preston was "substantially justified," and motivated by "special circumstances." Under the statute, this makes it clear that fees should not be awarded to Preston and this Court, having examined the entire record as it must, can make such a ruling, if solely for the sake of judicial economy.

CONCLUSION

The Severance Package was a collusive political exit strategy, not a reasoned piece of legislation for the public good. The courts have the power to rescind such an act, and to fashion appropriate relief.

Respectfully submitted,

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**ATTORNEYS FOR APPELLANT
ANDERSON COUNTY**

October 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anderson County, Appellant,

v.

Joey Preston and the South Carolina Retirement System,
Respondents.

Appellate Case No. 2013-002499

Appeal From Anderson County
Roger L. Couch, Circuit Court Judge

Opinion No. 5490
Heard June 11, 2015 – Filed May 31, 2017

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

James Theodore Gentry, Troy A. Tessier, and Wade
Stackhouse Kolb, III, of Greenville, and Alice
Witherspoon Parham Casey, of Columbia, all of Wyche
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Respondent Joey Preston.

Justin Richard Werner, of Columbia, for Respondent
South Carolina Retirement System.

WILLIAMS, J.: On November 18, 2008, the Anderson County Council (the 2008 Council) voted to approve a severance agreement (the Severance Agreement) for outgoing county administrator Joey Preston. Anderson County (the County) filed the instant action against Preston seeking rescission of that agreement. Following a nonjury trial, the circuit court entered judgment in favor of Preston on all causes of action as well as his counterclaim against the County. The County appeals the circuit court's decision, raising numerous issues on appeal. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS/PROCEDURAL HISTORY

Prior to the vote on Preston's Severance Agreement, the political environment in Anderson County was "toxic."¹ Throughout his tenure, Preston was involved in constant litigation—both individually and in his capacity as county administrator—with members of the council he served.

The 2008 Council was comprised of Chairman Michael Thompson and Council members Larry Greer, Ron Wilson, Gracie Floyd, Robert Waldrep, Cindy Wilson, and Bill McAbee. In June 2008, primary challengers ousted three incumbent members of the 2008 Council: Tommy Dunn defeated Thompson, Tom Allen defeated McAbee, and Eddie Moore defeated Greer. Some of the primary victors, as well as Waldrep and Cindy Wilson, ran on platforms calling for examination into and possible reform of the financial and governance practices of the Preston administration.

From June to December 2008, Waldrep and Cindy Wilson held a series of meetings with Moore, Dunn, and Allen at Waldrep's office. During these meetings, the participants laid out an agenda for the incoming Council (the 2009 Council) that included firing the law firm for the County and hiring a new one; hiring a financial investigator or auditor; designating Moore as chairman; drafting resolutions for the first meeting; implementing a hiring freeze; and addressing the position of county administrator and various other personnel matters.

¹ While the circuit court cited numerous examples of troublesome behavior that reflected the "leadership wasteland" existing in Anderson County, we focus only on the events relevant to resolving the issues on appeal.

After the primary elections, Preston retained Robert Hoskins as his attorney. On September 25, 2008, Hoskins notified the 2008 Council of Preston's anticipatory breach of contract claim, stating the following:

[I]t has come to Mr. Preston's attention that certain existing Council members have made statements that they and certain newly elected Council Members intend, after January 2009, to prevent him from carrying out his duties as County Administrator. . . . Preston considers the intent of certain members of Council and their allies to prevent him from performing his job as an anticipatory breach of his employment contract. . . . [T]he political and personal agenda of the obstructionists has rendered his ability to serve the people of Anderson County beyond January 1, 2009 impossible.

In response, the 2008 Council referred Preston's claim to its personnel committee—chaired by Ron Wilson—and hired Tom Bright, an employment attorney, to advise the County on the matter. Bright then interviewed all seven members of the 2008 Council, as well as the county attorney, to receive their input.

On October 23, 2008, Preston's attorney delivered a letter to Bright, in which he alluded to a number of causes of action and tort claims Preston planned to assert against current and incoming Council members. In the letter, however, he offered to settle Preston's anticipatory breach claim and "all claims against the County and the two individual Council [m]embers [he] previously mentioned." Under this proposed settlement, Preston would resign and execute a complete release of all claims against the County, Waldrep, and Cindy Wilson in exchange for the County paying \$1,276,081 in damages: \$827,222 for the total amount of pay and benefits due under his employment agreement² (the Employment Agreement); \$356,087 to the South Carolina Retirement System (SCRS) to purchase seven years, seven months, and twenty-three days of service credits to allow him to retire immediately with a full pension; and \$92,772 to his health reimbursement account for retiree health benefits.

After receiving the letter, Bright met with the personnel committee to discuss how the County should address the matter. In his notes outlining Preston's claims and

² In July 1998, Preston—who had served as county administrator since 1996—entered into an Employment Agreement with the County that granted him an initial three-year term and allowed for one-year renewals at the end of each contract year.

the County's options, Bright stated Preston had no anticipatory breach or constructive discharge claim. Bright also advised the committee that, under our supreme court's ruling in *Piedmont Public Service District v. Cowart (Cowart II)*, 324 S.C. 239, 478 S.E.2d 836 (1996), the County had a good argument that Preston's Employment Agreement was voidable—and therefore, had no value—because it purported to extend his employment beyond the term of the Council that approved it. Nevertheless, Bright also told the committee if the County were to lose, then it could face up to \$2 million in litigation costs going forward. Thus, Bright advised the 2008 Council it could (1) do nothing, (2) leave the issue for the 2009 Council to decide, (3) terminate Preston and pay him nothing, or (4) settle with Preston and pay out his contract. As to the fourth option, Bright cautioned that "[c]itizens may go after Preston and former Council members for giving away their [money] without good reason" if the 2008 Council chose to settle. After considering the options, the personnel committee directed Bright "to go and talk to Mr. Hoskins and try and get the best deal you can."

Following several weeks of negotiations, Bright emailed Hoskins a copy of a proposed severance agreement and release of all claims on November 18, 2008. That evening, the 2008 Council voted to amend the agenda to consider the Severance Agreement, voted for its approval, voted to approve budget transfers to fund it, and then voted to reapprove it on reconsideration. The 2008 Council approved the Severance Agreement, and the budget transfers to fund it, by a 5–2 vote. After the votes, the 2008 Council voted to hire Michael Cunningham as the new county administrator and adjourned without conducting any further business.

Pursuant to the terms of the Severance Agreement, Preston agreed to resign as county administrator on November 30, 2008, and release all claims against the County and any of its Council members regarding his employment. In exchange, Preston received \$1,139,833—less state and federal withholdings—from the County. The County also contributed \$359,258 to the SCRS "to pay for retirement service credits," paid Preston \$780,575 "in the form of a severance benefit," and gave Preston title to the 2006 GMC Yukon he was using as a County vehicle.

The newly constituted 2009 Council held its first meeting on January 6, 2009, during which it voted to hire a new law firm and a financial investigator to review Cunningham's employment contract, investigate the manner in which he was hired, and review the actions taken by the 2008 Council on November 18, 2008.³

³ In *Bradshaw v. Anderson County*, our supreme court held South Carolina Code section 4-9-660 (1986) of the Home Rule Act expressly authorized the 2009

Thereafter, the County sued Preston, alleging causes of action for (1) violation of the State Ethics Act,⁴ section 2-37(g) of the Anderson County Code of Ordinances (the County Code), and the common law; (2) violation of public policy; (3) breach of fiduciary duty; (4) fraud; (5) constructive fraud; (6) negligent misrepresentation; (7) capriciousness, unreasonableness, and fraud; (8) fundamental and substantial breach of the Severance Agreement; (9) breach of fiduciary duties relating to back-dated documents; (10) constructive trust; and (11) unjust enrichment. The County later amended its complaint to include additional factual allegations. Preston filed his answer to the amended complaint, asserting counterclaims against the County and SCRS.⁵ The County then filed a reply to Preston's counterclaims.

On December 12, 2011, the case was designated as complex and assigned for all purposes to the Honorable Roger L. Couch. After hearing arguments, the circuit court denied the parties' cross-motions for summary judgment in all respects on October 23, 2012. As to Preston and the County, the court found summary judgment was inappropriate because genuine issues of material fact existed regarding the claims and counterclaims asserted. The matter was tried without a jury from October 29, 2012, to November 5, 2012. In its May 3, 2013 order (the Final Order), the court granted judgment in favor of Preston on all causes of action as well as his counterclaim against the County.

In the Final Order, the circuit court disqualified four 2008 Council members for improperly participating in the votes approving the Severance Agreement. The

Council—operating under a council–administrator form of government—to directly engage professionals "for the purpose of inquiries and investigations." 388 S.C. 257, 263, 695 S.E.2d 842, 845 (2010). The court found the 2009 Council had the authority to investigate the 2008 Council's business and financial practices, "especially concerning contracts related to the former and current County Administrators." *Id.* at 258, 695 S.E.2d at 842. According to the court, it would be absurd to require the county administrator, "who is answerable to the council and not the electorate, to investigate himself." *Id.* at 263, 695 S.E.2d at 845.

⁴ S.C. Code Ann. §§ 8-13-100 through -1520 (Supp. 2016).

⁵ SCRS asserted cross-claims against Preston in its answer to the County's amended complaint. While the circuit court retained SCRS as a party—finding the extent of its liability was a question of fact—the court excused SCRS from appearing with the parties' consent. The parties also settled Preston's false arrest and abuse of process counterclaims and stipulated to their dismissal prior to trial.

court found Thompson voted in violation of section 2-37(g)(4)(e) of the County Code because he was seeking future employment from the County through Preston at the time of the vote. The court likewise found Ron Wilson's vote violated subsections 2-37(g)(4)(a) and (e) because Ron Wilson's daughter had recently received a substantial financial benefit from Preston after he extended her personal services contract with the County. Although Waldrep and Cindy Wilson voted against the Severance Agreement, the court found their votes violated section 2-37(g) because both had a "financial interest greater than that of the general Anderson County public" and their participation created "a substantial appearance of impropriety." Given that "Preston agreed not to pursue any further claims against any County Council member," the court found Waldrep and Cindy Wilson "had a direct economic interest"—regardless of the vote's outcome—and should not have participated while he maintained a lawsuit against them individually.

After disqualifying four of the seven members, the court—relying upon *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), and section 2-37(g)(3) of the County Code—nevertheless found "a majority of those present and properly voting approved Preston's Severance Agreement." The court also held, *inter alia*, (1) public policy neither rendered the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor was it a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and the filing of a petition.

In light of the circuit court's Final Order, the County filed a motion to alter or amend the judgment as well as a motion to amend its complaint. Preston filed an answer, and the County submitted a reply. Richard Freemantle, a third party, filed a post-trial motion to intervene. The circuit court, however, denied all of the parties' post-trial motions in an order (the Post-Trial Order) dated November 8, 2013. This appeal followed.

ISSUES ON APPEAL

- I. Did the circuit court err in concluding Preston owed no fiduciary duty to inform the County of improper votes and finding his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation?
- II. Did the circuit court err in finding a single tainted vote did not require invalidation of the Severance Agreement's approval or mandate its rescission?
- III. Did the circuit court err in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum?
- IV. Did the circuit court err in holding future payments from SCRS to Preston were not available in fashioning a remedy?
- V. Did the circuit court err in holding rescission was an unavailable remedy?
- VI. Did the circuit court err in finding the County acted with unclean hands?
- VII. Did the circuit court err in concluding the County could not invoke its equitable powers because an adequate remedy at law existed?
- VIII. Did the circuit court err in holding the County breached the terms of the Severance Agreement by bringing the instant lawsuit?

STANDARD OF REVIEW

Because the County's main purpose in bringing the instant lawsuit was to rescind the Severance Agreement, this action is equitable in nature. *See ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (per curiam). In an equitable action, this court reviews factual findings and legal conclusions de novo. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). "Therefore, we may find facts according to our own view of the preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, we are free to decide "question[s] of law with no particular deference to the circuit court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Our de novo review, however, does not require this court to disregard the circuit court's findings or "ignore the fact that the [circuit] court is in the better position to assess the credibility of the witnesses." *Ripley Cove*, 406 S.C. at 412, 751 S.E.2d at 669 (quoting *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449

(Ct. App. 2011)). Further, this broad scope of review does not relieve the appellant of the burden of demonstrating the circuit court erred in its findings. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

LAW/ANALYSIS

I. Preston's Knowledge of Conflicts of Interest

First, the County contends the circuit court erred in finding Preston's failure to inform the 2008 Council of Thompson and Ron Wilson's conflicts of interest prior to the Severance Agreement's approval did not constitute a breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation.

A. Breach of Fiduciary Duty

The County argues Preston—in his capacity as county administrator—owed the highest duty of loyalty and breached this duty by knowingly allowing Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes in favor of his Severance Agreement. According to the County, Preston had a duty to make these conflicts of interest known because he was still employed as county administrator when he attended the vote affecting his own interest. We disagree.

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

"A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing." *Id.* at 251, 599 S.E.2d at 472. "The evidence must show the entrusted party actually accepted or induced the confidence placed in [it]." *Id.*

In the instant case, the circuit court held Preston owed no fiduciary duty to disclose information about his employment claims to the 2008 Council because Preston and the County had assumed adverse positions by October and November of 2008.

Although Preston owed the County a fiduciary duty throughout his employment as county administrator,⁶ in this particular context, the County had no foundation for believing Preston would not act in his own interest to achieve the best possible settlement of his claims against the County. *See generally Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (explaining that, for a plaintiff "[t]o establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing"). The parties clearly had opposing interests throughout settlement negotiations and remained adverse to one another during the 2008 Council's vote on the Severance Agreement. Moreover, in preparation of litigation, the County and Preston each retained attorneys to represent their respective interests. In light of these facts and circumstances, we are unable to find any basis upon which the County could have reasonably believed Preston would act on its behalf—instead of representing his own interests—while trying to settle his employment claims against the County. Because the parties were directly adverse to one another, we hold Preston owed no duty to disclose Thompson and Ron Wilson's conflicts of interest during the vote on his Severance Agreement. *See id.*; *see also Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App. 2006) ("[A]dverse parties who have retained professional counsel . . . do not owe fiduciary duties to one another.").

Our holding is further supported by the State Ethics Act⁷ and the County Code,⁸ neither of which give Preston a legal duty to disclose Council members' conflicts

⁶ *See, e.g., Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985) ("It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." (quoting *Berry v. Goodyear Tire & Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978))).

⁷ *See, e.g., Act No. 248*, 1991 S.C. Acts 1616–17 ("No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest." (current version at S.C. Code Ann. § 8-13-700(B) (Supp. 2016))).

⁸ *See, e.g., Anderson County, S.C., Code of Ordinances § 2-288(a)(6)* (2000) ("A councilmember who has a financial or other private interest in any legislation shall disclose on the records of the county council the nature and extent of such

of interest. To the contrary, the relevant provisions imposed only a positive legal duty on Council members—not the county administrator—to disclose their own personal conflicts and abstain from voting if necessary. Further, when questions on conflicts of interests did arise, the County Code instructed members to seek guidance from the county attorney, not the county administrator. *See* Anderson County, S.C., Code of Ordinances § 2-289 (2000) (providing when an official "has doubt as to the applicability of a provision of [the ethics] division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given").

Based on the foregoing, we affirm the circuit court's finding that Preston owed no fiduciary duty to disclose Thompson and Ron Wilson's conflicts of interest during the 2008 Council's vote on his Severance Agreement.

B. Fraud, Constructive Fraud, and Negligent Misrepresentation

The County further contends Preston's failure to disclose the facts that rendered Thompson and Ron Wilson's votes improper amounted to fraud, constructive fraud, and negligent misrepresentation. We disagree.

interest. . . . A councilmember shall disqualify himself from voting if the matter under consideration involves his personal or financial interest to the extent such interest conflicts with his official duties and would impair his independence or judgment."); § 2-37(g)(4) ("No member [of Council] shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public, or in which he/she is otherwise disqualified by any state or county law or regulation. Each member shall make known, in the manner required by law, any such disqualifying interest and refrain from voting upon or otherwise participating, in his capacity as a county officer, in matters related thereto."). Subsection 2-37(g)(4) further provides, in relevant part, that a "member shall be deemed to have a personal or financial interest" in the following situations: the member "has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or direct descendant) has such an interest;" the member "has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter;" the member "is so deemed by any state law or regulation;" or the member "cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety."

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [that person] or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). To establish fraud, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35–36, 694 S.E.2d 43, 45 (Ct. App. 2010) (quoting *Schmauch*, 354 S.C. at 672, 582 S.E.2d at 444–45). "Failure to prove any element of fraud is fatal to the action." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004)). Nondisclosure is fraudulent when a party has a duty to speak. *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445.

The duty to disclose may be reduced to three distinct classes: (1) whe[n] it arises from a preexisting definite fiduciary relation between the parties; (2) whe[n] one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; [and] (3) whe[n] the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. at 673–74, 582 S.E.2d at 445–46 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (quoting *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985)). "To establish constructive fraud[,] all elements of actual fraud except the element of intent must be established." *Id.* at 506, 431 S.E.2d at 263. "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." *Id.* at 505, 431 S.E.2d at 263 (quoting *Giles*, 285 S.C. at 288, 328 S.E.2d at 918).

When no confidential or fiduciary relationship exists, "and an arm's length transaction between mature, educated people is involved," a party has no right to rely on the other's representations. *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993). "This is especially true in circumstances whe[n] one should have utilized precaution and protection to safeguard his interests." *Id.* at 516–17, 431 S.E.2d at 270.

In a negligent misrepresentation action, a plaintiff must prove six elements:

(1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001).

"Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." *Id.* at 42, 557 S.E.2d at 681.

In the instant case, we find the circuit court properly determined the County failed to meet its burden of proving the claims for fraud, constructive fraud, and negligent

representation. Because the Severance Agreement's negotiation constituted "an arm's length transaction between mature, educated people"—all of whom were represented by counsel—we hold the County had no right to rely upon any false representations allegedly made by Preston. *See Ardis*, 314 S.C. at 516, 431 S.E.2d at 270. Preston also had no fiduciary duty to disclose Council members' conflicts of interest, and thus, his silence did not constitute fraud. *Cf. Moore*, 360 S.C. at 251, 599 S.E.2d at 472; *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445. As noted above, the elected officials—not Preston—owed positive legal duties to disclose their own personal conflicts of interest and disqualify themselves from voting under both the County Code and the State Ethics Act. Moreover, our courts have repeatedly recognized the general rule that fraud cannot be predicated on misrepresentations as to matters of law, much less mere mistakes of law. *See First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945); *Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Ct. App. 1987). Given that the parties were clearly in adversarial positions at the time of the vote, the County had no basis for believing Preston owed it a legal duty to disclose information adverse to his claim, nor did it have a right to rely upon Preston's representations.

Based on the foregoing, we affirm the circuit court's finding that Preston's silence during the November 18, 2008 meeting did not constitute fraud, constructive fraud, or negligent misrepresentation. *See Robertson*, 350 S.C. at 348, 565 S.E.2d at 314 (noting that "[f]ailure to prove any element of fraud is fatal to the action"); *Woods*, 314 S.C. at 506, 431 S.E.2d at 263 (noting that, to prove constructive fraud, "all elements of actual fraud except the element of intent must be established"); *Stewart*, 348 S.C. at 42, 557 S.E.2d at 680–81 (requiring that, to establish negligent misrepresentation, a plaintiff must have "justifiably relied on the representation").

II. Tainted Votes

The County further contends the circuit court erred in finding a single tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission. We disagree.

The County does not advocate for a general rule that would require South Carolina courts to overturn legislation due to a single tainted vote; rather, the County argues courts should apply the single tainted vote rule in rare cases involving egregious circumstances. Specifically, the County contends Ron Wilson and Thompson's tainted votes required invalidation of the 2008 Council's approval of the Severance Agreement in the instant case because the following extraordinary factors were present: (1) the agreement conferred a private benefit on one individual and was

not a law of general application; (2) the agreement was passed by a "simple motion," rather than in the form of an ordinance that would require public notice and three readings; (3) the process by which the agreement was passed involved procedural irregularities; (4) members failed to disclose conflicts of interest; (5) the motion was presented by a member with a conflict of interest; and (6) approval of the agreement was not subject to the normal process of political redress.

The County relies upon several cases from other jurisdictions to support its proposed application of the single tainted vote rule. *See, e.g., Dowling Realty v. City of Shawnee*, 85 P.3d 716, 721–22 (Kan. Ct. App. 2004) (remanding the case to the trial court with directions to send it back to the city planning commission because a local government officer, who advocated approval of his project to "the governmental body of which he . . . [was] a member without identifying himself . . . as having a substantial interest in the project," acted in violation of Kansas ethics rules); *Appeal of City of Keene*, 693 A.2d 412, 415–16 (N.H. 1997) (voiding the county commissioners' denial of the city's request for a determination of public necessity on the grounds that a judicial action by a tribunal is voidable when a member is disqualified but still participates, regardless of whether the disqualified member's vote produces the outcome); *Thompson v. City of Atlantic City*, 921 A.2d 427, 430–43 (N.J. 2007) (voiding a settlement agreement between the mayor and the city as contrary to public policy based upon the involvement of several parties with conflicts of interest).

While we recognize courts in other jurisdictions have invalidated governmental actions based upon a single tainted vote, we are unable to find any South Carolina authority to support this court taking such an extraordinary action. In fact, our precedent suggests South Carolina does not follow the single tainted vote rule. In *Baird*, our supreme court considered whether a court has jurisdiction to invalidate an ordinance based upon tainted votes. 333 S.C. at 535, 511 S.E.2d at 77–78. There, a group of doctors sued Charleston County, arguing a bond ordinance was invalid because a county council member with a conflict of interest voted on the matter in violation of the State Ethics Act. *Id.* at 535, 511 S.E.2d at 77. In determining whether invalidating the bond ordinance was an appropriate remedy for a State Ethics Act violation, the court found the following:

[T]he vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. Therefore, a court has jurisdiction to invalidate an ordinance if the requisite

number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77–78 (citation omitted).

We read the second sentence in the above quote from *Baird* to also stand for the proposition that a court does *not* have jurisdiction to invalidate an ordinance if, after excluding the improper vote, the requisite number of votes to pass the ordinance still exists. Because *Baird* indicates we do not follow the single tainted vote rule in South Carolina, we find the circuit court properly declined the County's invitation to apply it in the instant case. Accordingly, we affirm the court's finding that one tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission.

III. Absence of a Quorum

Next, the County argues the circuit court erred in finding its quorum argument was not preserved, and in addressing the merits of the claim, ruling a quorum existed—despite the invalidation of four votes—because the Severance Agreement was passed by a majority of those Council members present and voting. We agree.

As a preliminary matter, we must determine whether the County properly raised the quorum argument below such that it is preserved for appellate review.

"A post-trial motion must be made when the [circuit] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enft Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); *see also* J. TOAL, S. VAFAT & R. MUCKENFUSS, *APPELLATE PROCEDURE IN SOUTH CAROLINA* 189 (3d ed. 2016) ("Post-trial motions are . . . utilized to raise issues that could not have been raised at trial.").

After entry of the Final Order, the County filed a motion to reconsider, arguing the circuit court's "invalidation of four total votes mean[t] there was no quorum for the vote on [the Severance Agreement], rendering the vote void." In the Post-Trial Order, the court found the quorum issue was not preserved because the County failed to present the issue to the court, despite having ample opportunity to raise it.

Unlike the circuit court, we find the prospect of a quorum being destructed did not exist until the court invalidated four Council members' votes in the Final Order, and in doing so, granted relief that was not requested by either party. Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated. The County repeatedly argued in favor of

invalidating the votes of Thompson, Ron Wilson, and McAbee. Nevertheless, invalidating three votes would not have destroyed the quorum.

At trial, the circuit court noted the issue of whether Cindy Wilson and Waldrep had conflicts of interest "has come up as an allegation" and stated as follows:

I didn't remember this being alleged or discussed during our pretrial motion period, that the two votes I want to say that weren't in favor because one time it was an abstention and one time it was a vote against, should also not count because they had a dog in the fight. I don't know whether that's ple[aded]. I don't know if it[] just wasn't argued. It's come up as an argument now, and I . . . went over the pleadings before we started, and I started off with hearings going over those, and I don't recall that being something that was ple[aded], but maybe it has been. I don't know. So, I'm [going to] ask you about that, and I'll give you a chance to tell me about your side of it in just a minute, Mr. Davis.

The court, however, never ruled at trial on whether Cindy Wilson or Waldrep's votes were invalid based upon their conflicts of interest. The court did not find Cindy Wilson and Waldrep were disqualified from voting due to conflicts of interest until it issued the Final Order. Therefore, once the court decided to invalidate Thompson and Ron Wilson's votes, along with Cindy Wilson and Waldrep's votes, the quorum issue arose.

Because the argument regarding Cindy Wilson and Waldrep's votes was not raised prior to trial or ruled upon during trial—and the County argued only for the disqualification of Thompson, Ron Wilson, and McAbee—we find the question of whether a quorum existed first arose when the circuit court invalidated the votes of four Council members due to conflicts of interest in the Final Order. Accordingly, we hold the County's Rule 59(e) motion was the proper means by which to raise the argument that the Severance Agreement should be invalidated because the 2008 Council passed it in the absence of a quorum. *See Fryer*, 369 S.C. at 399, 631 S.E.2d at 920; *TOAL ET AL.*, *supra*, at 189. Further, while the circuit court initially found the quorum issue was not preserved, we note the court also addressed the merits of the parties' quorum arguments in the alternative. Based on the foregoing, we find the County's argument is preserved for appellate review because it was properly raised to and ruled upon by the circuit court.

Turning to the merits, the County argues the circuit court erred in finding the 2008 Council's approval of the Severance Agreement was valid because—contrary to the court's findings—the disqualification of four Council members destroyed the quorum necessary for conducting valid business. We agree.

In the Post-Trial Order, the circuit court found a quorum was present and the vote was valid for the following reasons: (1) a quorum is determined based on a person's presence at the meeting, not on voting ability; (2) "the County's Code did not require a majority of Council to vote on an issue to be a valid vote, but rather a majority of those present and voting to carry the question"; (3) "the County's prior interpretation and usage under its own Code . . . allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site"; and (4) "the County Code expressly incorporated [the Freedom of Information Act⁹] and the State Ethics Act—both of which define quorum without reference to voting disqualifications—into County meeting procedures."

Section 2-37(g)(3) of the County Code provides, "Except where otherwise specified in these rules, a majority vote of those members present and voting shall decide all questions, motions, and other votes." Section 2-37(d) defines a quorum as follows:

A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

In the instant case, the circuit court invalidated four of the Council member's votes. The County Code, however, provides no guidance for situations in which a vote is invalidated due to a member's conflict of interest. For issues of parliamentary procedure not addressed in the County Code, it provides as follows:

In all particulars not determined by these rules, or by law, the chairperson or other presiding officer shall be guided

⁹ S.C. Code Ann. §§ 30-4-10 through -165 (2007 & Supp. 2016).

by the previous usage of county council or by
parliamentary law and procedure as it may be collected
from Roberts [sic] Rules of Order, latest edition.

Anderson County, S.C., Code of Ordinances § 2-37(g)(12) (2000).

The County Code states the Council may not take a vote during the temporary absence of a quorum, but it does not specifically address what happens when such a vote is taken. Therefore, we look to *Robert's Rules of Order*, which provides, "In the absence of a quorum, any business transacted . . . is null and void." HENRY M. ROBERT ET AL., *ROBERT'S RULES OF ORDER* § 40, at 347 (11th ed. 2013).

Although *Robert's Rules of Order* renders any business transacted in the absence of a quorum null and void, it does not address the effect of an invalidated vote on the calculation of a quorum. Nevertheless, South Carolina courts have repeatedly addressed this issue as it relates to various governing bodies. In *Garris v. Governing Board of South Carolina Reinsurance Facility*, for example, our supreme court considered the effect of a disqualified vote in a corporate context and stated the following:

In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (citations omitted).

Prior to *Garris*, our supreme court repeatedly stated the general rule that a corporation's director or board member with a personal interest in a corporate matter may not be "counted to make a quorum at a meeting where the matter is acted upon." See *Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 186, 64 S.E.2d 524, 529 (1951); *Fid. Fire Ins. Co. v. Harby*, 156 S.C. 238, 246–47, 153 S.E. 141, 144 (1930); *Peurifoy v. Loyal*, 154 S.C. 267, 288, 151 S.E. 579, 586 (1930).

Likewise, in *Baird*, our supreme court addressed the effect of a disqualified vote in the context of a county council vote. 333 S.C. at 535, 511 S.E.2d at 77–78.

Specifically, the *Baird* court considered the issue of "whether invalidation of a bond ordinance [was] a proper remedy for a violation of the State Ethics Act." *Id.* at 535, 511 S.E.2d at 77. As previously noted, the court stated "the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining *the necessary majority for valid action*." *Id.* (emphasis added). *Robert's Rules of Order* defines a quorum as "[t]he minimum number of members who must be present at the meetings of a deliberative assembly *for business to be validly transacted*." ROBERT ET AL., *supra*, § 3, at 21 (emphasis added). When read in conjunction with the definition of a quorum in *Robert's Rules of Order*, we interpret the court's language in *Baird* to mean a council member who is disqualified due to a conflict of interest may not be counted toward a quorum.

Based upon our review of the relevant authority, we find a council member who has a personal interest in a matter—and votes on the matter—is disqualified from the vote and may not be counted toward the quorum. Our position is supported by South Carolina precedent relating to both corporate boards and county councils. *See Baird*, 333 S.C. at 535, 511 S.E.2d at 77–78; *Talbot*, 259 S.C. at 82, 190 S.E.2d at 764; *Gilbert*, 219 S.C. at 186, 64 S.E.2d at 529; *Fid. Fire Ins. Co.*, 156 S.C. at 246–47, 153 S.E. at 144; *Peurifoy*, 154 S.C. at 288, 151 S.E. at 586.

Applying the rule to the facts of this case, we find the disqualification of Thompson, Ron Wilson, Waldrep, and Cindy Wilson—based upon their individual conflicts—required the court to remove them from its calculation of the quorum. Under the County Code and *Robert's Rules of Order*, a quorum—a majority of those members present and voting—was required for the Council to validly transact business. *See Anderson County, S.C., Code of Ordinances* § 2-37(d), (g)(3); ROBERT ET AL., *supra*, § 3, at 21; *see also Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942) ("[A] majority of a whole body is necessary to constitute a quorum . . . , and no valid act can be done in the absence of a quorum."). After removing the improper votes, however, only three of the seven Council members could be counted toward the quorum. Given that four members must be present and voting to constitute a quorum, we find the Severance Agreement is null and void because the 2008 Council approved the agreement, as well as the motion to transfer monies to fund it, without the quorum necessary for taking valid action. Accordingly, we hold the circuit court erred in failing to remove the four disqualified members' votes from its quorum calculation.

Although some may argue this creates an impracticable framework, we note the 2008 Council had several procedural options at its disposal through which it could have passed the Severance Agreement in spite of a majority of Council having

personal conflicts. For instance, members with conflicts could have *abstained* from voting, and their abstentions would have allowed them to be counted toward the quorum without tainting the entire vote. Unlike in the case of a recusal—in which a member physically leaves the room to avoid participation—when a member properly abstains, it does not have the effect of defeating a quorum because the member is still physically present. *See generally Gaskin*, 198 S.C. at 513–14, 18 S.E.2d at 456 ("If a quorum is present, a majority of a quorum is sufficient to act and bind the entire body. The members *who are present at a meeting cannot by a mere refusal to vote* defeat the action of the majority of those voting." (emphasis added) (citation omitted)). In this case, because four Council members were *disqualified*, those members are not counted for purposes of the quorum, and therefore, are treated as if they were not present at the meeting. *See Garris*, 333 S.C. at 453, 511 S.E.2d at 59 ("A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.").

Based on the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum. Therefore, we reverse the circuit court's holding regarding the quorum issue and remand the case for further proceedings consistent with this opinion.

IV. Availability of Future Payments from SCRS

The County contends the circuit court erred in declining to have Preston's monthly retirement benefit from SCRS placed in a constructive trust and redirected to the County. The circuit court did not reach the merits of this issue in the Final Order. Instead, the court held that, given its previous findings, the County's "cause of action for constructive trust no longer remain[ed] viable." In light of our holding in Part III, *supra*, we reverse and remand with instructions for the circuit court to specifically determine whether placing Preston's future retirement benefits in a constructive trust and redirecting monthly payments to the County would be an appropriate remedy in this case.

V. Rescission

The County contends the circuit court erred in finding rescission was unavailable because the parties cannot be returned to their status quo ante. We disagree.

"Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *Ripley Cove, LLC*, 406 S.C. at 413, 751 S.E.2d at 669 (quoting *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009)).

A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) whe[n] the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) whe[n] the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) whe[n] the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) whe[n] the mistake is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a wrong to enforce the agreement, sustained by competent evidence of the clearest kind.

King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984). Nevertheless, as our supreme court has noted, "there can be no rescission of a nonexistent contract." *Davis v. Cordell*, 237 S.C. 88, 98, 115 S.E.2d 649, 654 (1960). A cause of action seeking rescission and damages assumes a valid contract, whereas one attacking the contract as void assumes no contract existed. *Id.* at 98, 115 S.E.2d at 653–54.

"In the absence of fraud[,] which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King*, 282 S.C. at 313, 318 S.E.2d at 129.

"When a party elects and is granted rescission as a remedy, [the party] is entitled to be returned to status quo ante." *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

"Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore [the party] to the position occupied prior to the making of the contract." *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989). Because rescission returns the parties to the status quo ante, this necessarily requires any party damaged to be compensated. *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

In *Griggs v. E.I. DuPont de Nemours & Co.*, the U.S. Court of Appeals for the Fourth Circuit stated "the inability to compel full restoration of benefits received under the instrument to be rescinded does not automatically preclude the granting of equitable rescission." 385 F.3d 440, 452 (4th Cir. 2004). The court considered various authorities to determine whether a rescissory remedy could be fashioned that would eliminate the prejudice stemming from one party's delay in seeking rescission. *Id.* at 452; *see also, e.g., Henson v. James M. Barker Co.*, 555 So. 2d 901, 909 (Fla. Dist. Ct. App. 1990) ("In the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief."); 24 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:51 (4th ed. 2002) ("Where circumstances permit, some courts also have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer. This is the most practicable and satisfactory disposition of many cases."). After reviewing these authorities, the Fourth Circuit granted rescission based on the following reasoning:

Because Griggs's delay in seeking rescission has lessened the likelihood that he will be able to recover the tax payments made on the lump-sum distribution, our remedy properly forces Griggs, not DuPont, to bear the risk that the tax payments will not be fully recovered. Under these circumstances, Griggs's delay in seeking rescission works no prejudice on DuPont, thus making it proper and equitable to grant rescission without requiring Griggs to make complete restoration of the benefits he received in connection with his initial lump-sum election. At the same time, because the relief we describe allows Griggs to rescind his lump-sum election and instead receive a monthly payment for life (albeit in a lesser amount), DuPont's breach of fiduciary duty does not go unremedied.

Griggs, 385 F.3d at 452–53 (footnote omitted).

In light of our invalidation of the Severance Agreement, we find rescission is an unavailable remedy because the contract never existed. *See Cordell*, 237 S.C. at 98, 115 S.E.2d at 654 (noting "there can be no rescission of a nonexistent contract"). We further find rescission inappropriate because the parties cannot be returned to their status quo ante. *See Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. Although the County would benefit from a return of the monies improperly

allocated to fund the void Severance Agreement, Preston cannot be returned to the county administrator position and—at this stage—it is unclear what remedies, if any, he would be entitled to under his Employment Agreement because the circuit court has not ruled upon its validity.

The County relies upon *Griggs* and cites cases from other jurisdictions—as well as secondary sources—in support of its argument that "equity is not as straight-jacketed" as the circuit court suggested. See, e.g., *East Derry Fire Precinct v. Nadeau*, 924 A.2d 390, 393–94 (N.H. 2007) (finding that, when a party was "an active participant in the scheme" to create a fraudulent severance agreement approved by commissioners at a meeting, rescission was appropriate even though it deprived the party of a severance he would have received anyway, based on later events, had he stayed on the job); 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault."). We find these authorities distinguishable, however, because the record in the instant case does not support a finding that Preston engaged in fraudulent conduct, see *Nadeau*, 924 A.2d at 393–94, breached a fiduciary duty, see *Griggs*, 385 F.3d at 453, or was at fault, see 17B C.J.S. *Contracts* § 652. Accordingly, we find the County failed to demonstrate why the facts and circumstances of this case justify this court employing an exception to fashion a remedy that does not fully return the parties to their status quo ante.

Based on the foregoing, we affirm the circuit court's finding that rescission is unavailable as a remedy in this case because the parties cannot be returned to their status quo ante. Nevertheless, consistent with our previous findings, we remand for the circuit court to fashion an appropriate remedy for the parties.

VI. Unclean Hands

The County further argues the circuit court erred in finding it acted with unclean hands in this matter and could not invoke the court's equitable powers to rescind the Severance Agreement. We agree.

A party with unclean hands is precluded from recovering in equity. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005). "A party will have unclean hands whe[n] the party behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000)). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). "[T]he rule must be

understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a [c]ourt of equity." *Id.*

In the Final Order, the circuit court found the record was "replete with evidence of the County's unclean hands" and proceeded to list the conduct it believed supported this finding. After providing a lengthy list of actions, the court concluded:

[W]hen taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as [c]ounty [a]dministrator.

We hold the circuit court erred in finding the County had unclean hands for two reasons. First, the listed actions taken by incoming members of the 2009 Council are irrelevant to the analysis of this issue because those individuals had not been sworn into office yet, and therefore, had no authority to act on behalf of the County. While the court acknowledged these individuals' conduct could not be attributable to the County, it nevertheless included their conduct in the list and used such conduct as a basis for finding the County had unclean hands. To the extent the circuit court relied upon the actions of the incoming Council members, we agree with the County's contention that it "confused the political rhetoric of primary winners with actual County conduct."

Most of the remaining conduct the circuit court cited concerns actions taken by Waldrep and Cindy Wilson toward Preston during his tenure as county administrator, for which he sued both of them in their *individual capacities*, not their capacities as Council members. We find the conduct of two Council members acting in their individual capacities may not, however, be imputed to the County. Accordingly, we hold the circuit court erred in considering the conduct of "others" in reaching its conclusion. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738 (noting "[t]he expression 'clean hands' means a clean record with respect to the transaction with *the defendants themselves* and *not with respect to others*" (emphasis added)); *see also* 30A C.J.S. *Equity* § 118 (2015) ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible . . .").

Second, we find the listed conduct had nothing to do with the subject matter of this litigation. In the Final Order, the circuit court primarily focused its analysis upon

the actions of two individual Council members, Waldrep and Cindy Wilson, dating back to 2005. In concluding the County had unclean hands, the court specifically found the behavior of Waldrep and Cindy Wilson—along with incoming members of the 2009 Council—"prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance."

As noted above, the County was not responsible for the conduct of its incoming Council members, and thus, their conduct prior to taking office is irrelevant here. We find the court's reliance upon meetings that took place between incoming Council members in 2009 misplaced because the instant matter concerns actions leading up and relating to the November 18, 2008 meeting of the 2008 Council. What occurred after this meeting among individuals not yet sworn into office simply has no bearing upon the resolution of this issue. More importantly, much of the conduct referenced by the circuit court was already litigated in separate matters not before the court.

For these reasons, we hold the circuit court erred in considering conduct that—although indicative of "the atmosphere that surrounded the actors in this case"—was irrelevant to the subject matter of the instant litigation. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738; *Anderson*, 365 S.C. at 493, 617 S.E.2d at 756. We find the court ignored the requirements of *Arnold* and *Anderson* in concluding such conduct prejudiced Preston in the execution of his duties as county administrator because, simply put, Preston's ability to execute his duties as county administrator has nothing to do with this case. The instant litigation focuses on whether improper conduct at the November 18, 2008 meeting of the 2008 Council requires this court to invalidate the approval of Preston's Severance Agreement and rescind the agreement itself. Furthermore, Preston had already relinquished his position as county administrator before the 2009 Council decided to bring this action.

Based on the foregoing, we hold the circuit court erred in finding the County could not invoke its equitable powers to rescind the Severance Agreement because the County had unclean hands. Although we agree rescission is unavailable as a remedy in this case, we reverse the circuit court's finding that the County had unclean hands.

VII. Adequate Remedy at Law

The County contends the circuit court further erred in finding equitable relief was unavailable in this case because an adequate remedy at law existed. We agree.

Generally, equitable relief is available only when no adequate remedy at law exists. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* Our supreme court has consistently held that "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002).

In the Final Order, the circuit court concluded if the County "wished to question the legality of the Severance Agreement," then it could have accomplished this goal by bringing a declaratory judgment action challenging the legality of the 2008 Council's actions "without suing Mr. Preston directly for rescission."

Contrary to the circuit court's findings, the County argues it could not have received the complete relief sought—the return of all monies appropriated to fund the Severance Agreement—without the court invalidating the vote, rescinding the contract, and imposing a constructive trust on Preston's monthly retirement benefits. The County's main purpose in bringing this action was to seek the above equitable relief, not merely to question the legality of the Severance Agreement. Because the anti-alienation provision in section 9-1-1680 of the South Carolina Code (Supp. 2016), only allows a party to reach a retiree's benefits in a constructive trust case, we find no adequate remedy at law existed as to this equitable claim. Regardless of whether rescission was available, the County could not have received complete relief without the court invoking its equitable powers to place Preston's retirement benefits in a constructive trust. Thus, we find a declaratory judgment action would not have afforded the complete relief sought in this action. *See Santee Cooper*, 298 S.C. at 185, 379 S.E.2d at 123 (noting "[a]n adequate remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity" (citation omitted)). Further, as noted above, a declaratory judgment action can be equitable in nature—and indeed, would have been given the relief sought in this case.

Accordingly, given that no adequate remedy at law existed, we reverse the circuit court's finding that the County could not invoke its equitable powers because the

County could have challenged the Severance Agreement's legality via a declaratory judgment action instead of directly suing Preston.

VIII. Breach of the Severance Agreement

In light of our previous holding that the Severance Agreement is invalid because it was approved during an absence of a quorum, we find Preston can no longer succeed on his breach of contract counterclaim. Accordingly, we reverse the circuit court's finding that the County breached the covenant not to sue provision in the Severance Agreement by bringing the instant action. We decline to address whether attorney's fees are appropriate because the circuit court found this issue "should be held in abeyance pending the final disposition of this case and the filing of any petition as required by law."

IX. Remaining Issues

Finally, because our resolution of prior issues is dispositive in this appeal, we decline to rule upon whether the circuit court erred in finding the Severance Agreement was not unreasonable and capricious; a product of fraud and abuse of power; or void as against public policy. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Like the circuit court, we are mindful of the separation of powers concerns attendant to the judicial branch of government overturning the action of a duly elected county council, and therefore, take this opportunity to clarify that nothing in this opinion shall be construed as passing judgment on the merits or propriety of the 2008 Council's decision. Our decision hinges on the narrow question of whether the 2008 Council had legal authority to approve the Severance Agreement when four of the seven members, despite having clear conflicts of interest, improperly cast their votes on the matter. We hold the 2008 Council had no such authority because it could not legally act in the absence of a quorum. As a result, the Severance Agreement is null and void.

We affirm the circuit court's finding that Preston owed no fiduciary duty to inform the 2008 Council of improper votes and his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation. The circuit court also properly declined the County's invitation to apply the single tainted vote rule because *Baird* demonstrates South Carolina does not follow such rule. We hold the court erred,

however, in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum. Accordingly, we reverse and remand with instructions for the court to determine the rights and remedies of the parties in light of this opinion. On remand, the court should specifically address whether the future payments from SCRS to Preston are available in fashioning a remedy. Although we agree with the circuit court that rescission is not an available remedy because the parties cannot be returned to their status quo ante, we reverse the court's finding of unclean hands. We further reverse the court's finding that the County could not invoke its equitable powers because an adequate remedy at law existed. Lastly, we reverse the court's holding that the County breached the terms of the Severance Agreement by bringing the instant action.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs. FEW, A.J., not participating.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

RECEIVED

JUN 14 2017

SC Court of Appeals

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

PETITION FOR REHEARING OF APPELLANT
ANDERSON COUNTY

J. Theodore Gentry (No. 64038)
Troy A. Tessier (No. 13354)
Alice W.W. Parham (No. 13459)
Wade S. Kolb III (No. 100379)
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ATTORNEYS FOR APPELLANT
ANDERSON COUNTY

Pursuant to SCACR 221(a), Appellant Anderson County respectfully petitions the Court for rehearing of the following aspects of the Court's Opinion in this matter No. 5490, filed May 31, 2017, on the basis that each of the following grounds was overlooked or misapprehended by the Court. Arguments in support of this petition are set forth in a memorandum in support hereof.

1. Rather than remanding, the Court of Appeals should have fashioned a remedy, including placing a constructive trust on the flow of pension funds secured with Anderson County's money.
2. This Court should clarify that Anderson County did not violate the Severance Agreement, and no fee award is available to Preston, whether or not the Severance Agreement is voided.
3. The Court should rule in the alternative that Anderson County may amend its Complaint to seek invalidation of the Severance Agreement on the basis of lack of a quorum, in case future proceedings call into question the ruling the Severance Agreement is null and void for lack of a quorum.
4. The Severance Agreement is void because it was a product of fraud and abuse of power, it was unreasonable and capricious, and it violated public policy.
5. The tainted votes cast in favor of the Severance Agreement require its rescission.
6. Preston had a duty to disclose the facts that required disqualification of Thompson and Ron Wilson, and Preston breached his fiduciary duty, and engaged in fraud, constructive fraud, and negligent misrepresentation when he did not do so.
7. Rescission is available in this case.

Anderson County respectfully requests rehearing on each of the foregoing grounds.

Respectfully submitted,

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**ATTORNEYS FOR APPELLANT
ANDERSON COUNTY**

June 14, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

RECEIVED

JUN 14 2017

SC Court of Appeals

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING OF APPELLANT
ANDERSON COUNTY

J, Theodore Gentry (No. 64038)
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ATTORNEYS FOR APPELLANT
ANDERSON COUNTY

Appellant Anderson County submits this memorandum in support of its petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Court's Opinion in this matter No. 5490, filed May 31, 2017. Anderson County submits that each of the following grounds was overlooked or misapprehended by the Court.

I. Rather than Remanding, the Court of Appeals Should Have Fashioned a Remedy, Including Placing a Constructive Trust on the Flow of Pension Funds Secured with Anderson County's Money.

This Court reversed the Circuit Court's decision that Preston's retirement fund payments – including those flowing from Anderson County's payments under the void Severance Agreement – could not be placed in a constructive trust to be used as part of the repayment of Anderson County's huge outlay. Anderson County does not seek rehearing on that point. We do seek rehearing of the Court's remand to the Circuit Court to determine a remedy.

Because the record is clear, and because the passage of time makes certain remedies potentially less valuable to Anderson County with every monthly check mailed to Preston, we submit this Court should have fashioned the remedy, rather than remanding – and at a minimum should have provided an immediate remedy regarding Preston's retirement benefits. The retirement benefits previously and currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. The Record before this Court is sufficient to fashion an equitable remedy in this matter, and the Court should exercise its power to do so. Especially as to the amounts being paid to Preston before he turns 60 (starting at least at the time of trial), there is every reason to provide relief now, and no obstacle to doing so. *See* S.C. Code Ann. § 9-1-1680 (allowing a constructive trust on retirement fund proceeds).

II. This Court Should Clarify that Anderson County Did Not Violate the Severance Agreement, and No Fee Award Is Available to Preston, Whether or Not the Severance Agreement Is Voided.

The Court agreed with Anderson County that the voiding of the Severance Agreement meant that Anderson County could not have violated that Agreement. Anderson County does not seek rehearing of that ruling. Because of that ruling, this Court did not consider Anderson County's other arguments that there was no breach, and that Anderson County is not liable to Preston for attorney's fees. However, in light of the possibility of further proceedings, Anderson County seeks rehearing of this omitted point and seeks a ruling that – even if the Severance Agreement were not null and void – this lawsuit did not breach the Severance Agreement. The covenant not to sue in the Severance Agreement plainly was not intended to be some sort of “incontestability clause,” and absent very clear intent in the language to create that kind of a barrier, one should not be inferred. Courts have declined to treat covenants not to sue as preventing a challenge to the validity of the document itself. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985). More generally, the covenant by its own terms is limited to claims “relating to Mr. Preston’s employment with the County or his actions as an employee on behalf of the County.” (Plf. Ex.7, ¶ 8) This lawsuit is not about Preston’s “employment” or his actions taken “on behalf of the County,” but instead about the terms of his Severance Agreement and the manner in which it was adopted.

For the same reasons, the Circuit Court should have made it clear that a fee award is not available against Anderson County in this case, regardless of voiding of the Severance Agreement, because this litigation was substantially justified and other factors would make a fee award unjust. *See* S.C. Code Ann. § 15-77-300. Anderson County seeks rehearing to establish this point.

III. The Court Should Rule in the Alternative That Anderson County May Amend Its Complaint to Seek Invalidation of the Severance Agreement on that Basis.

This Court accepted Anderson County's argument that the invalidation of four votes rendered the Severance Agreement null and void; we do not seek rehearing on that point. And because of that ruling, this Court had no need to reach Anderson County's alternative argument that the Circuit Court erred in denying Anderson County's motion to amend its Complaint to seek invalidation on the basis of absence of a quorum. However, in light of the possibility of further proceedings and to ensure issues are preserved, Anderson County notes that this Court did not rule on this alternative argument and seeks rehearing of this omitted point to establish that, if the ruling that the Severance Agreement is null and void is for any reason overturned, the denial of Anderson County's motion to amend its Complaint to make that argument should be reversed.

IV. The Severance Agreement Is Void Because it Was a Product of Fraud and Abuse of Power, it Was Unreasonable and Capricious, and it Violated Public Policy.

Courts have the authority to invalidate an enactment, even in the absence of tainted votes, "in cases of fraud or clear abuse of power, or where [the action was] unreasonable or capricious." *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (quoting *SCE&G v. South Carolina Pub. Serv. Auth.*, 215 S.C. 193, 212, 54 S.E.2d 777, 785 (1949)). A court may also invalidate a county council action that violates the public policy of the state. *Piedmont Public Serv. Dist. v. Cowart*, 319 S.C. 124, 136, 459 S.E.2d 876, 882-83 (Ct. App. 1995) (invalidating employment contract as *ultra vires* and contrary to public policy), *aff'd on other grounds*, 324 S.C. 239, 478 S.E.2d 836 (1996); *Thompson v. Atlantic City*, 921 A.2d 427 (N.J. 2007) (invalidating settlement and release agreement with city procured for mayor of that city by political allies because conflicts of interest inherent in negotiation violated public policy). The Court misapprehended these principles in rejecting this argument.

Preston's claim for "anticipatory breach" was premised on the prediction that the *incoming* County Council was likely to take some unspecified improper action toward him. The claim was objectively baseless and therefore could not support the Severance Agreement.

Second, Preston's employment contract clearly provided that he served at the pleasure of County Council and could be terminated at any time and for any reason; the question was only whether he would be owed severance upon such termination. Preston's termination, in and of itself, simply could not have been a breach of contract.

Moreover, even if Preston could have claimed breach of his contract, Preston's own attorney admitted the "settlement" paid to Preston exceeded the maximum amount he could have claimed for breach. This was arbitrary.

Finally, the "debate" on the Severance Agreement was a sham, and based on fraud. The Agreement was added to the agenda by an amendment offered toward the end of the meeting and with no advance notice. The proposed Severance Agreement was then swiftly distributed, "debated," passed, "reconsidered," and voted on again – in addition to being funded in a separate action – all in a choreographed dance, with virtually no substantive debate. This was arbitrary, and an abuse of power. Meanwhile, Preston sat by with knowledge that the Agreement was being voted on by persons with clear and disqualifying conflicts of interest. This was fraud.

V. The Tainted Votes Cast in Favor of the Severance Agreement Require its Rescission.

Substantial and persuasive authority from other jurisdictions, cited to the Court in Anderson County's briefs, holds that a single tainted vote is sufficient to invalidate an action in cases like this one. Specifically, (i) where the enactment at issue confers a specific benefit for one individual rather than establishing a law of general applicability; (ii) where the action was not part of a County ordinance but instead was passed by a simple motion; (iii) where

consideration was marked by procedural irregularities; (iv) where tainted votes were cast by the chair or other key proponents of the action; *or* (v) where the matter was passed without notice or any opportunity for public comment or political redress, a single improper vote is sufficient to void the infected outcome. Here, not just one of these factors is present; they all are.

Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) is not dispositive here. The question of whether one tainted vote could support invalidation when the margin is larger was not even presented in *Baird*. To the contrary, *Baird* involved a one-vote majority, so the issue could not have arisen. Nor did *Baird* involve any of the special circumstances involved here, where one vote is enough. We request rehearing of this Court's holding that the statement in *Baird*, that "a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote," Opinion pp. 14-15, is the equivalent of a holding that a court *never* has jurisdiction to invalidate a vote on the basis of a smaller number of invalid votes. *Baird* did not address this question.

Second, even if Anderson County were required to invalidate a number of votes equal to the margin of passage of the Agreement, a single tainted vote would suffice. The passage of the Severance Agreement included a motion to reconsider – a parliamentary maneuver designed to prevent later reconsideration. The vote to end debate on the reconsidered motion was only 4-3. Because this one-vote margin was a necessary step in final approval, invalidation of a single vote is enough. The Court's rejection of these arguments misapprehended these points.

VI. Preston Had a Duty to Disclose the Facts That Required Disqualification of Thompson and Ron Wilson, and Preston Breached His Fiduciary Duty, and Engaged in Fraud, Constructive Fraud, and Negligent Misrepresentation When He Did Not Do So.

Preston was aware that Michael Thompson was soliciting a County job from him, and that he had just upgraded Ron Wilson's daughter's county contract for no good reason, and yet

he stood silently by and let them cast votes, thus implicitly and fraudulently representing to all present that their votes were proper, and breaching his duties to the County and its taxpayers. As a high-ranking employee, Preston had a duty to disclose the facts that made the Thompson and Ron Wilson votes improper. *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) (“Nondisclosure is fraudulent when there is a duty to speak.”).

The conclusion that Preston was excused from his duty to Anderson County because he also had asserted claims against the County confuses Preston’s private and public roles and misapprehends these points, and should be revisited. Certainly, Preston could negotiate with the County at arm’s length concerning his claims. But he did not resign. Instead, he remained employed by the County, and thus voluntarily retained a duty to the County. As County Administrator present at a vote affecting his own interest, Preston had a duty to make those conflicts known. His failure to do so constitutes breach of duty of loyalty, fraud, constructive fraud, and negligent misrepresentation.

VII. Rescission Is Available Here.

This Court held rescission is not available, in part because the parties cannot be returned to the *status quo ante*. For the reasons set forth in Anderson County’s briefs, this decision should be revisited – particularly in the event that future proceedings reopen this Court’s decision that the Severance Agreement is void. The facts of this case paint a picture of gross disregard for the public welfare and the public purse. Rescission is appropriate in such a case.

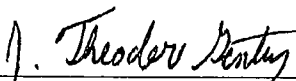
This is so for three reasons. First, where – as here – the party opposing rescission is himself at fault, he cannot rely on the “changed circumstances” rule to block rescission. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011). Second, equity is simply not so limited in fashioning remedies. This Court has agreed with Anderson County that Preston received over \$1.1 million of public money under a void contract. There must be clarity

that equity is available to the County to craft an appropriate remedy. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) (“in the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief”). Third, this ruling does not give sufficient weight to the public aspects of this case, and the fact that rescission is the appropriate remedy when a governmental action like this one is determined to be void; the considerations here are different from those that might apply in a purely private contractual setting. When public funds are expended under a void contract, it is imperative that an appropriate remedy be fashioned. The public interest must be given substantial weight in such a circumstance.

Anderson County respectfully requests rehearing on each of the foregoing grounds.

Respectfully submitted,

By:



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ATTORNEYS FOR APPELLANT
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June 14, 2017

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

JUN 15 2017

APPEAL FROM ANDERSON COUNTY

SC Court of Appeals

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County,.....Appellant,

v.

Joey Preston and the South Carolina Retirement System.....Respondents.

**PETITION FOR HEARING *EN BANC*, OR ALTERNATIVELY, FOR
REHEARING OF RESPONDENT JOEY PRESTON**

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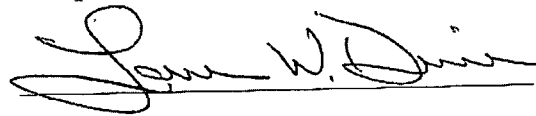
Attorneys for Respondent Joey R. Preston

Pursuant to SCACR 219 and 221(a), Respondent Joey Preston (“Respondent” or “Preston”) respectfully submits this Memorandum Supporting his Petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Opinion Number 5490 (“Decision”). Arguments in support of this petition are set forth in a memorandum in support hereof. Such arguments include:

- I. THE PANEL ISSUING THE DECISION LACKED THE QUORUM REQUIRED TO ISSUE THE INSTANT DECISION.
- II. DISQUALIFICATION OF WILSON’S AND WALDREP’S VOTES ADJUDICATED THE INSTANT CASE AND THIS COURT’S SUBJECT MATTER JURISDICTION INTO NON-EXISTENCE.
 - A. Without Wilson’s and Waldrep’s Votes, the Entire Case Before the Court Proves *Ultra Vires*.
 - B. This Court Otherwise Lacks Subject Matter Jurisdiction.
- III. THE COURT’S DECISION ERRED BY INVALIDATING THE SEVERANCE AGREEMENT DUE TO QUORUM ISSUES.
 - A. The Court Erred By Granting Appellant Relief Nowhere Found in Its Last Operative Pleading.
 - B. The Decision Erred By Ignoring the Law of the Case Resulting From Unappealed Findings.
 - C. The Decision Erred When Finding No Arguments Arose at Trial or Before Regarding the Disqualification of Waldrep’s and Wilson’s Votes.
 - D. The Decision Erred When Concluding Appellant Could Raise Its Quorum Arguments in a Rule 59(e) Motion.
 - E. The Decision Erred By Failing to Address the Lower Court’s Findings.

- IV. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING CONSTRUCTIVE TRUST.
- V. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING APPELLANT'S UNCLEAN HANDS.
- VI. THE DECISION ERRED BY INVALIDATING PRESTON'S SEVERANCE AGREEMENT.

Respectfully submitted,



by *W. Davis*
w/ permission

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June 15, 2017

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County,.....Appellant,

v.

Joey Preston and the South Carolina Retirement System.....Respondents.

**MEMORANDUM SUPPORTING PETITION FOR HEARING *EN BANC*, OR
ALTERNATIVELY, FOR REHEARING OF RESPONDENT JOEY PRESTON**

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Attorneys for Respondent Joey R. Preston

Pursuant to SCACR 219 and 221(a), Respondent Joey Preston ("Respondent" or "Preston") respectfully submits this Memorandum Supporting his Petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Opinion Number 5490 ("Decision").

I. THE PANEL ISSUING THE DECISION LACKED THE QUORUM REQUIRED TO ISSUE THE INSTANT DECISION.

The Court's Decision violates the South Carolina Constitution and controlling statutory provisions. Participation of only two members of the South Carolina Court of Appeals in reaching its Decision mandates vacatur, rehearing, and re-adjudication. It is axiomatic: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms." S.C. Const. Ann. Art. I, § 23.

Article V, § 7 of the South Carolina Constitution expressly grants the General Assembly the power to determine the Court of Appeals' structure and organization. In material part, Article V, § 7 mandates: "The structure and organization of the Court of Appeals shall be determined by the General Assembly. The Court of Appeals shall sit in panels." S.C. Const. Ann. Art. V, § 7. Pursuant to this constitutional grant of authority, the General Assembly enacted South Carolina Code § 14-8-80, which expressly provides: "On a panel, three judges shall constitute a quorum, and the concurrence of a majority of the judges is necessary for the reversal of the judgment below." S.C. Code Ann. § 14-8-80. A Court of Appeals panel, such as the two judge panel authoring the Court's instant Decision, lacks the mandatory quorum to adjudicate a matter absent participation by a third judge. As reflected by the Decision, however, Associate Justice Few (then Chief Judge

Few) did not participate in the outcome; nor could he. (Decision at 28 (Noting, “FEW, A.J., not participating.”))

At the time of oral argument (*i.e.*, June 11, 2015), Justice Few served as one of the three judges on the panel designated to hear this appeal. The General Assembly thereafter elected Justice Few to the South Carolina Supreme Court on February 3, 2016; he undertook the oath of office as Associate Justice on February 9, 2016. On May 25, 2016, the General Assembly elected Judge James Lockemy as the Court of Appeal’s Chief Judge filling the Justice Few’s prior position; Judge Lockemy’s investiture as Chief Judge followed within only a few weeks. Over a year later, this Court issued its opinion on May 31, 2017.¹

Upon assuming the office of Associate Justice of the Supreme Court (*i.e.*, on February 9, 2016), Justice Few could not simultaneously serve on both the Court of Appeals and the Supreme Court. This is true because his prior office had been filled by Judge Lockemy and because Article V, § 16 of the South Carolina Constitution mandates: “The Justices of the Supreme Court and the judges of the Court of Appeals...shall not, while in office...hold any other office or position of profit under the United States, the State, or its political subdivisions...nor shall they be allowed any...perquisites of office.” S.C. Const. Ann. Art. V, § 16. As of February 9, 2016, then, absent a duly appointed replacement, the presiding panel lost the required quorum needed to decide this matter. It was never regained.

¹ Of note, the Court’s analysis concerning abstentions (which in itself errs) cannot apply. *Id.* (Discussing how an abstaining member could still count toward quorum requirements). Only a member of the body can abstain. Here, Justice Few could not serve on both Courts thereby foreclosing his “abstention” as counting toward the panel’s quorum requirement.

Accepting the Court's own analysis, for the instant purposes only (*see infra*), "[N]o valid act can be done in the absence of a quorum" and the Decision proves "null and void" *ab initio*. (Decision at pp. 17-19) Thus, consistent with the Decision's reasoning, this Court must now vacate its opinion, reconstitute a quorum *via* the statutorily mandated three judge panel, re-open oral arguments if need-be, and decide this case anew. To hold otherwise belies the analytical crux of this Court's entire Decision.

II. DISQUALIFICATION OF WILSON'S AND WALDREP'S VOTES ADJUDICATED THE INSTANT CASE AND THIS COURT'S SUBJECT MATTER JURISDICTION INTO NON-EXISTENCE.

Disqualification of both the votes of Council Members Cindy Wilson ("Wilson") and Bob Waldrep ("Waldrep") adjudged both this case and the Court's subject matter jurisdiction into non-existence. According to the Decision, the lower court correctly applied the decision of *Baird v. Charleston County* finding South Carolina courts invalidate local government action if tainted votes prove outcome determinative. (*See Id.* at p. 19) The Decision likewise agreed with the lower court about disqualifying Wilson's and Waldrep's votes finding both had "clear conflicts" of interest prohibiting their participation in County Council votes concerning Respondent's severance agreement ("Severance Agreement"). (*See Id.* at 27 ("[D]espite having clear conflicts of interest...")) Based upon this reasoning, this Court must vacate its Decision and dismiss the County's appeal as *ultra vires*.

A. Without Wilson's and Waldrep's Votes, the Entire Case Before the Court Proves *Ultra Vires*.

Affirmance of the disqualification of Wilson's and Waldrep's votes garners irreversible impacts on both the case and this appeal. County Council authorized the filing

of the instant lawsuit on November 12, 2009 at called meeting starting at 2:00 PM. (*See* Ex. 2 (11/12/09 Meeting Minutes)) Following an executive session commencing at 2:05 PM and lasting until 3:40 PM, County Council considered whether: “[T]o hire the Wyche Burgess Law Firm for the purpose of reviewing and pursuing [the instant case] in regards to the contract with Mr. Preston.” (*Id.* at pp. 1-2) “The vote on the motion...resulted in four in favor (Waldrep, Moore, Ms. Wilson, Dunn), two opposed (Floyd, Allen).” (*Id.* at p. 2) The meeting adjourned at 3:50 PM. (*Id.*)

But, as the Court’s Decision confirms, both Waldrep and Wilson had “clear conflicts of interest” voting on measures impacting Respondent’s Severance Agreement. (*See Id.* at 27) Despite the same, within the next hour and ten minutes (*i.e.*, before the courthouse closed), the Appellant filed its original thirteen page Complaint initiating the instant, unauthorized lawsuit. (*See* R. pp. 000084-000096)

By operation of the Supreme Court’s holding in *Baird*, and this Court’s Decision, neither Waldrep’s nor Wilson’s votes--authorizing a public body to file this lawsuit (*i.e.*, Anderson County)—count, due to their respective disqualifications. As this Court correctly found, a “majority vote of those members present and voting shall decide all questions, motions, and other votes” considered by Anderson County Council. (Decision at p. 17) (Citing ACC § 2-37(d)) The public vote authorizing the filing of this case, then, failed by a vote of 2 (Moore and Dunn) to 2 (Floyd and Allen). (Ex. 2 at p. 2)

Appellant’s unauthorized filing of this lawsuit on November 12, 2009 lawsuit proved unauthorized, *ultra vires*, and a nullity from inception. “A civil action may be maintained only in the name of a person [or entity]...capable of possessing and asserting a right of action.” *Glenn v. E. I. Du Pont de Nemours & Co.*, 254 S.C. 128, 133, 170 S.E.2d 155

(1970). "[I]f there is a lack of legal entity [before the Court], the whole action fails ...it is as if there was no plaintiff in the record and therefore no action before the court; which presents an instance of want of jurisdiction." *Id.* at 134.²

A condition precedent to Anderson County possessing lawful authority and this constituting a legal entity actually before the Court below and this one was requisite authorization, which did and does not exist. (See ACC Ord. § 2-2 ("The ultimate and final source of authority in county government affairs is the county council...subject to the approval, execution, and control of the council...All centralized county functions, such as ...legal... are reserved to the county council, acting through the administrator and administrative staff."); ACC § 2-178 (c) (Public votes of Council prescribe authority of County Attorney); Ex. 1, p. 39, § XXVII (2012-13 Anderson County Budget Ordinance) (Requiring Council approval to fund legal services).)³

Without proper authorization, a slew of jurisdictional and jurisprudential defects ensue: Appellant lacked and lacks the capability, standing, capacity, real party in interest status, and lawful ability to press the causes of action it now urges. Without proper authorization, no actual case or controversy exists, nor could it—as no public entity with due authorization to sue—exists before this Court. The case fails. *Hughey v. Mooney*, 282

² Nor can an individual member or members constituting less than required act on behalf of a public body initiate suit for a body politic. See, e.g., *Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 83 (1997).

³ South Carolina Code § 19-3-10 requires South Carolina Courts to take judicial notice of local government enactments. Such facts also constitute adjudicative facts directly relating to whether this Court possesses subject matter to hear this case, an inquiry for which the Court has a duty to resolve once raised. As adjudicative facts, they prove subject to South Carolina Rule of Evidence 201's judicial notice provisions, including the mandatory provision prescribed by SCRE 201(d), under which Respondent presently moves.

S.C. 597, 602 (Ct. App. 1984) (“Unless a real party in interest... institutes suit, the court is without jurisdiction.”); *see also Ex parte Allstate Ins. Co.*, 248 S.C. 550, 562 (1966) (Court is “without jurisdiction” unless the real party in interest initiates suit and is properly before the Court.)

B. This Court Otherwise Lacks Subject Matter Jurisdiction.

The jurisdictional defects thereafter cascade in relation to this Court. On November 19, 2013, four (4) members of Anderson County Council, including Wilson, voted in favor of Anderson County Resolution No. 2013-067 ("Invalid Resolution"), while three (3) members voted against it. (*See* Ex. 2.) The Invalid Resolution purported to authorize Appellant’s attorneys "to take all necessary action to notice and fully pursue [the instant] appeal..." (*See* Ex. 3.)

Notwithstanding her “clear conflict of interest” as pertaining to Respondent’s Severance Agreement, Wilson: placed the Invalid Resolution on Council’s agenda (*see* Ex. 2 (11/19/13 Agenda, p. 2, ¶10(d); *Id.* (11/19/13 Meeting Minutes, p. 10, lines 31-36)); moved to have the Disputed Resolution approved (*Id.* at p. 46, lines 25-26); cast an outcome determinative vote against extending the time for discussion (so her fellow Council members could not be fully heard) (*Id.* at p. 51, lines 29-33); and then cast an outcome determinative vote in favor of the Invalid Resolution authorizing Appellant’s attorneys to file the County’s notice of appeal. (*Id.* at p. 51, line 33- p. 52, line 5) On November 19, 2013, Wilson pursued such actions, notwithstanding fellow Council member Gracie Floyd’s: openly objecting to Wilson’s placing the Disputed Resolution on the County’s agenda, expressly noting her conflict of interest in doing so, participating in any such deliberations, and notifying the full Council of an existing request by her to the State Ethics

Commission requesting an investigation into Wilson's conduct. (*Id.* at p. 10, line 31-p. 11, line 38)

Pursuant to Rule 203(b)(1), SCACR, the County was required, but did not, file a valid notice of appeal no later than December 8, 2013. A validly authorized notice of appeal constitutes a prerequisite to this Court's exercise of subject matter jurisdiction. *Elam v. S.C. DOT*, 361 S.C. 9, 14-15 (2004); *Mears v. Mears*, 287 S.C. 168 (1985) Counsel for the County (unwittingly) filed an *ultra vires* notice of appeal on Appellant's behalf, as no valid authority existed to do so due to County Council's failed vote on the Disputed Resolution. As a consequence, the notice of appeal filed by the County constitutes an unauthorized, *ultra vires* action and void *ab initio*.⁴

Moreover, Appellant cannot remedy either of the above defects at this point. As noted *supra*, the lack of a *bona fide* Appellant immediately deprives the Court of jurisdiction. *Glenn v. E. I. Du Pont de Nemours & Co.*, 254 S.C. at 133 ("[I]f there is a lack of legal entity [before the Court]...presents an instance of want of jurisdiction.") And, pursuant to Rule 203(b)(1), SCACR, Appellant was required, but did not, file a valid notice of appeal no later than December 8, 2013. "[I]f a party misses the deadline [to file a notice of appeal], 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." *Elam v. S.C. DOT*, 361 S.C. 9, 14-15 (2004); *see also Mears v.*

⁴ Respondent raised subject matter jurisdiction to this Court at the appeal's inception. Respondent acknowledges the issues may have been prematurely raised at that time, since the jurisdictional predicate (*i.e.*, Wilson's and Waldrep's tainted votes) remained in contention. However, now that the Court has definitively decided the issue, the legal impact on this Court's subject matter jurisdiction is inescapable.

Mears, 287 S.C. 168, 169 (1985) (Because it is a “jurisdictional requirement,” Court lacks “authority to extend or expand the time in which the notice of intent to appeal must be served.”)⁵ Because Appellant failed to file a timely notice of appeal, the Court of Appeals lacks jurisdiction to hear this case and it must be immediately dismissed.

Nor can this Court simply ignore the issue. Once this Court learns of potential jurisdictional infirmities, it has a duty to confirm the existence of its subject matter jurisdiction.⁶ *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (“Furthermore, this Court must, on its own motion, raise the issue of subject matter jurisdiction to ensure the ‘orderly administration of justice.’”)⁷ Once it confirmed the

⁶ It is anticipated Appellant will suggest this Court possesses jurisdiction so long as the notice of appeal is not irregular on its face. This is plainly wrong for two reasons. First, Courts routinely inquire beyond a party’s court filings and examine the facts underlying their jurisdiction. *See, e.g., Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (“A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually.”); *see also Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (Court allowed to consider evidence beyond filings); *see also Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (same). Second, Appellant’s anticipated argument, if true, would fail to address the underlying jurisdictional defect, such as here, a public body filing an appeal that is an unauthorized and *ultra vires* act of a public body, which can *only* act as prescribed by law. To hold otherwise, as Appellant might suggest, would enable the creation of *faux* subject matter jurisdiction—based upon artfully pled yet untrue facts—without regard to the Court’s obligation to the Constitution and veracity. Indeed, as the party invoking jurisdiction, once questioned, Appellant has the obligation to prove the same. *Melendez v. Sebelius*, 611 Fed. Appx. 762, 763 (4th Cir. 2015) (Once challenge “is raised to...subject matter jurisdiction, ‘the burden of proving the asserted basis for jurisdiction falls on the plaintiff.’”); *Banks v. Virginia Elec. & Power Co.*, 2000 U.S. App. LEXIS 2400, *6 (4th Cir. 2000) (“The plaintiff has the burden of proving that subject matter jurisdiction exists.”); *see also Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (“In determining whether a party has standing to bring suit, the party invoking the jurisdiction of the court bears the burden of establishing standing.”)

⁷ The Decision would otherwise err since this Court has no way of knowing the full extent of the potential jurisdictional impact disqualifying Wilson’s and Waldrep’s votes has. Of course, “[I]ack of subject matter jurisdiction can be raised at any time” and “can be raised

propriety of the disqualification of Waldrep's and Wilson's votes, this Court also confirmed it had no subject matter jurisdiction. Accordingly, the Court must "ensure the orderly administration of justice" by vacating its decision, and dismissing this appeal. *Tatnall v. Gardner*, 350 S.C. at 137. To hold otherwise is tantamount to exercising hypothetical jurisdiction—where none actually exists—so as to adjudicate an issue nonetheless. Such is not the province of South Carolina courts. Alternatively, this Court should vacate its decision, except as to the findings related to Waldrep and Wilson and remand this case to the lower court to conduct further evidentiary proceedings concerning what extent such disqualification impacts the Court's organic ability to hear this matter.

III. THE COURT'S DECISION ERRED BY INVALIDATING THE SEVERANCE AGREEMENT DUE TO QUORUM ISSUES.

Citing a lack of quorum, the Decision errantly invalidates Respondent's Severance Agreement and remands the case back to the trial court to determine if a remedy

for the first time on appeal." *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248 (Ct. App. 1998). Here, however, even non-subject matter jurisdiction issues warrant remand. If, as the Decision holds--the disqualification of Wilson's and Waldrep's votes were nowhere raised at trial (a holding to which Respondent assigns manifest error (*see infra*)), *but see* Decision at p. 15 ("Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidate")—further proceedings now prove necessary to ascertain what impacts such disqualification has on the Court proceedings. This proves necessarily true by virtue of the Decision's logic, since id unfair prejudicing Respondent—since (by such logic) the instant filing proves as the first time Respondent, as prevailing party, would have had to raise such issues. Of course, Respondent disputes certain aspects of this analysis (*see infra*). But, if this Court continues to hold the disqualification of Wilson's and Waldrep's votes--then, at a minimum, Preston should be treated on equal procedural footing with Appellant. Such errant analysis cannot be solely deployed to benefit Appellant but ignored as to Respondent and his detriment.

exists. The Court should grant rehearing on this issue, or alternatively, vacate its findings and issue a new opinion for several reasons.

A. The Court Erred By Granting Appellant Relief Nowhere Found in Its Last Operative Pleading.

By granting relief bottomed upon the absence of a quorum, the Decision grants relief to the County that nowhere appears in its Complaint. Nowhere in Appellant's pleading do they seek rescission (or any other relief) based upon the County Council lacking a quorum. (*See* R. pp. 000127 to 000141) Yet, the Decision, by judicial declaration, enters exactly that legal finding: "Based upon the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum." (*See* Decision at p. 20) Thus, the decision first errs, in this regard, by granting unpled declaratory relief.⁸

B. The Decision Erred By Ignoring the Law of the Case Resulting From Unappealed Findings.

Granting relief bottomed upon the absence of a quorum, as the Decision purports to do, has the impermissible effect of uprooting established law of the case. Recognizing that it failed both to allege and preserve quorum-related issues as a basis to seek the Severance Agreement's rescission, on July 15, 2013, Appellant filed a post-

⁸ Of course, such finding begets yet another infirmity of the Decision. On page 27 of the Decision, the Court reverses the lower court's ruling that a declaratory action would fail to provide adequate relief. (*See* Decision at p. 27) However, critically analyzing the Decision prompts the inescapable conclusion: what the Decision holds as an inadequate remedy (*i.e.*, declaratory relief) proves identical in substance to what its holding does. (*Id.*) For yet another reason, the Court should vacate its Decision, conduct rehearing either *en banc* or on a reconstituted panel, and ameliorate the deficiencies set forth herein, as the Court's ruling in this case will guide local government bodies statewide with respect to an array of issues potentially in perpetuity.

judgment, Motion to Amend (“Untimely Motion”) its Complaint seeking to amend its pleading by adding a claim for the exact relief the Decision presently (albeit errantly) grants and apparently allows. (See R. p. 00001 to R. p. 00043) At the time Appellant filed its Motion to Amend: *eight and a half months had lapsed* since the lower court concluded hearing evidence; *eight months had lapsed* since the parties submitted written closings, *two and half months had lapsed* since the lower court issued its final order and judgment, and *sixty days had lapsed* since Appellant had filed its Motion to Amend or Alter the Judgment. (Compare filing dates on: R. p. 264 with *Id.* p. 3052 with *Id.* p. 3099 with *Id.* p. 3163 with *Id.* p. 3245)

The lower court denied Appellant’s Untimely Motion on November 8, 2013 (“November 8th Order”). (R. pp. 44 to 49) Appellant could have, but did not, file a Motion to Alter or Amend the findings denying the Untimely Motion. For tactical reasons (*i.e.*, not wanting to highlight its deficient and belatedness of the Untimely Motion, nor its recognition that such basis relief nowhere appears in its operative pleading), Appellant instead made a tactical decision to pursue filing its Notice of Appeal on November 22, 2013. Moreover, the overwhelming number of findings supporting the Untimely Motion’s denial remain wholly untouched by the issues for which Appellant did seek reconsideration and upon which it bottoms its appeal. This yields the inescapable conclusion that all such un-appealed findings—including the County lacked the right to amend--ripened to finality and became law of the case. *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 333 (2015) (“Petitioners have not appealed this ruling. Thus, it is now the law of the case.”)⁹

⁹ Appellant likewise appears to recognize the Decision’s error as set forth above. For this reason, Appellant asks the Court to modify its Decision to find the County had the right to

Appellant neither moved to reconsider nor appealed any of the following findings:

- “The County failed to preserve the proposed Quorum Claim, as the issue was never presented to the Court.” (R. p. 44)
- “At trial, [Appellant] actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast.” (*Id.*)
- “Allowing [Appellant] to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013.” (*Id.* at p. 45)
- “Even if the Quorum Claim had merit, which the Court rejects...the County unduly delayed in seeking the Quorum Claim amendment.” (*Id.*)
- “The County had more than adequate opportunity to pursue the amendment: from the case's inception; during the three (3) years leading up to trial; following Waldrep's and C. Wilson's depositions; in connection with the previous amendment of Plaintiff's Complaint (which was by consent on March 29, 2012).” (*Id.*)
- “The County could also have pursued the amendment: on or before the first day of trial; during the trial; contemporaneous with the submittal of its November 16, 2012 written summation following trial; or during the six (6) month window between trial and issuance of judgment.” (*Id.*)
- “The County failed to identify any legitimate basis, legally or factually, for its delay in pursuing the Quorum Claim.” (*Id.*)
- “Permitting the County's proposed amendment—following a lengthy trial and after judgment issued—would require the Court to re-open proof in this case. Such result would highly prejudice Preston.” (*Id.*)
- “Absent re-opening proof, Preston would lose:

amend its Complaint to seek “invalidation of the Severance Agreement on the basis of absence of a quorum.” (App. Petit. for Reh., p. 3, § III) For the reasons explained herein, however, such modification would only enhance the Decision's error.

-“The opportunity to develop facts and introduce evidence of prior usage and to assert the same as an affirmative defense.” (*Id.*)

-“The opportunity to develop facts and introduce evidence regarding other affirmative defenses such as (*inter alia*) the rule of necessity doctrine, ratification, waiver, and estoppel.” (*Id.*)

-“The opportunity to develop facts and introduce evidence refuting the non-existence of a quorum.” (*Id.*)

-“The opportunity to introduce expert testimony concerning the Quorum Claim.”

-“The opportunity to pursue different litigation and trial strategies, based upon claims actually asserted.” (*Id.* at p. 46)

-“The opportunity to develop and introduce evidence pertaining to counter-theories that the entirety of the lawsuit constituted an unauthorized act.” (*Id.*)

-“Re-incur duplicative discovery and trial expense after trial. (*Id.*)

- “By contrast, if the [lower court] allowed the County to re-litigate the case by re-opening proof, Preston would:

-“Incur an unfair disadvantage inasmuch as it would allow the County to try the case under one theory, absent certain risks, and upon losing, re-open the record to re-try the case under a new theory” (*Id.*)

-“Incur an unfair disadvantage as to litigation decisions, trial strategies, and the presentation of evidence which Preston showed were made based upon the framing of the issues (as then framed), which cannot now be undone” (*Id.*)

-“The loss of the procedural right under Rule 15(b), SCRCP, which would have permitted Preston to seek a continuance during trial, had the County timely pursued the instant amendment” (*Id.*)

-“[D]ue to the County's undue delay and the resulting prejudice to Preston, the Court denies Plaintiff's Motion to Amend.” (*Id.*)

-“The Court also finds the County's proposed amendment proves futile.” (*Id.*)

- “The County alternatively seeks to amend pursuant to Rule 15(b), SCRCP contending the Parties tried the Quorum Claim by consent during trial.” (*Id.* at p. 48)

- “As noted above, the Court rejects the County's contention that the Quorum Claim was raised during trial or even before judgment issued.” (*Id.*)
- “The County's arguments fail under Rule 15(b)...” (*Id.*)
- “[A]mendment of Plaintiff's Complaint to add the Quorum Claim would highly prejudice Preston if allowed.” (*Id.*)
- “[E]ven if amendment under Rule 15(b) otherwise proved proper, such amendment was clearly not express and “implied consent will not be found if all the parties did not recognize [the issue] as an issue at trial, even if evidence in the record exists to support the amendment.” (*Id.*)

For these reasons, the lower court found the Appellant could not amend its Complaint to assert the quorum issues as a basis for relief. Because the County did not appeal any of the above findings, they have become law of the case and Appellant cannot seek affirmative relief based upon quorum issues. *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (stating that where a trial judge's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

The Decision errs by collaterally reversing issues nowhere embraced by the County's Appeal. The Decision further errs by failing to take into account (or even addressing) the findings set-out above, which have cemented as law of the case. Last, the Decision errs by failing to take into account the prejudice incurred by Preston as a result of the Decision allowing the County to amend its Complaint eight months after trial. For this reason and those set-out below, this Court should vacate its decision, or slate a rehearing *en banc*, or, alternatively, rehearing by a reconstituted panel.

C. The Decision Erred When Finding No Arguments Arose at Trial or Before Regarding the Disqualification of Waldrep's and Wilson's Votes.

Plain error infects the Decision in yet another way. According to the Court's reasoning, Appellant permissibly raised its quorum arguments, for the first time, in its post-trial Rule 59 Motion, because: "Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated." (Decision at p. 15) The Court should grant the instant Petition because such finding proves demonstrably and manifestly incorrect.

In light of the frequency with which the disqualification of Wilson's and Waldrep's votes appears in pre-trial discovery, the trial transcript, the Parties' Closings, the lower court's orders, and the parties' appellate briefs, the Court's finding in this regard appears to be a scrivener's error, albeit a material one. An illustrative but non-exhaustive list of examples includes:

- **Pre-trial Deposition of C. Wilson (published at trial).** (*See* R. p. 1680, line 10-22)(Preston's personal attorney threatened tort claims against Wilson and Waldrep); (*Id.* at 1689, lines 3-23) (Admitting Court found Wilson was interfering with Preston's ability to do job); *Id.* at 1693, line 24-1694, line 1-3) (Admitting existing tort claims threatened against Waldrep and Wilson on night of Severance Agreement vote); *Id.* at 1685, line 10-22)(Questioning Wilson about scope of release as embracing "council members.")
- **Respondent's motion for directed verdict.** (*See* R. p. 1351, line 13 to 1353, line 9) (*Id.* at p. 1351, lines 13-16: "Your Honor, you have heard evidence over the past...four days that would allow you, and the Court should discount both the votes of Cindy Wilson and Bob Waldrep."; *Id.* at p. 1352, lines 23-25 ("The consequence of this is that...both of their votes are discounted."); *Id.* at 1392, line 19 to 1394, line 9 (p. 1394, lines 2-9: "[A]nd you discount Cindy Wilson and Bob Waldrep's vote...[i]t still passes three nothing...[n]o matter which way you frame this... the vote still goes through."); *Id.* at 1394, line 22 to 1394, line 1 ("[I]t's framed by my pleadings...one of my affirmative defenses is specifically under...the *Baird* doctrine, and that is what I'm saying with respect" to the Severance Agreement vote.)

- **Appellant arguing against Respondent's motion for directed verdict.** (See R. p. 1378, line 19) ("I thought it was inventive, but wrong..."); *Id.* at 1379, lines 12-13 (*Baird* analysis should not apply to Waldrep and Wilson because the purpose of the ethics prohibition: "is to keep you from voting in favor of your own interest."); *Id.* at 1380, lines 12-16 ("The other thing that we pointed out in the...course of our case is that the benefit was not—it was not a release of Cindy Wilson and Bob Waldrep...")(emphasis added); *Id.* at 1381, line 19-21 ("The other problem with that argument, Your Honor...was that Ms. Wilson and Mr. Waldrep did not have time to read [the Severance Agreement]...")
- **Court discussing Respondent's directed verdict motion.** (R. p. 1397, line 21-22) ("[A]s to what votes should be or shouldn't be invalidated is also a question that's up for interpretation.")
- **Appellant's Closing.** (See R. pp. 3068 to 3069) ("The final point to make with respect to invalid votes relates to Preston's argument at trial that the votes of Cindy Wilson and Bob Waldrep should be invalidated because they were voting in favor of a release for themselves" and then outlining three arguments why the Court should not invalidate Waldrep's and Wilson's votes.)
- **Respondent's Closing.** (See R. p. 3125, § 2(b) & FN 21 ("[A]pplying *Baird* to the instant case (which was pled as the Ninth Affirmative Defense), the two negative votes (those of Bob Waldrep and Cindy Wilson) against Preston's Severance Agreement must be discounted..." and then reciting the evidence introduced at trial)
- **May 3, 2013 Final Judgment.** (See R. pp. 10-12 & FN5 & 7) (Lower court outlining evidence supporting Waldrep's and Wilson's conflicts of interest) (FN6 discussing Appellant's arguments against disqualifying Waldrep's and Wilson's votes.)
- **November 25, 2013 Reconsideration Order.** (See R. p. 78, Issue 15 (Again citing evidence presented at trial supporting disqualification of Waldrep's and Wilson's votes.)
- **Respondent's Brief.** (See Resp. Brief, pp. 21-23 & FN29-32 (Providing pinpoint cites of evidence supporting disqualification of Waldrep's and Wilson's votes.)
- **Appellant's Untimely Motion to Amend.** (See R. p. (Lower court should permit the amendment because: it would "assert[] no 'new' factual issue in the Second Amended Complaint that has not already been tried;" "Preston himself introduced [the] argument to the proceedings;" and the facts supporting the disqualification of Waldrep's and Wilson's votes "have been

fully developed” and later arguing amendment should be allowed to conform to evidence because parties tried disqualification of votes by consent under Rule 15(b), SCRPC. (R. pp. 3248-3249)

- **This Court’s Decision.** Page 16 of the Decision actually cites a passage where the disqualification of Waldrep’s and Wilson’s votes arose at trial. (Decision at p. 16)

Based upon the above and serial other citations found throughout the Record, the Decision erred when it found: “Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated.” (Decision at p. 15)

D. The Decision Erred When Concluding Appellant Could Raise Its Quorum Arguments in a Rule 59(e) Motion.

The Decision erred when it found the County could raise its quorum arguments, for the first time in its Rule 59(e) Motion. As the authority cited in the Decision notes: “Post-trial motions are...utilized to raise issues that could not have been raised at trial.” (Decision p. 15) (Citing J. TOAL, S. VAFI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA 189 (3d. ed. 2016). As demonstrated in Section (c) above, the issue of Wilson’s disqualification (and derivatively that of Waldrep) arose during Wilson’s pre-trial deposition. (*See supra*) Respondent raised the disqualification of Waldrep’s and Wilson’s votes numerous times at trial. (*Id.*)

As also noted above, Appellant introduced evidence intended to rebut the argument. (*Id.*) Appellant argued against the same during Preston’s directed verdict motion. (*Id.*) Appellant thereafter repeated the same exact arguments—despite several additional weeks—in its written closing argument. (*Id.*) Then, in its post-judgment and Untimely Motion to Amend, Appellant argued the facts supporting the disqualification of Waldrep’s and Wilson’s votes were “fully developed” at trial. (*Id.*) Simply nothing stopped the

County from arguing the lower court should invalidate the Severance Agreement based upon a lack of quorum, except Appellant's tactical decision not to do so.

As the lower court found in an unappealed finding: "At trial, [Appellant] actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (*Id.*) The lower court correctly concluded: "Allowing [Appellant] to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013." (*Id.* at p. 45)

Of course, if Appellant argued the disqualification of Waldrep's and Wilson's votes invalidated the Severance Agreement due to absence of a quorum, such argument tacitly acknowledges the *Baird* standard would apply. Such position ran directly contrary to Appellant's urged position (for over three years at the point) in favor of the "single tainted vote rule" sometimes deployed in handful of other jurisdictions. (*See* Decision at p. 14) If such concession were made and the lower court did not invalidate enough votes to allow Appellant to argue destruction of a quorum, then the County would necessarily lose. As a result, it made a tactical decision not to pursue relief on that ground, which is perfectly legitimate, but not grounds to assert, for the first time, a new basis for relief following judgment.¹⁰

¹⁰ Importantly, the instant case proceeded as a bench trial. As such, if the County wished to pursue the quorum issue and felt it was new material, it could have moved for a continuance under Rule 15(b), SCRCP. This did not occur. Moreover, under Rule 52(b), SCRCP, the County could have, but did not, request the trial court to re-open the proceedings and make additional findings. Appellant did not request the same, since it

E. The Decision Erred By Failing to Address the Lower Court's Findings.

Respondent's Petition should be granted because the Decision overlooks several material findings by the lower court. The findings omitted by the Decision and requiring adjudication include:

- The lower court's finding as to why both Appellant's and Respondent's pleadings embrace the disqualification of Waldrep's and Wilson's votes. (*See* R. p. 59)
- The lower court's analysis under Rule 59(e), SCRCP. (*Id.* at 58, FN32)
- The language indicating physical presence at the meeting site dictates whether a quorum exists under the Anderson County Code. (*See Id.* at 47)
- The lower court's analysis about why the disqualification of Wilson's and Waldrep's votes formed part of Appellant's *prima facie* case. (*See Id.* at 59)
- The lower court's discussion of Appellant's attempt to amend under Rule 15(b), SCRCP. (*Id.*)
- Consistent with the above, the varying formulations for carrying a measure under the Anderson County Code versus quorum requirements. For example, a measure passes by a majority of those present and voting, not a majority of the quorum. (*Id.*)
- Appellant's own prior interpretation and usage under its Code, which the lower court's analysis mirrors, and the County Code requires to be followed in precedential fashion. (*Id.*)
- The definition of quorum under FOIA, which Appellant's Code, incorporates, along with State Ethics Provisions, all of which mirror the County's own prior usage and the lower court's decision, but not this Court's decision. (*Id.*)

made the tactical decision not to do so. Instead, it aimed to keep the issue in its hip pocket but by doing so it waived the right to pursue the relief.

- The lower court's discussion distinguishing such case as *Garris v. Governing Bd. Of S.C. Reins. Facility*. (*Id.* at 47, FN2)

While the Decision mentions some, but not all, of these findings, it fails to rule upon any, nor does it offer any analysis why the lower court erred as to the same. For this reason, the Decision erred and Respondent's Petition should be granted.

Rule 59(e) motions are not the equivalent of procedural take-home exams. According to the Decision, the Court agreed with the lower court that the County failed to assert the absence of a quorum as a basis for relief prior to filing its Rule 59(e) motion. Based upon this ruling, the Decision then reaches the exact opposite result mandated by controlling precedent. South Carolina's Courts have ruled over and over that: "A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial." *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995). The lower court correctly adhered to controlling precedent in this regard, *see, e.g.*, R. p. 58 & FN32, and the Decision erred by not doing so.

No other votes were challenged in the pleadings." (App. Brief, p. 47.) Not so. Ignored by Appellant, the lower court found both the County's Complaint and Preston's Answer required the trial court to analyze the votes of all Council members. (R. pp. 6 & FN4; 133, ¶35; 59-60 & FN29-35.) As the lower court also found, "The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims Appellant alleged in seeking to invalidate Council's action." (R. p. 59.) Finally, Appellant never interposed a challenge to the lower court's finding where it held: "The Parties otherwise tried the issue of

disqualifying Waldrep's and C. Wilson's votes pursuant to Rule 15(b), SCRCP...The court allowed the evidence at trial and addressed the same on page 6 of its Order.") (Id.) Thus, the County errs by suggesting the issue was not adequately raised at trial because it clearly was.

IV. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING CONSTRUCTIVE TRUST.

The Decision erred in relation to its findings concerning Appellant's claim for constructive trust. This is true for several reasons. First, the Decision failed to address the lower court's findings about Appellant's constructive trust claim. (*See, e.g.*, R. p. 74) Specifically, the lower court found Appellant failed to prove the *prima facie* elements of such claim by the required clear and convincing standard. This proves especially true in relation to issues of fraud and constructive fraud, which the Decision agreed, Appellant failed to prove.

Second, the relief Appellant now urges in relation to its constructive trust claim (*i.e.*, partial payments into perpetuity) from Preston's retirement funds nowhere appears in Appellant's last operative pleading. As a result, the Decision erred by reversing the lower court, as both Appellant and the Decision acknowledge the "full amount" of funds Appellant attempts to place into constructive trust no longer exist to grant the relief requested. This was error.

Third, the Decision erred by mismatching its shoes. On one hand, the Decision makes a legal ruling (*i.e.*, invalidation bottomed upon absence of a quorum), but on the other hand, the Decision attempts to bootstrap such legal determination to a constructive

trust claim, which sounds in equity. These shoes do not match and the Decision consequently errs.

Fourth, the Decision proves ambiguous as to what the lower court is being asked to do. The Court should re-open its opinion and vacate the same. But, at a minimum, the Decision proves confusing as to its instructions to the lower court, which will only result in further litigation.

Last, the balance of the Decision (*i.e.*, findings: that the parties operated at arm's length, no confidential relationship existed under the circumstances, mutual representation by counsel, no fraud occurred, no constructive fraud occurred) forecloses constructive trust as a remedy, even if it could bootstrap to a legal finding, which it cannot. For these reasons, the Decision errs and the Court should grant Preston's Petition.

V. THE DECISION ERRED WHEN IT REVERSED THE LOWER COURT'S FINDINGS CONCERNING APPELLANT'S UNCLEAN HANDS.

The Decision errs as to unclean hands for several reasons. First, it fails to address the distinctions carefully drawn by the lower court in relation to the same. (*See, e.g.*, R. p. 57) Second, the Decision failed to address the lower court's analysis about sitting Council members and in-coming members acting in concert, pursuant to a common design, and as joint-tortfeasors. (*Id.* at 57-58). Last, the Decision failed to address Appellant's express ratification of such misconduct by the individual members. (*Id.* at 33.) Overlooked by the Court is the following resolution adopted by the County:

Whereas, Mr. Waldrep incurred those legal fees in defending an action brought by the former county administrator of Anderson County who

challenged actions taken by Mr. Waldrep and Ms. Wilson as members of council;

Whereas, the payment of those legal fees was approved by the interim county administrator for Anderson County;

Whereas, in order to reaffirm its legal position in the Jones case Anderson County Council desire to approve and ratify the payment by the county of legal bills incurred by Mr. Waldrep in connection with the Preston—with Preston versus Wilson.

Now, therefore, it is hereby resolved by Anderson County Council that Anderson County Council hereby ratifies and approves the payment of the defense of Preston versus Wilson.

(R. at 3300, ll. 10-50) The lower court twice referenced the same in its findings. (R. at 000032 (“Actions of sitting councilmen whose legal fees for actions surrounding the following were later paid by the County...”)) (R. at 000033) (Bullet point 3: “According to Waldrep, the County later paid his attorney’s fees ratifying his actions as within his official scope of duties...Cindy Wilson confirmed this was consistent with her recollection...”); (R. at 000057, FN 28 (“Notably Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63.”)) The Decision errs by failing to address the same.

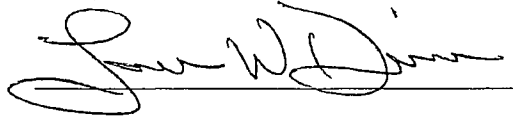
VI. THE DECISION ERRED BY INVALIDATING PRESTON’S SEVERANCE AGREEMENT.

For the reasons set forth above, the Decision erred when it invalidated Preston’s Severance Agreement. Accordingly, the Court should grant Preston’s Petition.

CONCLUSION

For the reasons set forth above, this Court should grant the instant Petition. The Court should grant rehearing *en banc* because the instant case involves far-ranging matters necessitating uniform treatment and similarly involves matters potentially impacting local government units statewide. Alternatively, the Court should grant rehearing to a reconstituted panel.

Respectfully submitted,



by *W. Davis*
per

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June 15, 2017

EXHIBIT 1

**(2012-13 ANDERSON COUNTY BUDGET
ORDINANCE)**

STATE OF SOUTH CAROLINA
COUNTY COUNCIL FOR ANDERSON COUNTY

ORDINANCE NO 2012-022

AN ORDINANCE TO ADOPT THE OPERATING AND CAPITAL BUDGETS OF ANDERSON COUNTY FOR THE FISCAL YEAR BEGINNING JULY 1, 2012, AND ENDING JUNE 30, 2013, AND TO MAKE APPROPRIATIONS FOR SUCH ANDERSON COUNTY BUDGETS FOR COUNTY ORDINARY PURPOSES AND FOR OTHER COUNTY PURPOSES FOR WHICH THE COUNTY MAY LEVY A TAX OTHER THAN FOR TRI-COUNTY TECHNICAL COLLEGE PURPOSES; TO PROVIDE FOR THE LEVY OF TAXES ON ALL TAXABLE PERSONAL AND REAL ESTATE PROPERTIES IN ANDERSON COUNTY FOR SUCH COUNTY ORDINARY PURPOSES, INCLUDING SUFFICIENT TAX TO PAY THE PRINCIPAL AND INTEREST ON OUTSTANDING INDEBTEDNESS OF ANDERSON COUNTY MATURING DURING SAID FISCAL YEAR; TO ADOPT THE OPERATING AND CAPITAL BUDGETS OF ANDERSON COUNTY FOR THE FISCAL YEAR BEGINNING JULY 1, 2012, AND ENDING JUNE 30, 2013, AND TO MAKE APPROPRIATIONS FOR SUCH ANDERSON COUNTY BUDGETS, FOR TRI-COUNTY TECHNICAL COLLEGE; TO PROVIDE FOR THE LEVY OF TAXES ON ALL PERSONAL AND REAL PROPERTIES IN ANDERSON COUNTY ON WHICH SCHOOL TAXES MAY BE LEVIED FOR SUCH TRI-COUNTY TECHNICAL COLLEGE PURPOSES; TO PROVIDE FOR THE LEVY, ASSESSMENT AND COLLECTION OF CERTAIN OTHER TAXES AND FEES; TO PROVIDE FOR THE EXPENDITURE OF SAID TAXES AND OTHER REVENUES COMING TO THE COUNTY DURING SAID FISCAL YEAR; AND TO PROVIDE FOR OTHER MATTERS RELATING TO ANDERSON COUNTY.

BE IT ENACTED by the County Council for Anderson County, South Carolina ("Anderson County"), as follows:

In order to undertake and achieve the Anderson County vision statement, as previously adopted by the Anderson County Council, and in order to undertake, carry out, and achieve the Anderson County priorities, as established by Anderson County Council, the following operating and capital budgets for Anderson County for the fiscal year beginning July 1, 2012, and ending June 30, 2013, are hereby adopted and directed to be implemented by the Anderson County Administrator and staff.

SECTION I. ADOPTION OF OPERATING AND CAPITAL BUDGETS FOR
COUNTY ORDINARY AND OTHER PURPOSES

Pursuant to Section 4-9-140 of the South Carolina Code of Laws, 1976, as amended (the "Code"), the operating and capital budgets of Anderson County (the "Anderson County Budgets"), for County ordinary purposes and for other County purposes for which the County may levy a tax other than for Tri-County Technical College purposes, as hereinafter set forth, by reference and otherwise, are hereby adopted for the fiscal year beginning July 1, 2012 and ending June 30, 2013.

SECTION II. LEVYING OF A SUFFICIENT TAX FOR COUNTY ORDINARY
AND OTHER PURPOSES

A tax of sufficient millage to fund the appropriations for the Anderson County Budgets, herein made, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, after crediting against such appropriations all other revenue anticipated to accrue to Anderson County during said fiscal year, not designated for any other specific purpose, is hereby directed to be levied upon all taxable property of Anderson County upon which the County may levy County ordinary taxes, for County ordinary purposes and for other County purposes for which the County may levy a tax, other than for the Anderson County Library, Tri-County Technical College purposes, the County Sheriff's Office, County sewer, Metropolitan Anderson Area ambulance service and countywide emergency service, solid waste fees, sewer fees, Civic Center fees, Animal Shelter fees, 9-1-1 tariffs, and road encroachment fees, all as separately levied in Sections VIII, XI, XIII, XIV, XV, XVI, XVII, XXXVI, XXXVII, XXXIX, and XXXX of this Ordinance, such tax to fund the following amounts or millage, which shall be separately identified, levied, collected, and accounted for, as millage, for the purposes shown, as required by subsequent sections of this Ordinance (excluding Fee-In-Lieu of Taxes), with the total millage so levied, exclusive of debt service millage to be set by the Anderson County Auditor, not to exceed 78.7 mils, total

County Ordinary		\$19,369,815
1998	General Obligation Bonds	1,024,845
2005	General Obligation Bonds	738,665
2007	General Obligation Bonds	632,310
2008	General Obligation Bonds	1,107,530

Other taxes and uniform assessments levied by this Ordinance in Sections VIII, XI, XIII, XIV, XV, XVI, XVII, XXXVI, XXXVII, XXXVIII, and XXXIX are:

Anderson County Library	\$3,676,410
Infrastructure Reserve Fund	\$1,696,805
Capital Projects Fund	\$226,240
Tri-County Technical College (Education Millage)	\$1,571,660
County Sheriff's Office	\$17,081,165
Anderson County Sewer	3.0 mils
Metropolitan Anderson Area Ambulance & Countywide	

City of Anderson Metropolitan Area	3.2 mils
All Anderson County	4.0 mils
Solid Waste/Recycling Fees	\$64.83/household, \$75.64/commercial
Sewer Fees	As set in Section XVII
Civic Center Fees	As set in Section XXXVI
Animal Shelter Fees	As set in Section XXVII
9-1-1 Tariff	As set in Section XXXIX
Road Encroachment Fees	As set in Section XXXX

SECTION III. GENERAL FUND APPROPRIATIONS AND REVENUES

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

GENERAL FUND APPROPRIATIONS

ACTIVITY/DEPARTMENT FOR WHICH APPROPRIATIONS ARE MADE:

APPROPRIATED

COUNTY GOVERNMENT ADMINISTRATION	\$18,393,270
HEALTH AND WELFARE	3,360,670
PUBLIC SAFETY	26,730,795
PUBLIC WORKS	7,574,015
CULTURE AND RECREATION	1,784,125
CONTINGENCY	1,000,000
TRANSFER OUT	1,594,895
<u>TOTAL APPROPRIATIONS - GENERAL FUND</u>	<u>\$60,437,770</u>

GENERAL FUND REVENUE

SOURCE OF REVENUE	<u>AMOUNT</u>
<u>LOCAL SOURCES</u>	
100-101 Property Taxes – RPC Current	\$32,555,175
100-102 Property Taxes – RPC Delinquent	3,900,000
100-103 Property Taxes – Vehicles	3,895,805
100-104 Fee-In-Lieu of Taxes	1,325,000
000-110 Catering-Civic Center	200
000-115 Concessions-Civic Center	5,000
000-121 Ticket Sales-Civic Center	9,500
000-140 Rent of Property-Civic Center	240,000
000-169 Sponsorships-Civic Center	6,000
000-180 Vendor Fees-Civic Center	3,000

001-102	Field Supervisor Fees-Sports Complex	2,200
001-105	Baseball-Sports Complex	28,000
001-106	Soccer-Sports Complex	14,000
001-107	Softball-Sports Complex	5,000
001-108	Tennis-Sports Complex	800
001-115	Concessions-Sports Complex	5,000
001-125	Rental-Sports Complex	1,000
003-115	Concessions-Amphitheater	250
003-120	Facility Fee-Amphitheater	3,000
003-140	Rent of Property-Amphitheater	5,000
200-110	Fees/Fines CC – Court Division	200,000
200-120	Fees/Fines CC – Family Court	500,000
200-121	Fees/Fines CC – Family Court Filing	30,000
200-135	Fees/Fines CC – RMC	775,000
200-140	Fees/Fines – Judge of Probate	365,000
200-150	Fees/Fines – Master in Equity	475,000
200-155	Fees/Fines – Sheriff	40,000
200-158	Fees/Fines – Magistrates	1,160,000
200-162	Decal Fees	135,000
200-165	Oconee County Master-in-Equity	36,055
200-166	Oconee County Drug Lab Match	43,550
200-175	School Crossing Guards	100,000
300-105	Town of Starr	11,000
300-105	Fees – Animal Shelter	110,000
300-110	Fees – Cablevision Franchise	1,000,000
300-120	Fees – Maps & Plats	1,800
300-125	Fees – Municipal Collection	26,000
300-132	Fees-Delinquent Tax Posting Fee	35,000
300-140	Permits – Building	250,000
300-145	Permits – Electrical	85,000
300-150	Permits – Heating and Air	40,000
300-155	Permits – Land Use	18,000
300-157	Fees – Plans Review	57,000
300-160	Permits – Plumbing	25,000
300-165	Permits/Licenses – Mobile Homes	25,000
300-174	Permits – Encroachment	60,000
300-175	Vital Statistics	55,000
300-180	Fees – Re-inspections	1,300
300-181	Fees-Sex Offender Registry	12,000
300-182	Inspections-Engineering	600
300-190	Miscellaneous	75,000
400-155	Local Contributions (Pendleton)	619,755
400-160	Library Security Reimbursement	75,000
600-140	Rent of Property	5,000
600-143	Rent of Property – Farmer's Market	10,000

600-144	Farmer's Market-Event Rental	7,000
600-145	Broadway Lake Rental	20,000
900-120	Interest Income	90,000
3700-000-101	Fund Balance	<u>693,780</u>
	<u>TOTAL AMOUNT OF LOCAL</u>	<u>\$49,271,770</u>

SOURCE OF REVENUE:		AMOUNT
STATE SOURCES		
400-218	Flood Control	\$100,000
400-220	Health and Environmental	10,000
400-260	Veterans Affairs	7,000
500-115	Election Commission	151,260
500-125	Local Government Funds	6,680,685
500-135	Merchants Inventory	273,260
500-150	Homestead	1,940,000
500-160	Salary Assistance	<u>7,875</u>
	<u>TOTAL AMOUNT OF STATE</u>	<u>\$9,134,080</u>
FEDERAL SOURCES		
400-350	Federal Grant	\$2,500
500-150	Lake Patrol	12,500
500-165	DSS Reimbursement	<u>200,000</u>
	<u>TOTAL AMOUNT OF FEDERAL</u>	<u>\$215,000</u>

Transfer In – Sheriff	\$572,855
Transfer In - State ATAX	35,000
Transfer In – Accommodations Fee	275,000
Transfer In – Capital Projects	<u>441,865</u>
<u>TOTAL TRANSFER IN</u>	<u>\$,1,324,720</u>
Capital Lease Proceeds-Fund Balance	<u>\$492,200</u>
<u>TOTAL AMOUNT OF CAPITAL</u>	<u>\$492,200</u>
<u>TOTAL REVENUE – GENERAL FUND</u>	<u>\$60,437,770</u>

SECTION IV. SPECIAL REVENUE FUND APPROPRIATIONS AND REVENUES

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

SPECIAL REVENUE FUND APPROPRIATIONS	
ACTIVITY/DEPARTMENT FOR WHICH APPROPRIATIONS ARE MADE	
<u>SPECIAL REVENUE FUND:</u>	\$58,235,835
<u>TOTAL APPROPRIATED</u>	<u>\$,58,235,835</u>

SPECIAL REVENUE FUND REVENUE

<u>SOURCE OF REVENUE:</u>		<u>AMOUNT</u>
<u>Sheriff Special Revenue Funds:</u>		
112	SRO – School District 2	\$52,180
121	SRO – School District 1	193,175
136	SRO – School District 5	256,245
145	SRO – School District 3	55,185
152	Sheriff – Incentive	45,000
156	Victim Bill of Rights-Sheriff	120,000
161	Sheriff –Fund Balance	1,792,960
166	SRO – School District 4	58,365
173	Detention Center Concessions	160,000
	Detention Center-Federal Grant	5,000
	Detention Center-Fund Balance	85,000
181	Office of Justice Programs – Federal Grant	677,920
	Transfer In-General Fund	27,315
195	Sheriff Forfeiture Fund	500,000
198	Sheriff Forfeiture Non-Drug Fund	<u>50,000</u>
	<u>Total Sheriff Special Revenue Funds</u>	<u>\$4,078,345</u>
<u>Special Revenue Other Than Sheriff's Office:</u>		
102	Grants-Local Contributions	5,023,550
	Federal Grants	2,325,000
	State Grants	11,400,000
	Transfer In-Accommodations Fee	15,000
	Fund Balance	65,000
106	Clerk of Court – Bondsmen	5,000
	Clerk of Court – Bondsmen – Fund Balance	8,000
107	Stimulus Allocations – Federal Grant	38,000
108	Water Recreation-Federal Grant	520,000
114	Public Defender-Local Contributions	218,525
	State Grants	490,645
	Transfer In-General Fund	328,900
118	HOME Program-Federal Grant	577,430
	Transfer In - General Fund	99,435
125	Assessor Mapping Project – Fund Balance	22,000
126	Textile Communities Revitalization Project-Grant	720,045
	Textile Communities Revitalization-T/I-General Fund	80,000
127	CDBG Rehabilitation-Federal Grant	500,000
135	Keep America Beautiful – Grant	13,000
137	Transportation Committee – Fund Balance	300
	Transportation Committee - T/I "C" Fund	2,000
139	"C" Fund (Advanced)	2,700,000
	Federal Grant	1,000,000

	"C" Fund – Interest Earnings	14,000
	"C" Fund – Fund Balance	1,004,000
140	Tri-County Technical College - Millage	1,571,660
	Delinquent Taxes	120,000
	Fee-In-Lieu of Taxes	76,590
	Merchants Inventory	13,630
	Homestead Exemption	117,000
	Transfer In-Capital Projects	174,630
143	Anderson County Library - Millage	3,676,410
	Delinquent Taxes	213,575
	Fee-In-Lieu of Taxes	143,000
	Homestead Exemption	210,000
150	Title IV-D/Family Court	473,000
155	Mass Transportation Grant	578,675
156	Victim Bill of Rights (excluding Sheriff & Detention Center)	80,000
163	Hazmat	38,000
	Fund Balance	1,815
165	Federal Emergency Management Agency	350,535
168	Documentary Stamps	1,000,000
	Documentary Stamps Fund Balance	67,040
174	E-911 Revenues	1,005,000
	E911 Fund Balance	382,475
175	State Accommodations Tax	277,250
176	Infrastructure – Federal Grant	5,942,400
	State Grant	1,485,600
	Transfer In-Infrastructure Reserve Fund	500,000
	Fund Balance	782,600
177	County Accommodations Fee	500,000
	County Accommodations Fee – Fund Balance	250,700
180	PARD/Recreation	392,230
	Local Contributions	22,525
	Transfer In-Accommodations Fee	28,550
	Transfer In-Capital Projects	124,630
	Fund Balance	4,050
191	Duke Power – EPD	15,000
	Duke Power EPD – Fund Balance	17,045
193	EMS–1/Countywide EMS-Property Taxes	3,078,095
	Delinquent Taxes	175,000
	Fee-In-Lieu of Taxes	115,000
	Homestead Exemption	173,000
	State Grant	20,000
	Fund Balance	335,020
194	Animal Shelter - Local Contributions	20,000
	Fund Balance	35,000
196	Infrastructure Reserve Fund - Property Taxes	1,696,805

Delinquent Taxes	85,000
Fee-In-Lieu of Taxes	60,000
Homestead Exemption	94,700
Fund Balance	<u>464,425</u>
<u>Total Other Special Revenue Funds</u>	<u>\$54,157,490</u>

**SECTION V. DEBT SERVICE AND OTHER FINANCING APPROPRIATIONS
AND REVENUES**

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

GENERAL OBLIGATION BOND DEBT SERVICE APPROPRIATIONS

<u>BOND:</u>	<u>APPROPRIATED</u>
2008 General Obligation Bonds	\$1,006,000
2007 General Obligation Bonds	814,325
2005 General Obligation Bonds	886,950
1998 General Obligation Bonds (Library) (formerly 1997A)	<u>1,271,940</u>
<u>TOTAL GENERAL OBLIGATION BOND DEBT SERVICE</u>	
<u>APPROPRIATED</u>	<u>\$3,979,215</u>

GENERAL OBLIGATION BOND DEBT SERVICE REVENUE

<u>SOURCE OF REVENUE:</u>	<u>AMOUNT</u>
Property taxes	\$3,687,345
Fee-In-Lieu of Taxes	132,000
Merchants Inventory	60,000
Homestead Exemption	193,030
Fund Balance	<u>(93,160)</u>
<u>TOTAL GENERAL OBLIGATION BOND DEBT SERVICE</u>	
<u>REVENUE</u>	<u>\$3,979,215</u>

REVENUE BOND DEBT SERVICE APPROPRIATIONS

<u>BOND:</u>	<u>APPROPRIATED</u>
Plastic Omnium	\$100,810
LINWA	142,210
Michelin	770,930
Walgreen's	794,580
Special Source Revenue Bonds	<u>265,370</u>
<u>TOTAL REVENUE BOND DEBT SERVICE</u>	
<u>APPROPRIATED</u>	<u>\$2,073,900</u>

REVENUE BOND DEBT SERVICE REVENUE

<u>SOURCE OF REVENUE:</u>	<u>AMOUNT</u>
Fees-In-Lieu-Of-Ad Valorem-Taxes	\$243,020
Economic Development Fund	1,830,880
<u>TOTAL REVENUE BOND DEBT</u>	
<u>SERVICE REVENUE</u>	<u>\$2,073,900</u>

SPECIAL TAX DISTRICT APPROPRIATIONS

Reimburse County for Public Works Projects	<u>AMOUNT:</u>
Thornwood Acres	\$5,200
Burgess Estates	6,070
Whispering Oaks	13,145
Cedar Glen	12,750
<u>TOTAL SPECIAL TAX DISTRICT APPROPRIATIONS</u>	<u>\$37,165</u>

SPECIAL TAX DISTRICT REVENUE

<u>SOURCE OF REVENUE:</u>	<u>AMOUNT:</u>
Special Tax District Fees	\$37,165
<u>TOTAL SPECIAL TAX DISTRICT</u>	
<u>REVENUE</u>	<u>\$37,165</u>

LEASE PURCHASE FINANCINGS ANNUAL APPROPRIATIONS

Equipment Lease Purchase	\$1,825,175
<u>TOTAL LEASE PURCHASE FINANCINGS</u>	
<u>ANNUAL APPROPRIATIONS</u>	<u>\$1,825,175</u>

All lease purchase millage revenue from millage levied for the Palmetto 800 MHz system in excess of that necessary to make lease purchase payments will be placed in the Infrastructure Reserve Fund.

LEASE PURCHASE FINANCINGS REVENUE

<u>SOURCE OF REVENUE:</u>	<u>AMOUNT</u>
T/I From General Fund	\$1,059,245
T/I From Infrastructure Reserve Fund	765,930
<u>TOTAL LEASE PURCHASE FINANCINGS</u>	<u>\$1,825,175</u>
<u>REVENUE</u>	
<u>TOTAL DEBT SERVICE AND OTHER</u>	
<u>FINANCINGS APPROPRIATIONS</u>	<u>\$7,915,455</u>
<u>TOTAL DEBT SERVICE AND OTHER</u>	
<u>FINANCINGS REVENUE</u>	<u>\$7,915,455</u>

To the extent that any monies remain in any debt service funds of the County, upon complete satisfaction of the debt for which such funds were collected, the County Administrator may transfer all such excess and otherwise unused funds to, and utilize such funds for any other Anderson County debt service fund which has been lawfully created by Anderson County Council to pay debt service on any lawful debt obligation of the County. Further, to the extent that any monies remain in the capital project accounts of the County, upon complete satisfaction of the stated purposes for which such funds were initially authorized, the County Administrator may transfer all such excess and otherwise unused funds to, and utilize such funds for any other Anderson County activity or purpose which has been duly authorized by Anderson County Council and for which debt funds of the County may be lawfully used.

SECTION VI. CAPITAL PROJECTS FUNDS APPROPRIATIONS AND REVENUES

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

CAPITAL PROJECTS FUNDS APPROPRIATIONS

<u>APPROPRIATED</u>	<u>ACTIVITY</u>
346 FY 2009 Special Source Revenue Bond	\$310,000
360 Capital Project Reserve Fund	1,261,815
368 Economic Development	<u>2,771,815</u>

<u>TOTAL CAPITAL PROJECTS FUNDS APPROPRIATIONS</u>	<u>\$4,343,630</u>

CAPITAL PROJECTS FUNDS REVENUES

<u>SOURCE OF REVENUE:</u>	<u>AMOUNT</u>
346 FY 2009 Special Source Revenue Bond Proceeds-Fund Balance	\$310,000
360 Capital Projects Millage	225,000
Capital Projects Delinquent-Taxes	20,000
Capital Projects Fee-in-Lieu-of-Taxes	15,000
Capital Projects Homestead Exemption	20,000
Capital Projects Fund Balance	981,815
368 Economic Development Fund Balance	296,815
Economic Development-Property Taxes and Fee-In-Lieu of-	<u>2,475,000</u>
Taxes and Transfer In from Infrastructure Fund	

<u>TOTAL CAPITAL PROJECTS FUNDS REVENUE</u>	<u>\$4,343,630</u>

SECTION VII. ENTERPRISE FUNDS APPROPRIATIONS AND REVENUES

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein; provided, however that to the extent, only, that revenues for Enterprise Fund activities exceed the revenue projections shown below, the Appropriations shown for Enterprise Funds herein may be adjusted by the Administrator to match the increased revenues, subject to the requirements of Section XXVIII, hereof. Provided, further, that the Administrator, or his designee, is authorized to write off, discharge, or otherwise adjust uncollectable and otherwise unenforceable debt owed to the enterprise funds of the county, utilizing the same standards used by the Anderson County Treasurer to adjust nulla bona debt of the County.

ENTERPRISE FUNDS APPROPRIATIONS

<u>ACTIVITY:</u>	<u>APPROPRIATED:</u>
Sewer	\$7,414,625
Solid Waste/Recycling	6,209,365
Airport	<u>2,744,780</u>
<u>TOTAL ENTERPRISE FUNDS APPROPRIATIONS</u>	<u>\$16,368,770</u>

ENTERPRISE FUNDS REVENUES

<u>REVENUES</u>	<u>AMOUNT</u>
Sewer Property Taxes, State Revenue, Fees & Interest	\$5,142,815
Sewer – T/I from Infrastructure Fund	780,000
Sewer – T/I from Economic Development Fund	535,935
Sewer – Fund Balance	955,875
Solid Waste/Recycling	5,788,735
Solid Waste/Recycling State Grant	32,455
Solid Waste/Recycling Fund Balance	388,175
Airport	2,269,390
Airport Federal Grant	134,645
Airport Fund Balance	<u>340,745</u>
<u>TOTAL ENTERPRISE FUNDS REVENUES</u>	<u>\$16,368,770</u>

SECTION VIII. LEVYING OF A SUFFICIENT TAX FOR ANDERSON COUNTY LIBRARY PURPOSES

A tax of sufficient millage to fund the appropriations in the amount of \$ **3,676,410** (excluding delinquent taxes totaling approximately \$213,575, fee-in-lieu of payments totaling approximately \$143,000 and \$210,000 homestead exemption), for the Anderson County Library Budgets, herein made, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, is hereby directed to be levied on all personal and real property in Anderson County, and shall be identified as such on Anderson County tax bills. To the extent such

levy results in excess revenues, above those stated above, all such revenues shall be placed and maintained in the Anderson County Library fund balance. Any funds in the Anderson County Library fund balance at any point in time in excess of those required for the Anderson County Library budgets herein made, may be utilized by the Anderson County Library Board of Trustees; provided, however, the expenditures of said surplus funds shall never exceed the amount of the most recent approved budget of the Library. There shall be credited against said appropriations all other revenues anticipated to accrue to Anderson County during said year for Anderson County Library. All such taxes and other revenues shall be levied, collected, deposited, disbursed and accounted for in the Anderson County Library Fund, with a specific levy and account for the library appropriation category listed herein.

SECTION IX. ANDERSON COUNTY LIBRARY FUND APPROPRIATIONS AND REVENUES

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

ANDERSON COUNTY LIBRARY FUND APPROPRIATIONS

<u>ACTIVITY:</u>	<u>APPROPRIATED:</u>
Anderson County Library Fund	<u>\$4,242,985</u>
<u>TOTAL ANDERSON COUNTY LIBRARY FUND APPROPRIATIONS</u>	<u>\$4,242,985</u>

ANDERSON COUNTY LIBRARY FUND REVENUE

<u>SOURCE OF REVENUE</u>	<u>AMOUNT:</u>
Property Taxes	\$3,676,410
Delinquent Taxes	213,575
Fee-In-Lieu of Taxes	143,000
Homestead Exemption	<u>210,000</u>
<u>TOTAL ANDERSON COUNTY LIBRARY FUND REVENUE</u>	<u>\$4,242,985</u>

The Anderson County Auditor is hereby directed to levy as separately identified County ordinary millage and the Anderson County Treasurer hereby directed to collect, disburse monthly (if funds are available), and account for as a separate fund the sums identified herein for the Anderson County Library Fund.

SECTION X. ADOPTION OF OPERATING AND CAPITAL BUDGETS FOR TRI-COUNTY TECHNICAL COLLEGE PURPOSES

Pursuant to Section 4-9-70 of the Code, the operating and capital budgets of Anderson County specifically for Tri-County Technical College as hereinafter set forth, by reference and otherwise, are hereby adopted for the fiscal year beginning July 1, 2012 and ending June 30, 2013.

**SECTION XI. LEVYING OF A SUFFICIENT TAX FOR TRI-COUNTY
TECHNICAL COLLEGE PURPOSES**

A tax of sufficient millage to fund the appropriations in the amount of **\$1,571,660** (excluding delinquent taxes totaling approximately \$120,000, fee-in-lieu of payments totaling approximately \$76,590, merchants inventory payments totaling \$13,630, homestead exemption payments totaling \$117,000 and \$174,630 to be transferred from the Capital Projects Fund), for the Tri-County Technical College Budgets, herein made, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, is hereby directed to be levied on all personal and real property in Anderson County on which school taxes may be levied, and shall be identified as such on Anderson County tax bills. To the extent such levy results in excess revenues, above those stated above, all such revenues shall be placed and maintained in the Tri-County Technical College fund balance. There shall be credited against said appropriations all other revenues anticipated to accrue to Anderson County during said year for Tri-County Technical College. All such taxes and other revenues shall be levied, collected, deposited, disbursed and accounted for in the Tri-County Technical College Fund, with a specific levy and account for the special education appropriation category listed herein.

**SECTION XII. TRI-COUNTY TECHNICAL COLLEGE FUND
APPROPRIATIONS AND REVENUES**

There is hereby appropriated, with the detail and the provisos as so stated in the Anderson County Budget Book, hereby incorporated by reference as a part of this Ordinance as fully as if set forth verbatim herein, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, the following sums of money in the amounts and for the purposes set forth as follows, with the anticipated revenues to be applied thereto as reflected herein:

TRI-COUNTY TECHNICAL COLLEGE APPROPRIATIONS	
<u>ACTIVITY/DEPARTMENT:</u>	<u>APPROPRIATED:</u>
Tri-County Technical College	<u>\$2,073,510</u>
<u>TOTAL TRI-COUNTY TECHNICAL COLLEGE APPROPRIATIONS</u>	<u>\$2,073,510</u>
TRI-COUNTY TECHNICAL COLLEGE REVENUES	
<u>SOURCE OF REVENUE:</u>	<u>AMOUNT:</u>
Property Taxes	\$1,571,660
Delinquent Taxes	120,000
Fee-In-Lieu-of-Taxes	76,590
Merchants Inventory	13,630
Homestead Exemption	117,000
Transfer In-Capital Projects	<u>174,630</u>
<u>TOTAL TRI-COUNTY TECHNICAL COLLEGE REVENUE</u>	<u>\$2,073,510</u>
<u>SUMMARY OF REVENUES FOR TRI-COUNTY TECHNICAL COLLEGE</u>	<u>\$2,073,510</u>
<u>SUMMARY OF APPROPRIATIONS FOR TRI-COUNTY TECHNICAL COLLEGE</u>	<u>\$2,073,510</u>

SECTION XIII. LEVYING OF A SUFFICIENT TAX FOR ANDERSON
COUNTY SHERIFF'S OFFICE PURPOSES

A tax of sufficient millage to fund the appropriations in the amount of **\$17,081,170** for the Anderson County Sheriff's Office Budgets, herein made, for the fiscal year beginning July 1, 2012 and ending June 30, 2013, is hereby directed to be levied on all personal and real property in Anderson County, and shall be identified as such on Anderson County tax bills, with such millage for the Anderson County Sheriff's Office, exclusive of any debt service millage to be set by the Anderson County Auditor, not to exceed 30.2 mils, total. To the extent such levy and other revenues collected by the Sheriff's Office results in an excess of \$21,120,345, any such excess shall be applied towards department 5181, Sheriff-Support Services up to the amount of that departmental budget. Any remaining surplus of net revenues over and above the aforementioned sum shall be placed and maintained in the Anderson County Sheriff's Office fund balance, a special revenue fund. All such taxes and other revenues shall be levied, collected, deposited, disbursed and accounted for in the Anderson County Sheriff's Office Fund, with a specific levy and account for the Sheriff's Office appropriation category listed herein.

SECTION XIV. TAX FOR ANDERSON COUNTY SEWER

There is hereby directed to be levied a tax of three (3) mils on all county ordinary taxable and real property in all unincorporated areas of Anderson County, pursuant to Anderson County Ordinance Number 164 of 1986, in order to provide sewer service in the County.

SECTION XV. LEVYING OF A TAX FOR METROPOLITAN ANDERSON
AREA AMBULANCE SERVICE AND FOR COUNTY
EMERGENCY MEDICAL PURPOSES

There is hereby directed to be levied a tax of three and two tenths mils (3.2 mils) on all county ordinary taxable real and personal property in the metropolitan Anderson area (zone 9) pursuant to Anderson County Ordinance Number 254 of 1988, for ambulance service, in order to provide ambulance service and emergency medical service in such area, and a tax of four (4.0 mils) to provide such emergency medical services in the remainder of the County; such former levy, for zone 9, to be subject to and dependent upon the approval by County Council, prior to the levy of County taxes, of a contract for the provision of such services; and, such latter levy to be subject to and dependent upon the approval by County Council, prior to the levy of County taxes, of: the creation and organization of an oversight and governance board for County emergency medical services not addressed elsewhere; bylaws and agreements and other organizational documents for such board; applicable minimum standards for County providers of emergency medical services; oversight rules and agreements for County providers of emergency medical services; approval by County Council of funding for such emergency medical services including any required levy of County taxes; and a plan and procedure for the distribution of such levied funds to the County providers of emergency medical services on a fair and equitable basis.

SECTION XVI. SOLID WASTE/RECYCLING FEES

There shall be a uniform \$64.83 Residential Solid Waste/Recycling Fee annually imposed upon the owner of record of each residence in the County, including all single and multi-family homes, mobile homes, and all lease and rental properties, and a uniform Commercial \$75.64 Solid Waste/Recycling Fee annually imposed upon every business, excepting industries, located in a municipality in the County, and to be collected by such municipality not less frequently than annually and remitted to the County within thirty (30) days from the deadline imposed by the municipality for such collections. Together, these fees, plus the Starr C&D Landfill usage fee of \$28/ton and revenues received from the sale of recycled materials, interests income, state grant and tire revenue are currently estimated to produce approximately \$5,821,190 (excluding budgeted usage of fund balance of \$388,175) for this fiscal year, and constitute the total anticipated fiscal year 2012-2013 revenues of the Solid Waste and Recycling Department.

The residential Solid Waste and Recycling Fees shall be levied as a uniform assessment by the Anderson County Auditor and placed upon the annual real estate tax notice and collected by the Anderson County Treasurer, pursuant to state law. The fiscal officers of the County shall have the authority to nulla bona or abate these fees to the same extent and under the same conditions as they do for a comparable tax.

Further, there shall be imposed a late fee and supplemental processing charge of \$6.00, for all Solid Waste/Recycling Fees not timely remitted to the County Treasurer by March 16 of the year when due. For all past due accounts in excess of one year, the County shall impose an additional annual penalty of \$12.00. The County shall pursue all legal remedies available to it to recover past due amounts, and shall hold the property owner responsible for all costs of collection, including reasonable attorney fees, as a part of such collection efforts and as a part of the fees imposed by County Council pursuant to state law, in order that lawful tax-paying citizens not be forced to subsidize those taxpayers who do not pay this lawful fee in a timely manner. Failure by a municipality to collect the uniform Commercial \$75.64 Solid Waste/Recycling Fee or to remit such collected fees to the County in accordance with this section may result in the County terminating solid waste disposal privileges for such municipality until all such collections and/or remittances are made current.

All proceeds collected from these fees shall be accounted for in a separate fund to be used solely to account for solid waste operations in the County, including but not limited to, the collection, disposal, transfer, and recycling of solid waste, including, without limitation, the purchase or construction of machinery, equipment, and facilities for such operations, as well as the administrative expenses incurred in the operation of the Anderson County Solid Waste and Recycling Department and collection of the annual solid waste/recycling fee. The County is authorized to issue appropriate legal obligations, including bonds, as appropriately authorized by normal County processes to pay for all of the foregoing costs, utilizing the proceeds from these fees to pay for such costs, including, without limitations, to pay the debt service for such bond obligations. The fees addressed in this section may be set or changed by simple vote of County Council, and will be adjusted by the County Administrator and the Public Works Division Director of the County to reflect, but not exceed, cumulative changes in the Consumer Price Index for Urban Areas after approval by County Council. The provisions of this Section shall be codified in a separate ordinance of the County pertaining to Solid Waste/Recycling Fees, which shall include provisions for enforcement, including

civil and criminal penalties for non-payment.

Because empirical evidence indicates that senior citizens generate less Solid Waste, by consuming less, than younger residents, the Anderson County Auditor shall only levy and collect a \$40 Residential Solid Waste/Recycling Fee for every household which qualifies for and is granted the State Homestead Exemption.

SECTION XVII. SEWER FEES

The County is party to multiple agreements with the City of Anderson, South Carolina (the "City"), which have been in effect for many years and are of indefinite duration. Those agreements require the County to pay a pro rata share of the cost of certain upgrades to the City's sewer system, based on the volume of discharge and the nature of the discharge. Because the County does not set the amount of such costs and because the costs are based on actual use by customers using the system, the only equitable method to use for paying the cost of increase charged by the City, pursuant to contractual agreements of long standing, is to increase the County sewer use charges affected, by the respective percentage or amount of increase charged by the City, i.e., to treat the amount charged by the City as a "pass-through" charge to the system users. In addition, the County has certain debt instruments in effect, with the South Carolina State Revolving Fund and others, which require the County to set sewer user charges in such an amount as will generate sufficient funds to pay all debt service on such debt instruments. The County Administrator and the Public Works Division Director may effect such "pass-through" charges by insuring that amounts charged by the City are correct and then passing those charges along, pro rata, to the users of the County sewer system impacted by the City charges, in the form of adjusted sewer use charges, based on the same cost increase factors utilized by the City, and may otherwise adjust such sewer use charges as required to adequately meet all debt service requirements of sewer system debt instruments and obligations duly authorized by County Council.

SECTION XVIII. STORMWATER REQUIREMENTS AND PERSONNEL

Federal and state law mandates the management of stormwater runoff by Anderson County. Accordingly, certain Environmental Services Division employees have been assigned to the management of Anderson County's Stormwater Runoff management program. Anderson County Council may utilize funds from the Sewer Fund for the Stormwater Runoff management program, to the extent such funds are available and sufficient for that purpose, rather than impose additional federally and state mandate-created fees for such purposes.

SECTION XIX. CREATION AND APPROPRIATION OF PUBLIC INFRASTRUCTURE FUND

There has heretofore been established, and shall be maintained as a separate budgetary and operational fund of the County, the Anderson County Public Infrastructure Fund (the "Fund"). The County shall deposit into such Fund those revenues of the County derived from fee-in-lieu-of-tax ("FILOT") payments from the several joint county industrial and business parks of the County ("multi-county parks" or "MCIPs"), which are designated

to be so deposited by this Ordinance or other ordinances of Anderson County, including, without limitation, Ordinance #2004-041, as amended from time to time ("Ordinance #2004-041"). Moneys deposited into the Fund shall be utilized for the costs of infrastructure serving economic development purposes in Anderson County ("Infrastructure") in accordance with the provisions of 4-1-170, et seq., Code of Laws of South Carolina, 1976, as amended, and as directed by Anderson County Administrator. Such expenditures are hereby authorized by Anderson County Council. Deposits into such Fund shall include, without limitation, those revenues from the Anderson County-Greenville County multi-county park which are allocated to that purpose by Ordinance #2004-041, (exclusive of such revenues as are being utilized for separate special source revenue bonds issued to fund Infrastructure). Moreover, Anderson County Council affirms that distribution of the FILOT revenues received by Anderson County pursuant to the multi-county park agreements with Clarendon County and with Abbeville/McCormick Counties for park premises under those two agreements which are located in Anderson County shall be distributed in the same manner and pursuant to the same allocation methodology as set forth in Ordinance #2004-041. All monies and revenues received by Anderson County pursuant to Ordinance #2004-041 and this Section shall be accumulated in, accounted for, and distributed from such Fund as provided in such Ordinance and in this Section. Expenditures may be made from such Fund to pay the cost of such Infrastructure directly or to make debt service payments on bonds or notes payable issued by the County to fund such Infrastructure.

SECTION XX. SPECIAL TAX DISTRICT REVENUES AND APPROPRIATIONS

The County Finance Department shall receive and account for those revenues of the County levied and collected for the special tax districts of the county, as authorized, required, and levied by the County ordinances creating such special tax districts. The County Finance Department will disburse moneys from such funds in accordance with the County ordinances creating the special tax districts, including, without limitation, for reimbursements of the County Public Works Division in accordance with such ordinances. Such monies are hereby appropriated for those purposes.

SECTION XXI. FUNDING OF COUNTY ORGANIZATIONS

All dependent boards, agencies, commissions, and organizations of the County, funded by these budgets, except for County Rescue Squads shall be disbursed funds on a quarterly basis upon a letter of request to the County Administrator anytime after the beginning of the first month of the quarter. A brief report shall be submitted along with the letter of request, detailing how County funds were expended in the previous quarter. An audit report shall be presented to the County Administrator within six months following the end of the respective fiscal year for each organization addressed by this Section following receipt of request by the County Administrator.

SECTION XXII. SETTING OF A MILLAGE RATE

The Anderson County Council, working in cooperation with the Anderson County Auditor and Treasurer and in accordance with the laws and Constitution of the State of

South Carolina, shall calculate and fix the amount of the millage necessary, not to exceed 78.7 mills, total, exclusive of debt service millage to be set by the Anderson County Auditor, as set forth herein, to support the appropriations herein made, with the exception of those appropriations and portions thereof supported by revenues other than property taxes, and shall so advise the Auditor and Treasurer of Anderson County who shall levy and collect said millage, respectively, as hereby directed by the County Council, in addition to any millage (for debt service or otherwise) for which the statutory authority to determine and levy is granted to the Anderson County Auditor and the authority to collect is given to the Anderson County Treasurer. All such levies of taxes authorized herein by Anderson County Council for County of Anderson purposes shall be set forth, stated, and mailed to the taxpayers of Anderson County on a tax notice showing such levies separate and independent of levies of taxes by any other legal entity or political subdivision of the State of South Carolina, whether on a two-sided tax notice or a multi-page tax notice or any other form of tax notice accomplishing the purpose set forth in this paragraph. Anderson County Council will provide forms for such tax notices and no funds appropriated by this budget ordinance are authorized for the procurement or preparation of any other form of tax notice.

SECTION XXIII. COMPLIANCE WITH COUNTY CODE AND ACCOUNTABILITY

All funds for County ordinary purchases and procurements shall be obligated in accordance with the County Code through the County Central Purchasing Department and will be disbursed by the Finance Department so as to provide for necessary auditing, unless specifically exempted by County Council in public session.

All State and Federal Grants will be administered, coordinated, and accounted for by the Anderson County Finance Department.

Use of funds appropriated by County Council district or otherwise, to reimburse members of County Council for reimbursable expenses (that is, for lodging, travel, registration fees, training, meals, and telephone usage) incurred in the discharge of their official duties shall be in accordance with the terms and provisions of the County Code.

SECTION XXIV. DEPOSITS

All service charges, reimbursements, fees, fines, other funds received by county departments shall be deposited with the County Treasurer as soon as possible after collection; but in no case shall the time lapse between collection and deposit with the Treasurer exceed thirty (30) days. The Treasurer is authorized and directed to deposit all funds received into the appropriate interest-bearing accounts, and any surplus funds and all accumulative interest shall be deposited into the General Fund of Anderson County.

SECTION XXV. SURPLUS FUNDS

Except as otherwise noted herein, any surplus in the General Fund of the County or any moneys accruing therefrom shall be used as a contingency fund and shall be spent as authorized and directed by the Anderson County Council during the fiscal year addressed by this Ordinance, only. At the end of such fiscal year those funds shall be accounted for as

addressed in the next succeeding Section. Any surplus in other funds of the County or any monies accruing therefrom shall be retained and accounted for in such other fund or funds and shall be carried forward from year to year as fund balances in such funds.

SECTION XXVI. END OF FISCAL YEAR ACCOUNTING

All appropriations made by this Ordinance for which monies have not been obligated or encumbered by the end of June 30, 2013, shall lapse and expire at that time. All appropriations made by this Ordinance for which the funding monies have been obligated or encumbered by June 30, 2013 shall remain on the books of Anderson County at June 30, 2013 for matching of the applicable expenditure for year-end accrual purposes. Once the ledgers are closed for year-end accrual purposes, the unused encumbrance amount will be removed from the encumbrance system. Unobligated General Fund budgetary appropriations and monies received by County departments and existing without obligation at the close of the fiscal year addressed by this Ordinance shall revert to the General Fund of Anderson County to be accounted for as fund balance; no existing appropriation or actual revenues on hand at the end of the fiscal year may be expended by any department during the succeeding fiscal year without new appropriation by County Council. Any surplus in other funds of the County or any moneys accruing therefrom shall be retained and accounted for in such other fund or funds and shall be carried forward from year to year as fund balances in such funds.

The external auditor utilized by Anderson County to conduct the County's annual external audit of its finances and financial records, in accordance with state law, shall be the independent, certified, professional accountant or accounting firm selected in accordance with Anderson County Ordinance #2002-007, codified in Section 2-637 of the Anderson County Code of Ordinances, as enacted by Anderson County Council on March 5, 2002.

SECTION XXVII. TRANSFERRING OF FUNDS

With the exception of those positions under the control of an elected or appointed official, the creation of a new position or increased salaries and fringe benefits, excluding health insurance benefits, of an existing position must be approved by County Council. The Administrator shall consult with County Council prior to transferring any existing County employee to another position if that transfer will result in increased compensation to the employee.

The Administrator may approve changes in a department budget from one line item to another in an amount up to and including \$5,000 at any one time; provided, however, the total department budget shall not increase and that no new positions may be created, no additions to legal fees, professional fees, contractual services or capital expenses, may be accomplished by such a transfer without County Council approval. Aggregate transfers within a department which exceed \$5,000 presented in any given thirty-day period within a department shall require County Council approval. No transfer for any one type of good or services may be subdivided, split or "stacked" for purposes of evading the requirements of this section.

SECTION XXVIII. DISBURSEMENT

The County Administrator, based on financial conditions and cash-flow considerations, shall determine the proper rate of disbursement of the above-enumerated appropriations during the fiscal year. Transfers from fund to fund in order to properly account for and manage County funds and appropriations in accordance with generally accepted accounting standards continue to be explicitly approved notwithstanding any other language of this Ordinance, subject always to the reporting requirements of this Ordinance. The County Administrator and the County Treasurer are hereby granted authority to enter into agreements with the Anderson County Board of Education and the School Districts of Anderson County, consistent with this Ordinance, to make accelerated disbursements of Anderson County school tax receipts to the School Districts of Anderson County and to the Anderson County Board of Education.

SECTION XXIX. PAUPER BURIALS

Pauper burials shall be funded in the budget of the Department of Social Services budget (5302) at the rate of \$250/child and \$400/adult; full documentation for each such burial is required.

SECTION XXX. RETIREMENT OF AUTOMOTIVE AND HEAVY EQUIPMENT

Unless otherwise directed by County Council, automotive and heavy equipment will be retired from service by any department receiving replacement equipment on a one for one basis as the replacement equipment is received. Retired equipment will be appropriately evaluated for reassignment or disposition by the Transportation Division Director and the County Administrator.

SECTION XXXI. TAX ANTICIPATION NOTES

As permitted by Article X, Section 14, of the Constitution of the State of South Carolina, 1895, as amended and Section 11-27-40, Code of Laws of South Carolina, 1976, as amended, County Council is hereby empowered to authorize the issuance of tax anticipation notes in the aggregate principal amount of not exceeding \$10,000,000 (the "TANS") in anticipation of the collection of taxes imposed and levied by this Ordinance. The TANS may be issued at any time or from time to time during the fiscal year beginning July 1, 2012 and ending June 30, 2013; shall be issued pursuant to a Resolution adopted by County Council; may be issued in bearer form or fully registered upon terms and conditions prescribed in such Resolution; shall be issued in the principal amounts, mature and bear interest as prescribed in such Resolution; may be sold by negotiated or public sale upon such terms and conditions as County Council prescribes in the Resolution.

SECTION XXXII. CREDIT CARD PAYMENTS

To the maximum extent authorized by and in accordance with law, and in accordance with County procurement policies, all Anderson County offices, including those of elected officials, are authorized to adopt and implement uniform procedures, through the

County Central Services Division, to accept credit card payments for all payments due to the County or processed by County offices.

SECTION XXXIII. CREDIT CARD POLICY

All Anderson County credit card charges and purchases made utilizing an Anderson County credit card are to be reported to the Finance Office, and accompanied by a detailed receipt and a written report, the format of which is to be designed and determined by the County Administrator or his designee. The written report shall contain sufficient detail to show who made the charge, what the charge was for, when the charge was made, where the charge was made, and why the charge was incurred. Charges incurred for or associated with economic development projects must still be reported, as addressed above, and accompanied by the receipt and report described above, but may be reported by project codename, until such time as the project is publicly announced or finally terminated.

SECTION XXXIV. CIVIC CENTER ACCOUNTABILITY PROGRAM

In an effort to foster more community support in and use of the Civic Center of Anderson (the "Civic Center"), County Council hereby approves funds appropriated by this Ordinance, to local civic groups and organizations to financially assist their events at the Civic Center. Such Accountability Program funds, not to exceed amounts used by the Civic Center for such purposes during the fiscal year ending June 30, 2013, will be awarded to not-for-profit and eleemosynary organizations that meet the specifications and standards set herein and apply to the County Administrator for such funds. The Administrator will review the list of applicants and award the Accountability Program funds as he feels will best benefit the overall Anderson County community. The Accountability Program funds utilized will be applied, on paper, to the Civic Center's year-end revenues. It is the intent of County Council that Civic Center Accountability Program funds will be awarded in a manner similar to that by which Anderson County accommodations tax allocations are currently distributed. Accountability Program funds may be utilized only toward the facility rental costs of the Civic Center, and may not be applied to non-facility rental fees, such as for the use of Civic Center equipment, stage, dance floor, etc. All such non-facility rental items must be rented at retail rate from the Civic Center. Civic Center Accountability Program funds may not be awarded to any organization that does not have a contingency plan to fund its event if Accountability Program funds are not awarded. Accountability Program funds may only be awarded as an assistance to those groups which are otherwise planning to hold an event at the Civic Center. Accountability Program funds may be awarded to completely or partially cover facility rental costs. Any facility rental fees not covered by Accountability Program funds must be paid to the Civic Center by the utilizing organization, in accordance with normal Civic Center payment policies and procedures. Any non-facility rental fees must likewise be paid to the Civic Center by the utilizing organization in accordance with normal Civic Center payment policies and procedures, regardless of Accountability Program fund allocations. Forms, applications, and procedures consistent with this Ordinance will be established by the Civic Center staff, approved by the Administrator, and utilized as set forth in this Section.

SECTION XXXV. GRANTS AND GRANT MATCHING FUNDS

The Anderson County Administrator, or his duly authorized representative, is hereby authorized to apply for all grants of any nature whatsoever where no County matching funds are required, or for those grants for which County matching funds are required when all necessary County matching funds have been made available by Anderson County Council through the annual Anderson County operating and capital budgets or are available in applicable County enterprise fund balances, for County Council authorized programs, institutions, and facilities of Anderson County, and to receive and expend such grant funds for the purposes authorized in the respective grant applications. Notwithstanding the foregoing, County staff shall conduct an analysis identifying any recurring expense or monetary obligation for which the County may be responsible in the future where said expense or obligation will be payable from funding sources other than the grant being applied for. Any grant opportunity which involves such expenses or obligations shall require County Council approval prior to the submission of the grant application.

No funds appropriated by this Ordinance may be utilized as matching funds for any parks and recreation grant, including, without limitation, grants received from the South Carolina Department of Parks, Recreation, and Tourism, except for Anderson County Council District Recreation Funds appropriated hereby, except as otherwise provided herein.

SECTION XXXVI. APPLICABLE CIVIC CENTER RATES

Rates as set forth on Civic Center of Anderson Sales and Marketing Division rate sheets dated July 1, 2012 shall be applied by the Civic Center of Anderson for all rental contracts entered into between July 1, 2012 and June 30, 2013.

SECTION XXXVII. APPLICABLE ANIMAL SHELTER RATES

Rates as set forth on Environmental Division rate sheets dated July 1, 2012 shall be applied by the Anderson County Animal Shelter for all services rendered between July 1, 2012 and June 30, 2013.

SECTION XXXVIII. APPLICABLE JUROR REIMBURSEMENT RATES

There shall be paid unto the Grand Jurors in Circuit Court the sum of \$20 per diem and Petit Jurors shall be paid the sum of \$12 per diem. There shall be paid unto Jurors in Summary Court the sum of \$10 per diem. In addition to the aforesaid sum, jurors shall be reimbursed twenty-five, \$.25, cents per mile per day from their home to the Anderson County Courthouse for the term for which they are drawn to serve. These rates shall be effective for all services rendered between July 1, 2012 and June 30, 2013.

SECTION XXXIX. FUNDING OF E-9-1-1 SERVICES

In order to provide all citizens of Anderson County with the best emergency dispatch services available and to fund those services in the most effective, efficient manner possible, the County Administrator is hereby directed to utilize and apply the maximum E-9-1-1 tariff funds available by current South Carolina law to the County's E-9-1-1 system, in accordance with County procurement policies and state law.

SECTION XXXX. ROAD ENCROACHMENT PERMITS

The Anderson County Transportation Division is authorized to charge fees for encroachments on County roads and rights-of-way and for encroachment permits for such encroachments in accordance with an encroachment fee schedule prepared, from time to time, by the Anderson County Transportation Division, and approved by Anderson County Council by appropriate Council action. Such fees for encroachments on Anderson County roads and rights-of-way and for encroachment permits for such fees shall be sufficient to fully reimburse the County for all costs of supervising, inspecting, and repairing, as necessary, all damage to County roads and rights-of-way caused by such encroachments.

SECTION XXXXI. INVENTORY OF CAPITAL ASSETS

In accordance with Anderson County Ordinance 2004-055, as codified, there is to be an annual inventory of all Anderson County capital assets valued in excess of two hundred dollars, as part of and subject to the annual Anderson County budget process.

Pursuant to the Anderson County Code of Ordinances, the processing of the annual budget requests for any given Anderson County department, office, or entity, responsible for an annual capital asset inventory, shall be stayed until the Anderson County Finance Department has certified to the County Administrator that department's, office's, or entity's annual capital asset inventory as meeting all procedures and requirements of the county, including reconciliation of any discrepancies and initiation of appropriate accountability action regarding any missing capital asset of the county.

SECTION XXXXII. FUND BALANCE POLICY

Maintenance of an adequate and appropriate fund balance is critical to an overall sound fiscal policy and practice of the County. Maintenance of such fund balance not only protects the County against emergencies and unexpected contingencies, it actually saves the County significant amounts of money, through less reliance on tax anticipation notes and through lower interest rates for borrowing money and issuing debt. A fund balance policy is looked upon favorably by rating agencies and investors. County Council, therefore, and hereby, establishes a policy that the County will maintain a general fund balance of approximately six (6) months of current budget expenditures, including operating transfers out, but not less than two (2) months of such expenditures.

SECTION XXXXIII. REASONABLE ACCOMMODATION POLICY

Anderson County is a participant in the Federal Community Development Block Grant Program for the purpose of undertaking various important community and economic development activities throughout the County. The Community Development Block Grant Program requires a reasonable accommodations policy for Section 504 regulations. Anderson County, acting by and through the Anderson County Council, desires to comply with all necessary Grant requirements. Anderson County, acting by and through the Anderson County Council, is hereby willing to make reasonable accommodations for the known physical or mental impairments of an otherwise qualified participant, applicant or employee, providing it does not cause undue financial or administrative burden on the County or cause a fundamental alteration of the County's

program. Anderson County Council hereby recognizes that the policy created hereunder includes employees, applicants for employment, and the public when the public is involved in County activities. The Anderson County Administrator, for and on behalf of the County, is hereby authorized and directed to do any and all things necessary or appropriate in connection with this Policy.

SECTION XXXXIV. SOLICITOR CASE FACILITATOR

Funding for the temporary Case Facilitator in the Solicitor's Office is budgeted for an additional year and is intended to provide representation for Anderson County in the Magistrates Courts of Anderson County. This is a temporary position only. In order for this position to be considered in future budget years, the Solicitor's Office must provide the Administrator with quarterly reports indicating the number of new cases referred each quarter, the number of court appearances each quarter, and a certification from the Solicitor that this position was only used for representation in Magistrate Court on Anderson County cases during the quarter.

SECTION XXXXV. SEVERABILITY

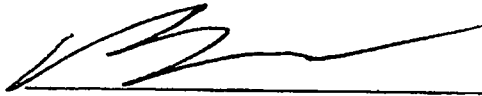
If any clause, phrase, sentence, paragraph, appropriation, or section of this Ordinance shall be held invalid for any reason, it shall not affect the validity of this Ordinance as a whole or the remaining clauses, phrases, sentences, paragraphs, appropriations, or sections hereof, which are hereby declared separable.

SECTION XXXXVI. EFFECTIVE DATE

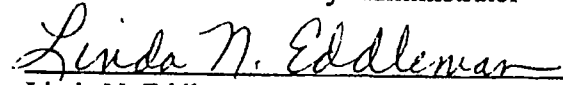
This Ordinance shall become effective and enforced from and after July 1, 2012.

ADOPTED in meeting duly assembled this 28th day of June, 2012.

ATTEST:



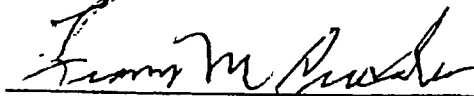
Rusty Burns
Interim Anderson County Administrator



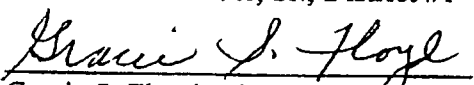
Linda N. Eddleman
Clerk to Council



Tom Allen, Chairman



Francis M. Crowder, Sr., District #1



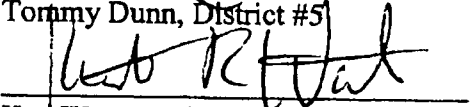
Gracie S. Floyd, District #2



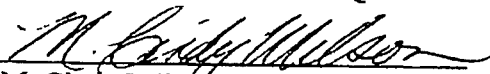
Eddie Moore, District #3



Tommy Dunn, District #5

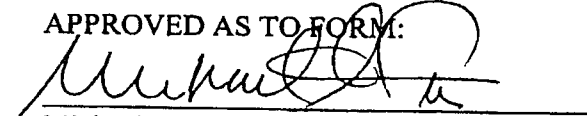


Ken Waters, District #6



M. Cindy Wilson, District #7

APPROVED AS TO FORM:



Michael S. Pitts
Anderson County Attorney

First Reading:

May 15, 2012

Second Reading:

June 5, 2012

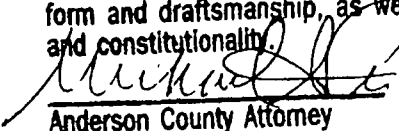
Third Reading:

June 28, 2012

Public Hearing:

June 5, 2012

Pursuant to Section 2-38 of the Anderson County Code of Ordinances, the attached Ordinance/Resolution 2012-022 has been reviewed by the Anderson County Attorney as to form and draftsmanship, as well as to legality and constitutionality.



7/19/12
Anderson County Attorney Date

EXHIBIT 2

(ANDERSON COUNTY COUNCIL
MEETING MINUTES)

[November 12, 2009]

ANDERSON COUNTY COUNCIL
ANDERSON, SOUTH CAROLINA
Called Meeting – November 12, 2009 - 2:00 p.m.
Linda N. Eddleman, Clerk to Council

MINUTES

All area newspapers, radio stations and television stations were informed of this meeting in compliance with the guidelines set forth in the *Freedom of Information Act*.

PRESENT

Chairman Eddie Moore, Presiding
Bob Waldrep – District #1
Gracie S. Floyd – District #2
Vice Chairman Tom Allen - District #4
Tommy Dunn – District #5
M. Cindy Wilson – District #7
Rusty Burns – Interim Administrator
Mike Pitts, County Attorney
Linda N. Eddleman – Clerk to Council

ABSENT

Ron Wilson - District #6

Chairman Eddie Moore called the meeting to order and Ms. Wilson asked everyone to join her in reciting the Lord's Prayer.

Mr. Waldrep moved to enter executive session at 2:05 p.m. for the purpose of discussing and reviewing claims that the County might be involved in with a severance agreement that was previously signed by the County and former administration with Mr. Joey R. Preston. Ms. Wilson seconded and vote was six in favor, none opposed (Mr. Wilson absent). Mr. Mike Pitts stated that attorneys representing the Wyche Burgess Law Firm would be providing their legal analysis. Ms. Floyd asked which attorneys were present and Mr. Pitts informed Council that Mr. Frank Holliman, Mr. Ted Gentry, and Mr. Carl Muller were all here. They were employed in early September to provide analysis and legal research on these claims.

Mr. Dunn moved to return from executive session and re-enter regular session at 3:40 p.m.; Mr. Waldrep seconded. Vote was unanimous in favor.

Mr. Waldrep reminded the audience that no action was taken in executive session. He then moved to employee the services of Wyche Burgess Law Firm for the purpose of reviewing and taking any appropriate legal action - the rescission of the contract with Joey R. Preston. Mr. Dunn seconded the motion. Ms. Floyd questioned if the motion was to employ the said firm. Chairman Moore said yes. Ms. Floyd also inquired if members of Council wished to ask further questions of the law firm and if the County is fully prepared to hire them. Mr. Allen stated that the decision was to act to hire and to act on the legal advice of the firm. Chairman Moore confirmed Mr. Allen's statement.

Ms. Floyd suggested that Council consider how advantageous this action would be for the taxpayers of Anderson County and also see if the County could afford such a task at the amount quoted. She asked Council if this motion should not be discussed more in depth as the County has already spent roughly a quarter of a million dollars for an investigation that has yet to be completed and is still incurring heavy costs. "There is a possibility that the County will have more law suits and there are law suits on the books now that the County will have to settle," Floyd said. She then questioned how much more the

people of the County can take. Ms. Wilson said that in response to the events of November 18, 2008 and upon reviewing the recent report, she personally believes that Council would be violating their fiduciary agency to this County not to pursue this action. She believes that the citizens of the County put the seven Council members in office to protect the treasury and the morals of the county.

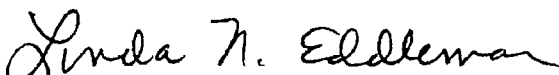
Ms. Floyd asked what amount the law firm would charge the county to pursue the issue if hired. Mr. Waldrep responded that the Wyche Burgess Law Firm is to charge a rate of \$290 per hour. Mr. Floyd also asked how long the entire process would take. Mr. Waldrep said that the law suit filed by the District 2 Council member is still on-going at this time and because of this present case, he does not know how long that would take. He believes that one would need the gift of prophecy to determine the length of time this process would consume. There will be an initial hearing in possibly two or three months. Mr. Waldrep understands that there are more legal matters that would be determined by a judge and he would be looking at the overall circumstances; largely focusing the November 18, 2008 Council meeting in which a contract suddenly appeared before County Council without any prior discussion or notice. Ms. Floyd stated that District Two does not have an attorney. She has a personal attorney that she personally employs. "Somebody told Mr. Cunningham that the County was going to tie his lawsuit up for 3 years and that same person can tell Mr. Cunningham that—can that same person tell us how long this will take," she said. Ms. Floyd also stated that this large financial task would throw the County into even deeper in debt and the County cannot pay for what it currently faces. Council discussed further.

Mr. Dunn moved to call for the question with Mr. Waldrep seconding. Vote was four in favor, one opposed (Allen) and one abstention (Floyd).

Chairman Moore called for the vote. The vote on the motion to hire the Wyche Burgess Law Firm for the purpose of reviewing and pursuing legal action in regards to the contact with Mr. Preston resulted in four in favor (Waldrep, Moore, Ms. Wilson, Dunn), two opposed (Floyd, Allen). Motion carried.

Mr. Dunn moved to adjourn and Mr. Waldrep seconded. Vote was unanimous in favor. The meeting adjourned at 3:50 p.m.

Respectfully submitted,

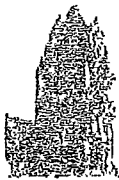


Linda N. Eddleman, CCC
Clerk to County Council

EXHIBIT 3

**(ANDERSON COUNTY COUNCIL AGENDA
AND MEETING MINUTES)**

[November 19, 2013]



**ANDERSON
COUNTY**

Making News.
Making Progress.

Council Members

Francis M. Crowder, Sr.
Chairman
District 1

M. Cindy Wilson
Vice-Chairman
District 7

Gracie S. Floyd
District 2

Eddie Moore
District 3

Thomas F. Allen
District 4

Tommy Dunn
District 5

Ken Waters
District 6

Unda H. Eddleman
Clerk to Council

Rusty Burns
Interim Administrator

AGENDA

ANDERSON COUNTY COUNCIL

Special Recognitions -- November 19, 2013 - 6:00 pm

Historic Courthouse -- Council Chambers -- Second Floor
Chairman Francis M. Crowder, Sr., Presiding

1. CALL TO ORDER:

Chairman Francis M. Crowder, Sr.

2. INVOCATION AND PLEDGE OF ALLEGIANCE:

Council Member Tom Allen

3. PRESENTATION RESOLUTIONS/PROCLAMATIONS:

- a. Proclamation -- a proclamation expressing gratitude to Red Cross for overseeing the emergency relief and recovery efforts provided to the Azalea Apartment fire victims and their families and other matters related thereto. -- Mr. Tommy Dunn (allotted 5 minutes)

4. ADJOURNMENT

AGENDA

ANDERSON COUNTY COUNCIL

Regular Meeting -- November 19, 2013 - 6:30 pm

Historic Courthouse -- Council Chambers -- Second Floor
Chairman Francis M. Crowder, Sr., Presiding

1. CALL TO ORDER:

Chairman Francis M. Crowder, Sr.

2. INVOCATION AND PLEDGE OF ALLEGIANCE:

Council Member Gracie S. Floyd

3. APPROVAL OF MINUTES:

- a. November 5, 2013 meeting

4. CITIZEN COMMENTS: Agenda Matters

5. "IT'S A WONDERFUL NEIGHBORHOOD" PRESENTATION BY MR. DAVID SIMPSON -- Eddie Moore (allotted 10 minutes)

6. INFORMATION FROM COUNTY COUNCIL MEMBER, DISTRICT #2: Mrs. Gracie S. Floyd (allotted 30 minutes)

7. ORDINANCES -- THIRD READING:

- a. #2013-042 -- an ordinance to amend an agreement for the Development of a Joint County Industrial and Business Park (2010 Park) of Anderson and Greenville Counties as to enlarge the park. -- Mr. Burriss Nelson (allotted 10 minutes)

8. ORDINANCES -- SECOND READING:

- a. #2013-043 -- an ordinance amending Ordinance #99-004, the Anderson County Zoning Ordinance, as adopted July 20, 1999, by amending the Anderson County Official Zoning Map to rezone from R-20 (Single-Family Residential) to C-2 (Highway Commercial) one parcel of land, identified at 3031 Highway 81 North, consisting of +/- 5.75 acres. The parcel is further identified as TMS #146-00-08-017. -- Mr. Bill West (allotted 10 minutes)
- b. #2013-045 -- an ordinance authorizing a fee in lieu of tax and Infrastructure Improvement credit arrangement pursuant to a fee in lieu of tax agreement between the County and Plastic Omnium Auto Extérieurs, LLC ("Plastic Omnium") for its second expansion; the termination of an existing fee in lieu of tax arrangement (the "Original FILOT") between Anderson County, South Carolina (the "County") and Plastic Omnium by terminating the lease agreement for the Original FILOT and transferring the property subject to the Original FILOT to Plastic Omnium; the conversion of an existing fee in lieu of tax arrangement (the "First Expansion FILOT") between the County and Plastic Omnium to a simplified fee type of fee in lieu of tax arrangement and extending the term of the First Expansion FILOT; the conversion of an existing fee in lieu of tax arrangement (the "Energy FILOT") between the County and Inergy Automotive Systems (USA), LLC ("Inergy") to a simplified fee type of fee in lieu of tax arrangement and extending the term of the Energy FILOT; an Infrastructure financing agreement between the County and Plastic Omnium for property not subject to a fee in lieu of tax arrangement; and Infrastructure financing agreement between the County and Inergy for property not subject to a fee in lieu of tax arrangement; and other matters relating to the foregoing. -- Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
- c. #2013-046 -- an ordinance authorizing Anderson County to enter into a lease agreement with the Federal Aviation Administration ("FAA") for space use FAA rents at the airport; and other matters related thereto. -- Mr. Holt Hopkins/Mr. Mike Pitts (allotted 10 minutes)

9. ORDINANCES -- FIRST READING: --

- a. #2013-047 -- an ordinance authorizing the execution and delivery of a fee in lieu of tax agreement and an Infrastructure finance agreement by and between Anderson County, South Carolina and a company known to the County at this time as PROJECT RACK with respect to certain economic development property in the County, whereby such property will be subject to certain payments in lieu of taxes, and Project Rack will receive certain Infrastructure credits in respect of investment in related Infrastructure; and other matters related thereto. -- Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)

Anderson County Council
Post Office Box 8002 • Anderson, S.C. 29622-8002
(864) 260-1048 • (864) 260-4356 fax

003598

- b. **#2013-049** – an ordinance authorizing (1) the execution and delivery of a fee in lieu of tax and incentive agreement by and between Anderson County, South Carolina (the "County") and a company identified for the time being as **PROJECT OPPORTUNITY**, acting for itself, one or more affiliates or other project sponsors (the "Company"), in connection with the expansion of certain facilities in the County (the "Expansion Project"); (2) certain special source revenue credits in connection with the Expansion Project; (3) the execution and delivery of a first amendment to lease agreement (and related amended memorandum of lease and option to purchase) by and between the County and the Company approving a ten-year extension of the term of such lease agreement and the fee in lieu of tax arrangement set forth therein; (4) the assignment and transfer to the Company of rights, interests, and obligations under the lease agreement and related agreements; (5) the execution and delivery of a special source credit agreement by and between the County and the Company in connection with certain additional existing property in the County (the "Existing Non-FILOT Project"); (6) the benefits of a multi-county industrial or business park to be made available to the Company, the Expansion Project, and the Existing Non-FILOT Project; and (7) other matters relating thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - c. **#2013-050** – an ordinance authorizing an amendment to the agreement for development for Joint County Industrial Park by and between Anderson County, South Carolina, and Greenville County, South Carolina, to locate certain real property located in Greenville County in the Joint County Industrial/Business Park; and other related matters. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - d. **#2013-051** – an ordinance authorizing the amendment of the agreement for development of Joint County Industrial and Business Park within Abbeville County, South Carolina (Enviro Project) executed on January 8, 2008 by and between Anderson County, South Carolina and Abbeville County, South Carolina, providing for the development of a Joint County Industrial and Business Park so as to include additional property in Abbeville County as part of the Joint County Industrial Park, and other matters relating thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
10. **RESOLUTIONS:**
- a. **#R2013-064** – a resolution authorizing the execution and delivery of an inducement agreement by and between Anderson County, South Carolina, and Company A and Company B (collectively, **Project Choco**) whereby, under certain conditions, said Companies will acquire, by construction or purchase or lease/purchase property in Anderson County and Anderson County will provide certain economic development inducements to Company A and Company B for the project, and execute certain documents and enact certain further legislation for said companies' project involving an expected over one million dollars (\$1,000,000) in investment and the creation and maintenance of certain jobs. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - b. **#R2013-065** – a resolution authorizing the execution and delivery of an inducement agreement by and between Anderson County, South Carolina, and **Project Fleur** (the "Company") whereby, under certain conditions, said Company will acquire, by construction, lease and purchase, certain property in Anderson County and Anderson County will execute fee-in-lieu-of-tax agreement(s) and provide certain economic development inducements to the company for the project, and execute certain documents and enact certain further legislation for said company's project involving some ten million dollars (\$10,000,000) in total investment; and matters related thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - c. **#R2013-066** – a resolution authorizing the acquisition of certain airport aviation easements; and matters related thereto. Mr. Holt Hopkins (allotted 10 minutes)
 - d. **#R2013-067** – a resolution authorizing the County's attorneys to pursue an appeal in Anderson County v. Preston, et al; and matters related thereto. – Ms. M. Cindy Wilson (allotted 30 minutes)
11. **ACCEPTANCE OF THE 2014 FULL DEPTH PATCHING AND SINGLE TREATMENT PLAN – FUNDING REQUEST** - Mr. Holt Hopkins (allotted 15 minutes)
12. **REPORT FROM THE ANIMAL WELFARE COMMITTEE:** (November 12, 2013 meeting) – Chairman Tom Allen (allotted 5 minutes)
- a. Public Review of Draft Ordinance
13. **REPORT FROM THE PERSONNEL COMMITTEE:** (November 12, 2013 meeting) – Chairman Francis M. Crowder (allotted 5 minutes)
- a. Executive Session – Recommendation from Personnel Committee regarding Clerk of Council
14. **REPORT FROM THE FINANCE COMMITTEE:** (November 14, 2013 meeting) – Chairman Tommy Dunn (allotted 25 minutes)
- a. PetCo Grant
 - b. Broadway Water Meter Reading Agreement
 - c. Transfers
 - d. Aviation Easements (Possible Executive Session)
 - e. Executive Session:
 - 1. Personnel Matter
 - f. Executive Session – Economic Development Matters:
 - 1. Project Fleur
 - 2. Project Choco
15. **APPOINTMENTS:** Various Boards/Commissions - All Districts (allotted 5 minutes)
16. **REQUESTS BY COUNCIL MEMBERS:** All Districts (allotted 14 minutes)

17. **ADMINISTRATOR'S REPORT:** (allotted 10 minutes)
 - a. Letters of Appreciation:
 1. For: Sheriff John Skipper From: Greenwood Chief of Police Gerald Brooks
 2. For: Officer Dustin McQueen From: Ms. Amy Heard
 3. For: Mr. Charles Pinson From: Mr. John D. Henderson
 4. For: Mr. Matthew Schell From: Ellen Clark
 - b. Building and Codes October Monthly Activity Report
 - c. Single Treatment and Crack Sealing Contracts – November 4 – November 8, 2013
18. **CITIZEN COMMENTS:** Other Matters
19. **REMARKS FROM COUNCIL MEMBERS**
20. **ADJOURNMENT**

State of South Carolina)
County of Anderson)

ANDERSON COUNTY COUNCIL
REGULAR COUNTY COUNCIL MEETING
NOVEMBER 19, 2013

IN ATTENDANCE:
FRANCIS CROWDER, CHAIRMAN
M. CINDY WILSON
GRACIE FLOYD
EDDIE MOORE
TOM ALLEN
TOMMY DUNN
KEN WATERS

ALSO PRESENT:
RUSTY BURNS
MIKE PITTS
RITA DAVIS

Celia Myers

1 FRANCIS CROWDER: Mr. Pitts, how many have we
2 got signed up tonight, please, sir.

3 MIKE PITTS: Twenty on agenda items, Mr.
4 Chairman.

5 FRANCIS CROWDER: All right, thank you. Just
6 so -- before we start so that we know the rules of the
7 road, I know there are two passionate subjects on the
8 agenda tonight and we always welcome people to come to
9 County Council. But in order to maintain decorum, we
10 appreciate you keeping your comments, you know, as
11 civil as we possibly can. I know that unfortunately in
12 our nation we have a diverse society, but I hope at the
13 local level that we can express ourselves openly and do
14 it in the correct manner. Each person speaking will be
15 given three minutes. As you approach the podium at the
16 proper time, please state your name, what district
17 you're from and we welcome you being here tonight.
18 Having said that, I'd like to call to order the
19 Anderson County Council Regular Meeting of November
20 19th, 2013, at 6:30 at the Historic Courthouse Council
21 Chambers, second floor. And at this time I would call
22 on the Honorable Council member, Gracie S. Floyd, to
23 lead us in our invocation and pledge of allegiance.
24 May we all stand.

25 (INVOCATION AND PLEDGE OF ALLEGIANCE
26 BY GRACIE FLOYD)

27 FRANCIS CROWDER: Thank you. At this time I'd
28 like to move to Item number 3 on the agenda, approval
29 of minutes. Do I have a motion? Have a motion by the
30 Honorable Eddie Moore and second by the Honorable --
31 I'll drop the Honorable the rest of the time -- Cindy
32 Wilson. I'm a little tired. I moved today. Any
33 discussion?

34 CINDY WILSON: Mr. Chairman, may I?

35 FRANCIS CROWDER: Yes, Ms. Wilson.

36 CINDY WILSON: This part of the minutes
37 were apparently correct, but the title page on the
38 regular meeting part, they need to take out special
39 recognition and re-label it regular meeting. That was
40 the primary typo that I saw.

41 FRANCIS CROWDER: So you're making a motion
42 for
43 those changes?

44 CINDY WILSON: Yes, sir.

45 FRANCIS CROWDER: All right, do we have a
46 second? We have a second by Mr. Moore. Any discussion
47 on the amendment?

48 CINDY WILSON: And one other thing, if I
49 may, apparently, and I'm guilty, too, some of us aren't
50 speaking into our mike very clear and so there's some

1 question marks in some areas so if anyone has time to
2 go through and flesh out those gaps. Thank you.
3 FRANCIS CROWDER: All right. We have a
4 motion...
5 GRACIE FLOYD: Mr. Chairman?
6 FRANCIS CROWDER: Yes, ma'am.
7 GRACIE FLOYD: We have an active motion on
8 the floor?
9 FRANCIS CROWDER: Yes.
10 GRACIE FLOYD: Okay. I will wait.
11 FRANCIS CROWDER: Okay. Thank you. All
12 right. We have an active motion on the floor. Any
13 discussion on the active motion? We have a first and a
14 second. Hearing none, all those in favor raise your
15 right hand. Let the record show it was unanimous.
16 Now, for the ---
17 GRACIE FLOYD: Mr. Chairman?
18 FRANCIS CROWDER: Yes, ma'am.
19 GRACIE FLOYD: Point of order, please.
20 FRANCIS CROWDER: Yes, ma'am.
21 GRACIE FLOYD: Okay. Mr. Chairman, I don't
22 know if you have approved the agenda yet as it stands.
23 Sometimes we do it at the meeting, sometimes we don't.
24 But there is an agenda item on this that I think that
25 should not be here today, sponsored by the person who
26 has put it on, I think it's number 11. Mr. Chairman
27 and fellow council members, this agenda item should not
28 be here. Not number 11. It's the one about Joey
29 Preston, here, has it been taken off already?
30 FRANCIS CROWDER: No, it's item 10(d).
31 GRACIE FLOYD: 10(d). Okay. All right. I
32 maintain that that motion is out of order because it's
33 being presented by someone who has a conflict of
34 interest as stated by Judge Couch on two occasion, that
35 there is a conflict of interest from this person and it
36 should not be on the agenda.
37 Now, in view of that, I have written a letter
38 to Mr. Hayden (phonics). I need somebody out there to
39 come up here that can -- Mr. Dunn -- Mr. Burns, you can
40 help me; couldn't you? I have written a letter to the
41 Ethics Commission. I'd rather read. Would you give
42 each council person one of these? May I have one --
43 bring them back. Bring the copies back to me, please.
44 I am writing to you as a member of the
45 Anderson County Council. A majority of Anderson County
46 Council, Ms. Wilson included, voted to authorize a
47 lawsuit against the former county Administrator, Joey
48 R. Preston, related to the severance vote taken on
49 November the 18th. After three years of litigation,
50 including a multi-day trial in front of the Honorable

1 Roger Couch, the court found that during the vote
2 regarding Mr. Preston's severance, Ms. Wilson, along
3 with Mr. Waldrep -- would you please give one to the
4 press over there, please -- was voting under a conflict
5 of interest. Let me read that again. The court found
6 that during the vote regarding Mr. Preston's severance,
7 Ms. Wilson, along with Mr. Waldrep, voted on a conflict
8 of interest. Throughout this process Ms. Wilson has
9 continued to participate in this process and has failed
10 to recuse herself even after the verdict and the clear
11 finding that she was voting under a conflict of
12 interest. Since that request the Circuit Court judge
13 has now reaffirmed his decision and again, detailed Ms.
14 Wilson's conflict of interest in voting on matters
15 involving Joey Preston. Despite this, Ms. Wilson has
16 an item on the agenda for our council meeting on 11/19
17 to vote to appeal the case against Joey Preston. I
18 believe that Ms. Wilson's failure to recuse herself
19 despite the court's finding of her conflict of interest
20 constitutes a violation of the state Ethics and
21 Accountability Act and the Anderson County code.

22 Accordingly, I enter and request a formal
23 investigation into the actions of Council Member M.
24 Cindy Wilson to determine if any violation has
25 occurred. Let me read that one again. Accordingly
26 enter and request a formal investigation into the
27 actions of Council member M. Cindy Wilson to determine
28 if any violations have occurred. I am also enclosing
29 both orders for your review. Signed the Honorable
30 Gracie S. Floyd.

31 Mr. Chair, I believe that we are in violation
32 of the Judge's orders that he has ordered twice.
33 Twice. And still, and still District 7 is allowed to
34 go on with this thing. If it comes from another
35 council member, I could understand it, but it doesn't,
36 it comes from the same council member that started it.
37 And that is my point of order and that's my point of
38 discretion here.

39 FRANCIS CROWDER: Thank you. At this time may
40 I temporarily -- can we temporarily adjourn while I
41 seek legal counsel? Do I have a motion to adjourn? Do
42 I have a second? All those raise your right hand. All
43 right. At this time I want to have ten minutes -- a
44 private conference -- I want a private conference to
45 get legal advice on how the chair should rule on the
46 item.

47 **(MEETING ADJOURNED 6:40 PM To 6:46 PM)**

48 FRANCIS CROWDER: The Chair requests that I
49 have a motion to come out of adjournment. We have a
50 motion by Mr. Moore. Second by Mr. Allen. All those

1 in favor, raise your right hand. Let the record show
2 it was unanimous of those members present. After
3 seeking legal advice, we will continue forward with the
4 agenda as published. And so, therefore, we appreciate
5 the comments, but having sought legal advice, the
6 agenda stands as it is. And you will notice County
7 Ordinance says that the agenda is approved on Wednesday
8 afternoon at five o'clock. So, hearing nothing else,
9 we will now move forward with actually voting on the
10 minutes. Do I have -- we have a motion to approve the
11 minutes and a second. Any other discussion? Hearing
12 none, all those in favor -- no, we only did the
13 amendments, we did not do -- and so consequently all
14 those in favor, please raise your right hand. Let the
15 record show it was unanimous.

16 All right. At this time, we have citizens'
17 comments. Mr. Pitts.

18 MIKE PITTS: Yes, sir, Mr. Chairman.
19 First up is Kay Rhodes.

20 KAY RHODES: Good evening, Council. I
21 appreciate the opportunity to make a comment.

22 FRANCIS CROWDER: Yeah. If you would repeat
23 your name and also what District you're from.

24 KAY RHODES: Okay.

25 FRANCIS CROWDER: Into the mike so we'll have
26 it for the record.

27 KAY RHODES: Okay. Thank you. Good
28 evening, Council. I appreciate the opportunity to make
29 a comment. My name is Kay Rhodes and I'm here to
30 respectfully remake a request to the council. I live
31 in District 1. I didn't know this was an agenda item
32 when I requested to speak, but I got to move over to
33 the agenda side. I'm asking the council to drop all
34 present and future suits against Joey Preston related
35 to the severance package he received from the county.

36 I don't know Mr. Preston personally so I have
37 no reason to make this request on his behalf. I make
38 it on behalf of the taxpayers of Anderson County. I
39 understand from newspaper articles over the past years
40 that we taxpayers have spent approximately three
41 million dollars to get back severance pay of
42 approximately one million dollars. Economics alone
43 justify abandoning this practice, even if some feel he
44 got his settlement undeservedly.

45 I don't know all the politics of the issue,
46 but I know how budgets work. Think of how the three
47 million dollars could have been used to improve our
48 county. Instead, it went to court and attorneys fees
49 and returned nothing. When the council felt compelled
50 to seek a return of the settlement and entered into a

1 suit, it may have been a legitimate case. Only the
2 participants know those details. But when it's
3 returned repeatedly as Mr. Preston keeps his severance
4 pay, then we need to stop and accept the decision.
5 These decisions come from experts who know the law.
6 I'm requesting the council abandon any further use of
7 taxpayer funds to sue Mr. Preston for the severance
8 pay. Thank you so much.

9 MARY WILSON: Thank you, Mr. Chairman and
10 council members. I am from District 7 County and
11 Hopewell Precinct. I lived out there all my life just
12 about. I would like to ask for each of you to search
13 your heart and vote for what is best for Anderson
14 County citizens. If you vote not to pursue, to take
15 the South Carolina Supreme Court route, what a hardship
16 you will place on citizens of Anderson County who have
17 lost jobs, and others on fixed income and these trying
18 times as we will be paying legal fees near one million
19 for Mr. Preston. Is this the legacy you want to leave
20 in your name for your family and friends to remember
21 you by? Thank you. And God bless Anderson County.

22 CAROLYN TOLBERT: Honorable members of our
23 County Council. Thank you for being willing to be
24 servants for all of us. I came here tonight from
25 District number 2 to ask you to please honor your
26 commitment to serve us all. In doing so, I was going
27 to make some comments, but I'm going to change my mind
28 after the first prayer I heard tonight prior to the
29 first adjournment. I believe, Tom, you did that. I'm
30 not sure to whom I owe those thanks, but I prayed with
31 you. Civility is essential in government. It's
32 essential in the families. It's essential in the
33 world. May the peace that we long for, for the service
34 that we need, come from you as you consider the appeal
35 for Joey Preston's case. I ask you not to appeal. May
36 God bless you. We have prayed for wisdom, for
37 guidance, for truth. May your prayers be answered and
38 mine tonight. Thank you.

39 ANGELA REEVES: Mr. Chairman and County
40 Council, thank you so much for allowing us a free voice
41 here tonight. I couldn't have said it any better than
42 the folks that have gone before me. And as Ms. Tolbert
43 said, I hope that you will prayerfully consider this
44 appeal going to the South Carolina Appellate Court.
45 Within the next two months we're going to be incurring
46 costs on the interest that we owe Mr. Preston. We're
47 going to be incurring costs on the legal fees that
48 we're going to have to go forward with this. I think
49 that we should honor what our country was founded on
50 with the Judicial system. It's already been spoken

1 twice, I can't imagine in my personal life that I would
2 want to go to court three times just to try to make
3 myself -- win my case. Whether there was a mistake
4 made by two of y'all, four of y'all, none of y'all, not
5 a quorum, a quorum, something happened to bring this
6 thing forward for three years and to cost us so much
7 money.

8 Mr. Crowder, I understand, this is the first
9 time I've ever been here, that you may have to sign
10 your name on a resolution to pull this forward. Mr.
11 Crowder, you are a very, very smart businessman, very
12 successful. You did not get where you are today by
13 making decisions that were not financially sound.
14 You're a wonderful Christian man. I hope that when you
15 sign that resolution going forward, that you will
16 prayerfully consider your signature.

17 All of y'all, please, please, do this for the
18 citizens. Do this for the citizens of Anderson County.
19 I am a medical professional in private practice. A lot
20 of my patients are county employees. I also have city
21 employees. My county employees are not doing very well
22 right now. So I'm asking you, on behalf of my
23 patients, my clients, the citizens of the county, to
24 reconsider this appeal and not go forward.

25 And Ms. Floyd, I do want to say to you, thank
26 you. Thank you for your consistency. Thank you for
27 your common sense approach. Thank you for being the
28 silent minority, majority with the rest of us. We
29 appreciate your ????. Thank you and may God bless
30 everybody in here who is here for a cause tonight.
31 Thank you.

32 TRISH WATERS: Good evening. I am Trish
33 Waters. What I want to talk about is further on the
34 agenda. I am the AKC legislation rep for Clemson
35 Kennel Club. We would like to thank the Animal Welfare
36 Committee members, Mr. Allen, Mr. Crowder and Mr. Dunn,
37 for allowing us to be part of the process of working
38 with you and doing things for the betterment of the
39 animals here in Anderson County. It's very different
40 from what's going on with the Joey Preston stuff. I do
41 understand for the last twenty out of thirty years I
42 have been an Anderson County resident, even though I am
43 no longer.

44 Let's see, but as far as the Animal Welfare
45 Committee, I want to thank you for including us and for
46 a job well done. Thank you.

47 BRIAN JONES: I'm Brian Jones. I'm in Mr.
48 Dunn's District 5 and I, too, also would like to thank
49 Mr. Allen, Mr. Crowder and Mr. Dunn for putting up with
50 us for these many weeks listening to three or four

1 different sides, putting something together here that
2 makes a lot of sense. I'm going to make this short.
3 Thank you for what you guys did. This is good.

4 BOB MARTIN: My name is Bob Martin. I'm
5 from District 1. Mr. Chairman and Council members, I
6 come here with two purposes tonight. One, to present
7 to you, which is being handed out now, a resolution by
8 the Republicans in Anderson County asking you to --
9 this is a resolution that you've seen before.

10 Last night at our Republican meeting it was
11 unanimously confirmed and I was asked to present this
12 to you, that we wish to continue.

13 Second part of why I'm here because I've had
14 several very good friends who've spoken from the other
15 side. You know, I'm in the process of reading a book
16 about veterans in Anderson County, young men, most of
17 them not much more than boys, seventeen, eighteen years
18 old that served this county, the state, and indeed,
19 this country, with honor and integrity. And I ask no
20 more of them than I ask of you.

21 We started down this path five years ago. I
22 was at the meeting of November the 18th, 2008. It was
23 one of the most atrocious settings that I've ever had
24 the displeasure of being at. I saw an agenda radically
25 changed on a motion from Mr. Wilson. And we know where
26 Mr. Wilson is now.

27 This is a copy of the constitution, this is a
28 copy of the Bill of Rights, and I'd just like to quote
29 a little thing out of the Declaration of Independence.
30 We hold these truths to be self-evident. This country
31 was founded on truth, not on subterfuge, not on
32 political scheming. It was founded on the character of
33 good men and women who would agree to serve the
34 community. I'd like to think that I can disagree with
35 people without being disagreeable. You started down
36 this path, the same conditions exist now that existed
37 then, and I sincerely thank you for your endurance.
38 Thank you very much. And I hope you'll continue.

39 RALPH DRIVER: Ralph Driver, County Council
40 District 1. And I appreciate what you've read out.
41 I'd appreciate it if you'd read the rest of it, because
42 it's not just that one little ??? sound bite that you
43 got out of it. I carry one of these all the time. ???
44 taught me to do that.

45 It's time to end this legal action. Anderson
46 County lost and must pay the defendant. It's now four
47 million dollars according to the figures that were
48 passed out earlier to the taxpayers today. Obey the
49 court order now. End this waste of Anderson County
50 taxpayers' dollars once and for all. You know, this is

1 kind of like a golf game. I don't care what you do,
2 there's not going to be a winner, because you're
3 playing the golf course and what you're doing now is
4 you're playing the legal system. The legal system's
5 won. Time to put this to bed. Let's get back to work.
6 As a former county employee I gave my heart and soul to
7 the airport. Now I need a kidney and I'm in line with
8 eighty-four thousand other Americans that need a kidney
9 and for four million dollars that was spent, I know
10 there's at least four people that could have a kidney
11 right now. So, anyway, vote to do away with it.

12 LISA SIMPSON: Lisa Simpson, District 6.

13 FRANCIS CROWDER: Speak a little louder,
14 please.

15 LISA SIMPSON: Lisa Simpson, District 6.

16 FRANCIS CROWDER: Thank you, ma'am.

17 LISA SIMPSON: I would just like to ask my
18 councilman, Mr. Ken Waters, to not vote to settle this
19 lawsuit and to allow the appeal to continue through the
20 court process. I feel like this is the right thing to
21 do. Thank you.

22 CAROLYN BYERS: Mr. Chairman, my name is
23 Carolyn Byers and I live in District 1. I would just
24 like to encourage each of our council members to go
25 ahead with this appeal. As your constituents we worked
26 hard to get you into these seats. A large group of
27 people in this county want this to go all the way to
28 the Supreme Court. As the paper stated this morning,
29 over three million dollars in legal fees is a gross
30 overstatement. A large portion of that was in
31 frivolous lawsuits from people brought against this
32 county. As a professor from Clemson stated, the
33 council members will likely weigh the political costs
34 of their decisions more than they will weigh any other
35 factor trying to determine whether to appeal in the
36 severance pay case.

37 There will be political backlash from the
38 people who put your -- put you in those seats. And we
39 will work hard to get you off those seats. Mr. Ramson,
40 a political science professor at Clemson University,
41 stated, there's no guarantee that an appeal will turn
42 out the way we want it to, either. But is there any
43 guarantee in most situations in life? And I ask you
44 what price is justice? So please go forward with our
45 encouragement and prayers. And I thank you.

46 SETH RIDDLEY: Mr. Chairman, I would like
47 to offer some thoughts as a citizen of Anderson County
48 District 3. On agenda item 10(d), a resolution
49 authorizing the county's attorneys to pursue an appeal
50 in Anderson County versus ---

1 FRANCIS CROWDER: Sir, just a minute. Would
2 you start over and state your name and what district
3 you're from.

4 SETH RIDDLEY: My name is Seth Riddley and
5 I am a resident of District 3.

6 FRANCIS CROWDER: Thank you.

7 SETH RIDDLEY: I've been a resident of
8 Anderson County my whole life. This is my first
9 council meeting in several years, because I've spent
10 the last few years living in Boston going to college up
11 there. Around the time I was leaving the controversy
12 over former county Administrator Joey Preston's
13 severance package was just beginning, on the heels of
14 myriad other controversies. Five years later, I've
15 moved back home after getting a bachelor's degree and
16 I'm standing here. And I can't believe this is what
17 the Anderson County Council is still spending time on.
18 And spending the taxpayers' dollars on. Millions of
19 dollars.

20 In today's Anderson Independent Mail, Clemson
21 University Professor Bruce Ransom said, in making a
22 decision the council members will look at things like,
23 if we go for this and we lose, will there be a mounting
24 political backlash from people who are tired of this
25 litigation already? Will they make us lose our seats?
26 If you vote to continue this fight, the answer to that
27 question may very well be yes. Thank you.

28 SARA CROCKER: Sara Crocker, District 1.
29 I'm going to switch things back up and talk about the
30 Animal Welfare ordinance for just a second. And I just
31 want to thank Mr. Allen, Mr. Dunn and Mr. Crowder. You
32 gentlemen did a great job listening to us, working with
33 us. Thank you for including us in the process. Mr.
34 Allen, you did a fantastic job wading through the high
35 tides of emotion and even though we -- you know, both
36 sides two or three different sides, we didn't all agree
37 on everything. I think every side walked away thinking
38 that it was a great place to start. So thank you very
39 much.

40 NANCY CHAPMAN: Good evening. My name is
41 Nancy Chapman and I'm in Mr. Dunn's district, District
42 5. Everybody's got a past. The past does not equal
43 the future, unless you choose to live in it. We not
44 only live in it in Anderson, we're wallowing in it.
45 You've imprisoned our citizens, our taxpayers' money,
46 our resources and our future. And I may not be
47 representing the majority opinion here tonight, and
48 that's okay, because I know I'm representing the silent
49 majority that sits out there in the county that doesn't
50 phone you, that doesn't email you and doesn't call

1 radio stations and they're there. I've talked to them
2 since the last council meeting. They are there.
3 They're angry and they're mad. And they're fed up with
4 the political process that we have allowed ourselves to
5 be trapped in this situation talking about the same
6 thing three and five years later, five million dollars
7 gone. We have too many important things in the future
8 in this county to be addressed and here we sit wasting
9 more time and thinking about this.

10 So, the silent majority, you also represent.
11 It isn't the people that send you emails all the time,
12 or call you. You represent everybody in the county. I
13 heard the last time we were here, you talked about the
14 squeaky wheel. There's more than just squeaky wheel,
15 there's a wheel that's also paying taxes and you're
16 ignoring them because they aren't calling you.

17 Is it more important to fight and be right or
18 is it more important to have humility and accept that
19 maybe this was the wrong thing to do from the get-go.
20 This is a resentment gone bad and it's time to put it
21 to bed. And how do you get through resentment? It's
22 by forgiveness. And it's about time we started praying
23 for what God's will is on this not our will. We've
24 been in self-will way too long. You could take it to
25 the Supreme Court of this state, you could take it to
26 the Supreme Court of the United States of America.
27 You can get any decision you're looking for, but you
28 can not mandate morality and ethics and how people
29 interact and how they carry themselves in a job. You
30 can't. Look at the highest level of office in this
31 country, hasn't been able to be successful there and
32 you're not going to do it here in Anderson County.

33 So we're looking for leaders, we're looking
34 for the heroes that are willing to stand up and be
35 counted. And I will end with one little note. The
36 weak can never forgive. Forgiveness is the attribute
37 of the strong. Let's be strong.

38 MAX FLEMING: My name is Max Fleming,
39 District 5. And I'm here to ask you to please vote to
40 appeal this thing. All these people that said, let it
41 go because you spent too much money, if somebody broke
42 into their business or their home, took two hundred
43 dollars worth of stuff and it's going to cost forty
44 thousand dollars a year to keep them in prison,
45 everyone of them would probably holler keep them there.

46 And as far as ethics goes, I was at that
47 November 18th meeting and I saw a lot of ethics
48 violations. And the Chief Justice of the Supreme Court
49 has said it was ethics violation. So if you take it
50 there, I think you've got a good chance to win. And

1 the person that's talking about ethics violation pulled
2 two contracts out of her purse and said there's been no
3 secret meetings. I guess she wrote the contracts
4 herself, didn't meet with anybody. So I urge you to
5 vote to appeal this thing.

6 DENNY FLOYD: Denny Floyd, District 5.
7 Well, today we had it in the paper about our little
8 fight against Joey Preston, I guess. And a little
9 excerpt in here says, years later that battle has
10 generated thousands of pages of legal documents and
11 three million dollars in legal bills, but Anderson
12 County has lost the fight every major turn.

13 Well, you know, there's one statement that I
14 can go back and think about was Reverend Jesse Jackson.
15 He made this statement one time, he goes a half truth
16 is a whole lie. Well, that's what I read here in my
17 opinion. Because, guess what, they didn't put the
18 whole answer in the paper. They put what people wanted
19 to hear so they could come up here and tell you it's
20 wrong to stop, just don't carry on with this. We
21 didn't spend three million dollars, I think some of
22 them got it wrong. They're saying four and five
23 million. I'm just going by the paper. Three million
24 dollars, but we didn't spend all that fighting Joey
25 Preston. Like, has already been said, a lot of the
26 money was spend fighting the frivolous lawsuits that
27 came against this county trying to protect Mr. Preston.
28 We got to keep this going. We spent the money. It's
29 down to the pennies now to finish this out. Why would
30 you stop? But I don't actually believe you're going
31 to. Because I do not believe this county is going to
32 stop when you're here. You said pledge of allegiance
33 to the flag, what's the last sentence in that. Liberty
34 and justice for all. That means people who do wrong,
35 gets justice. So we the people who do right get our
36 justice. Just think about that. Y'all have a good
37 day.

38 BROOKS BROWN IV: Brooks Brown, District 1.
39 Mr. Chairman, I urge you on behalf on the citizens of
40 District 1 to drop this insatiable search of blood.
41 That's all this is, is a personal lawsuit by the
42 representative of District 7, who started out almost
43 twenty years ago against Joey Preston over a water and
44 sewer line across her family's property. Then it's
45 been one thing after another after another. She's lost
46 every single time. Nine times she sued. Nine times
47 she's lost. Now we've got this insatiable thing I'm
48 going to get my thing and I'm going to spend the last
49 penny. What then?

50 I would like to see this thing terminated

1 tonight. Not spend another dime. Four million dollars
2 equates to about eight mils. Y'all were fighting at
3 the budget over one mil. Why in the world would you
4 spend eight mils to try and save one when this matter
5 can be settled. As the lady said, we're going to have
6 to start paying interest on this loan that we've given
7 to Mr. Preston. Let the matter go. And if the
8 Republican party wants to pursue it, let them come out
9 of their pockets, it's their principle, let it be their
10 suit. Thank you.

11 RICK FREEMANTLE: Good evening, Mr. Chairman,
12 council members. My name is Rick Freemantle, District
13 7. I'd like to enlighten you about the Judicial good-
14 old-boy process here in Anderson County. I am the one
15 who has brought Joey Preston to court for FOI
16 violations and brought that woman, Gracie Floyd, to
17 court for FOI violations. I, too, lost three times in
18 the good-old-boy justice system. But then we got on
19 the highway. We went over to Columbia to the Supreme
20 Court and what do you think happened over there? Where
21 sane minds looked at all the information and sanity
22 prevailed.

23 Most of you up there ran on a promise. You
24 have remained loyal. I heard economics brought up
25 again tonight. Either we're going to be a nation of
26 laws or men. Men worry about economics. Laws rule
27 nations. If you stick to your laws, you remain a
28 nation for a very, very long time. If you run, and go
29 to -- worry about economics and let men run your
30 nation, you dissolve very quickly. The trash pile of
31 nations that have failed because of that is endless.
32 This is an issue bigger than you, bigger than me, it's
33 bigger than Anderson County. You do realize that if
34 you don't go with this appeal, you give up now, that
35 you're saying that it's okay to have a sheriff's
36 department obstruct justice so he can protect a sitting
37 administrator. Cater Lake. You're saying -- you know,
38 I heard God referenced a dozen times already tonight.
39 I want to puke from the people -- the remarks I've
40 heard. You're saying it's okay to have an
41 administrator sit in that chair and for eight years
42 have an affair with a county employee behind the back
43 of his wife and his children. That's what you're
44 saying if you don't go forward with this. It's okay to
45 have an administrator involved in a paeans scheme with
46 a sitting county council member while giving that
47 county council member's daughter a nice job with a
48 lucrative contract. That's what you're saying okay to.
49 But worst of all, you're saying it's okay what that
50 woman did on November the 18th, 2008 and everyone of

1 you will have to apologize to her because you've been
2 so wrong, if you go and step off this now. Thank you.
3 KURT GIBSON: Chairman Crowder and Council
4 members, thank you for allowing me to address you. I'm
5 from District 4. When the original decision came down
6 I was confident that it would be overturned on appeal
7 if you appealed it. And then we did the motion for
8 reconsideration and your attorney, Ted Gentry, did a
9 fantastic job on the motion for reconsideration and I
10 was even more confident then. And now after we
11 received the second order, I'm even more confident
12 because after six months they didn't come up with
13 anything better than what the order was originally. It
14 really didn't address the quorum issue at all. And the
15 Supreme Court precedent is clearly on our side for the
16 quorum issue. There's a -- it seems like there's very
17 little that the decision did to address that issue.
18 Tried to skirt around it, but if you read the motion
19 for reconsideration, and you read the county's motion
20 for reconsideration, you'll see how clear it is.
21 Supreme Court precedence is on our side, the county
22 code's on our side. If you read the order, if you read
23 the answer from Lane Davis, you'll see that it's very
24 convoluted. They tried to get around the Supreme Court
25 precedent the best they could, but they just failed.

26 That's what the Appellate Court is for. We've
27 got a relatively small amount of money to spend now to
28 take it to the next level and get a decision in our
29 favor. Otherwise you're giving up and it's going to
30 cost the county a lot of money on a case that's easily
31 winnable.

32 A lot of people talk about the silent
33 majority. I've talked to a lot of those people that
34 don't come here, also, and I can't find anybody that
35 thinks that Joey Preston should have gotten one point
36 one four million dollars or one point four million,
37 leaving his post, especially in the manner that it
38 happened and etcetera. So there's, you know, everybody
39 quotes the silent majority, but if they don't come up
40 here and speak and talk to you, then they're not --
41 they remain silent of their own accord. I think we
42 should go forward and I hope you'll vote that way.
43 Thank you.

44 MIKE PITTS: I'm having a hard time
45 reading this one, Mr. Chairman. I believe it's Charles
46 D. Crowe.

47 FRANCIS CROWDER: Mr. Crowe, would you state
48 your name and what district you're from.

49 CHARLES CROWE: It's Charles Crowe, and I'm
50 going to have to add my nickname to it tonight, because

1 somebody's made reference to the radio crowd. I'm
 2 better known as the radio hog. And deserve it. Most
 3 of you that do listen know that. I'm going to have to
 4 change everything I came here to speak on tonight,
 5 after hearing Mr. Brown speak and a few of these other
 6 gentlemen and ladies speak. And the pass-out I got in
 7 order to -- when I came in here.

8 First of all, Mr. Brown, and you're the
 9 taxpayers, I want you to know, you're right. You're
 10 right. He did bring I don't know how many suits
 11 against Cindy and she lost every one of them. But
 12 don't you forget for one minute he wasn't using your
 13 tax dollars to bring all them lawsuits. And you paid
 14 dear for them, friend. He hired every lawyer he could
 15 get his hands on.

16 FRANCIS CROWDER: Sir. Just a moment. I need
 17 to have a ruling.

18 CHARLES CROWE: I know I was out of order.

19 FRANCIS CROWDER: Yep.

20 CHARLES CROWE: I apologize. I apologize to
 21 Mr. Brown.

22 FRANCIS CROWDER: All right.

23 CHARLES CROWE: But he's the one that made
 24 them remarks.

25 FRANCIS CROWDER: Well.

26 CHARLES CROWE: I know I shouldn't have.

27 FRANCIS CROWDER: All remarks have to be made
 28 to council and the chair. And no remarks can be made
 29 to any member of the audience.

30 CHARLES CROWE: Mr. Chair, then, I won't
 31 withdraw the statement, but I will make sure I clarify
 32 my next one. I'm sure that the person that was
 33 responsible for these pass-outs tonight's paid dear to
 34 have these things researched because I remember when
 35 another council person who ordered some researches one
 36 time, Mr. Preston ordered her to pay five hundred
 37 dollars for that research material. I know I picked it
 38 up. I picked it up. And I wonder if she paid any
 39 money for her research. I want to thank her for the
 40 research because I found out, in reading this, if she
 41 hadn't pulled the contract out of her pocketbook, we
 42 wouldn't be out three hundred and twenty-one thousand
 43 seven hundred and forty-nine dollars. We wouldn't be
 44 out that much money if she'd had printed it and gave it
 45 to me. That's just one thing. I don't know about all
 46 these others. I'm thinking there's a lot of others on
 47 this list, these legal fees, that didn't come out of
 48 Joey Preston's even after the thing that council did.
 49 I'm not holding county -- the previous council
 50 responsible for, I'm not holding them responsible for

1 all these lawsuits. But I'm holding the person -- and
2 then, this here thing, that you know that's been
3 carrying on this vendetta, Lord, and then who has --
4 what is this, it went before the ethics commission.
5 Who has been more unethical than the person who's part
6 of the deal to yield this contract, made a major role
7 in this contract that's been in every executive session
8 y'all been in, voted on everything, I don't know
9 anything more unethical. I don't know a thing more
10 unethical. But anyway, listen, I don't have to tell
11 y'all how I'm asking you to vote, you can tell by my
12 talk. And, again, I apologize for being out of order.
13 Y'all have a hard enough job as it is. You have a
14 hard enough time keeping council straight, let alone us
15 out in the audience, so thanks for putting up with me.

16 FRANCIS CROWDER: Please state your name and
17 what district you're from, please, sir.

18 MARK POWELL: Unlike many speakers, I've
19 been here many a time addressing this and I know the
20 process. My name is Mark Powell, District 7. Thank
21 you, District 7 for all that you have done. Let me
22 address the resolution you were given a copy, again,
23 tonight, from the Republican Party. Reason that's
24 important all but one of you are a Republican. You ran
25 on the Republican ticket, a lot of the people at that
26 office in that facility worked hard to get you in
27 office, so the importance of that resolution is you are
28 our representative as a Republican.

29 And thank you, Ms. Floyd, this is awesome.
30 Thank you so much for giving your people and my people
31 this document. Let me see here. Bradshaw versus,
32 yeah, frivolous. Reimbursements for Candy Kern,
33 frivolous. Patricia Jones versus, frivolous. Everett
34 Bradshaw, frivolous. Michael Cunningham because of
35 you, not frivolous, but gosh darn expensive.
36 Challenging council's -- this is the good one.
37 Challenging the council's ability to hire
38 investigators. Oh, my God, I do believe the Supreme
39 Court Justice said that is patently absurd. But,
40 anyway, here's another one. Investigating Eddie Moore
41 again, frivolous. Patricia Jones, Eddie Moore,
42 frivolous. Defense Eddie Moore, frivolous. So, thank
43 you, for pointing out to these people who don't keep up
44 with anything most likely. They read the Anderson
45 Independent, who only tells you we've spent so much
46 money going after Joey Preston. We haven't spent
47 anything going after Joey Preston. We spent money
48 going after our tax dollars. I've stated it many a
49 times had Gracie and the others who gave him his buyout
50 that night, if they had specifically, specifically give

1 him -- you said --
2 FRANCIS CROWDER: Ma'am. That correct? All
3 right. You're out of order.
4 MARK POWELL: District 2 council person
5 ---
6 FRANCIS CROWDER: Is that still legal?
7 MARK POWELL: Oh, oh, here's more. So,
8 all the money you spent, giving him more than his
9 contract, give him three times more than his contract.
10 He spent like four thousand dollars fixing his Denali.
11 Shoving it in our face wearing the shirt. Did he
12 deserve anything? No. What did he deserve, maximum?
13 His actual contract.
14 Let's think about the people who wrote this
15 contract. Ron Wilson, in jail. Ron Wilson's daughter,
16 oh, he was thrown off, he can't vote, so the local
17 judge said. Oh, Cindy, Bob, here's the deal. This is
18 not a vendetta. I don't care how much money it costs.
19 I agree with someone else who said if someone stole a
20 hundred dollars, two hundred dollars from you, you
21 would be in court until you got your money back. This
22 is our money. It's not about Joey Preston. It's not
23 about Cindy Wilson. It's about the fact that five
24 council members trampled on our rights on FOI. Oh,
25 FOI. Why hasn't the judge heard that case yet?
26 Anderson County case against Joey is complicated. The
27 Rick Freemantle case? Did they give twenty-four hours
28 notice? No. Is that complicated to uphold in court?
29 No. Go forward.
30 FRANCIS CROWDER: Thank you.
31 DAN HARVELL: Mr. Chairman and members of
32 council, Dan Harvell, County Council District 3.
33 Normally when I come here, I don't speak as Chairman of
34 the Anderson County Republican Party, because I don't
35 feel like it's my place to do that when there are
36 varied opinions, but after what happened last night,
37 which was a reaffirmation of the resolution that our
38 party passed months before urging you to go ahead with
39 this, to seek justice, I come representing the party,
40 because the vote on this last night from all these
41 members of the Republican Party in Anderson County, the
42 executive committee, was unanimous that you proceed
43 with this.
44 To harken back many years ago, it took three
45 election cycles to break the council that was a council
46 that would allow an administrator to run with
47 bureaucratic -- with no bureaucratic restraints as to
48 what he was doing. There were millions of dollars
49 being wasted every year. And I don't hear anybody
50 saying anything about that. The Daniel report proved

1 what was going on during that last, that previous
2 administrator's time here. Ms. Wilson was doing the
3 best she could, along with, later, Mr. Bob Waldrep, on
4 council, trying to rein in what was going on. The
5 harassment that Ms. Wilson took, coming from the
6 administrator was unprecedented in the state of South
7 Carolina of a bureaucrat going against an elected
8 council member that he was supposed to be working for.
9 This had never happened before to this level. And for
10 that reason, justice needs to be heard on this.

11 I doubt anyone in this building that has
12 spoken so far against this was at the Supreme Court as
13 many of us were to hear such remarks from Justice Jean
14 Toal, saying this looks like a conspiracy. You know
15 this is the good old boy system at work. One of the
16 most liberal members -- Democrat members of the state
17 Supreme Court said basically the same thing. But you
18 know, how could this happen like this? They saw, they
19 saw the tape. How many of the people that have spoken
20 here tonight against moving forward have seen the
21 November 18th meeting and what an absolute circus that
22 was. What a circus that was.

23 Justice is more important, and I don't think
24 anyone's been uncivil about this. I think most people
25 that have come here have spoken well about what they
26 wanted, one way or the other, even in past years.
27 Civility is important in government, but nothing is
28 more important in government than justice. And that's
29 what has to happen with this. Sure, we've spent so
30 much money on this so far. And it's unfortunate that
31 the administrator's lawyers have done everything they
32 can to throw a wrench into every gear they could to
33 slow this thing down to make more money. I mean, we've
34 got lawyers here that, I mean, they're self-
35 promulgating here. You know how the system works.
36 Take this to the Supreme Court and I think we'll be
37 positive in our outcome. Thank you.

38 FRANCIS CROWDER: Is that it?

39 GRACIE FLOYD: Mr. Chairman?

40 FRANCIS CROWDER: Yes, ma'am.

41 GRACIE FLOYD: Point of privilege.

42 FRANCIS CROWDER: Yes, ma'am.

43 GRACIE FLOYD: Thank you. First of all,
44 people who saw the film on November the 8th saw -- I
45 don't know where y'all get that lie from that I reached
46 down in my pocketbook and pull out the papers. It
47 wasn't there, folks, it didn't happen like that.
48 Secondly, you lost. You've lost twice. You've lost.
49 What do you want to do now? You are spending those --
50 you just stood up and said that we ought go ahead and

1 keep moving. You're not spending any money on this.
2 MIKE PITTS: Out of order.
3 FRANCIS CROWDER: I think I need to have a
4 ruling. Mr. Pitts, I think this is a two-way street.
5 GRACIE FLOYD: I asked for the privilege
6 and got it.
7 FRANCIS CROWDER: Yeah, but I didn't know what
8 you were going to do with your point of privilege. So
9 the chair has the right to stop right now and ask for a
10 ruling.
11 GRACIE FLOYD: Mr. Lawyer, what did I do
12 wrong?
13 MIKE PITTS: The chairman makes the
14 rulings on points of privilege and how the meeting's
15 proceeding and he's ---
16 FRANCIS CROWDER: Well, in my mind -- I'm
17 asking this. In my mind, if it's not all right for
18 people in the audience to take on council members, is
19 it all right for council member to take on people in
20 the audience?
21 MIKE PITTS: I think it's a two way
22 street.
23 FRANCIS CROWDER: Pardon?
24 MIKE PITTS: I don't believe that ---
25 FRANCIS CROWDER: All right. So I think the
26 point of order is out of order.
27 TOMMY DUNN: Mr. Chair.
28 GRACIE FLOYD: All right. I still have the
29 floor, Mr. Chairman. Well, how am I supposed to say
30 what I need to say if I cannot say what -- I didn't
31 call anybody by name. I didn't -- all I'm saying is
32 that -- no, you can't move on this, Mr. Moore, you're
33 not the Chair.
34 FRANCIS CROWDER: Well, I am the Chair. And
35 you do ---
36 GRACIE FLOYD: You're going to have to tell
37 him to move on, unless you've been doing it all the
38 time.
39 FRANCIS CROWDER: I'm not listening to him,
40 I'm listening to me, myself and I.
41 GRACIE FLOYD: Well, good. I have the
42 floor. I asked for a point of privilege and I want it
43 to address what I said. Okay. I want to address these
44 people coming up here and they said all these things
45 that are not the truth. They want to know where I got
46 my, they want to know where I got my statements from.
47 I got it from the county. You could have gotten it
48 from the county.
49 FRANCIS CROWDER: I think you have an item on
50 the agenda that gives you thirty minutes to give

1 information from county council members' district
2 number 2 ---
3 GRACIE FLOYD: Okay. But I did ask for a
4 point of privilege.
5 FRANCIS CROWDER: All right. Well can I cut
6 short a point of privilege? Sir? I can rule you out
7 of order and at that time -- we will now have a recess.
8 TOM ALLEN: Mr. Chairman, very quickly
9 as a point of order, per our county ordinance, we are
10 not allowed to debate citizens' comments.
11 GRACIE FLOYD: Who was debating, Mr. Allen?
12 I was making a statement.
13 TOM ALLEN: Ma'am, you have thirty
14 minutes coming up in a just few minutes and that's per
15 our ordinance. We're not -- this is not a debating ---
16 GRACIE FLOYD: I asked for a point of
17 privilege, sir.
18 TOM ALLEN: Not long ago you ---
19 FRANCIS CROWDER: I did not know what the
20 subject was.
21 GRACIE FLOYD: How could you know? You
22 can't read my mind. But you gave it to me.
23 FRANCIS CROWDER: I'm stopping and halting,
24 we're going to take a ten minute break at this
25 particular point in time. Do I have any objections to
26 taking a ten minute break? Hearing no -- all those in
27 favor of taking a ten minute break, please raise your
28 right hand. All right. Thank you.
29 GRACIE FLOYD: You didn't ask for the nays.
30 FRANCIS CROWDER: I got it. Let the record
31 ---
32 GRACIE FLOYD: Ask me, I didn't vote.
33 FRANCIS CROWDER: I asked for hands.
34 GRACIE FLOYD: You didn't ask for the nays.
35 That's Robert's Rules.
36 **(BREAK FROM 7:35 PM TO 7:43 PM)**
37 FRANCIS CROWDER: If we could have quietness,
38 please. If you want to talk, please go outside.
39 All right. Just for clarification for people
40 in the audience, so that you won't think that we let
41 things just sort of go casual, but there's a county
42 ordinance that specifically says that there's no debate
43 either between you and us or us and you. Second of
44 all, a point of privilege is only used for trivial
45 items such as the heat needs to be turned up, the air
46 conditioner needs to be turned up and not an item on
47 the agenda. So, the Chair was within its right
48 according to the County Ordinance and we will now move
49 forward to the item on the agenda, which is item number
50 5, which has been taken off of the agenda for tonight

1 because the person has had some grief in his family and
2 was not able to be with us.

3 And at this time item number 6, I recognize
4 the Honorable Gracie S. Floyd, information for County
5 Council members District Number 2.

6 GRACIE FLOYD: Thank you. Thank you. It's
7 good to see all of you. Now, as I was saying before I
8 was so rudely interrupted, the contract did not come
9 out of my pocketbook. It came out of a folder on my
10 desk. That's where it was. It wasn't my pocketbook.
11 The Judge has ruled twice on behalf of Anderson County.
12 Twice. So what you going to do? Keep going until you
13 find a judge that's going to rule for -- how do I say
14 it? I can't say you -- rule for the county? Is that
15 what you're going to do? And do you think that the
16 county's going to sit there and take it? Please
17 realize that this has been going on now for thirteen
18 years. This started out over Beaverdam and the same --
19 some of the same folks that came up tonight to give
20 their opinion are some of the same folks that were
21 involved in this Beaverdam thing and pushing this
22 thing.

23 Folks, I don't have a dog in the fight. My
24 dog is this. We have spent four million dollars and
25 yet you tell me that the -- we don't have any money to
26 give the employees a raise. Who haven't had a raise in
27 years. You tell me that we don't have the money to
28 provide bus service for people who need to get back and
29 forth, for our seniors who need a ride, who cannot
30 drive any more. You tell me that we don't have money
31 for our roads that are in bad shape now. You tell me
32 that Anderson County can't hire anybody, we supposed to
33 have a freeze on employees.

34 All right. Now, about the frivolous lawsuits.
35 I've got here two thousand dollars, three thousand
36 dollars, one thousand, one thousand, another three
37 thousand and another four hundred and six dollars.
38 Those were the funds of the previous -- of the
39 frivolous lawsuits. Now, how much did we spend on the
40 lawsuits? One hundred and fifty-eight thousand, two
41 hundred and thirty-nine thousand, six hundred and nine
42 thousand, two hundred and sixty-two thousand, two
43 hundred and sixteen thousand. These people would have
44 you to believe what they -- well, there are people who
45 will have you to believe what they want you to believe.
46 But if you got common sense, if you've got common
47 sense, it would dictate that if you are spending money
48 and not getting any money back and getting deeper in
49 the hole, that you would stop. That's common sense,
50 people. You don't have to get folks to come and tell

1 you, oh, keep going because you going to win it, you're
2 going to win it. We haven't won it yet. But you know
3 that was all I was going to say about this Joey Preston
4 thing. I gave you, I didn't have to spend a dime for
5 this. It comes from the finance records of Anderson
6 County. You could have gotten it yourself if you
7 wanted it. Not one dime.

8 I do want to talk about something here that's
9 happening in Anderson County with the Broadway Lake
10 Community Center. This is the anniversary of that
11 entity and do you remember when we opened it in
12 November the 18th it was said that nobody was going to
13 use it. You remember they said that they called it
14 Gracie's Dance Hall? Remember that? Remember how the
15 radio had people calling in to say that was a waste of
16 money and dah dah dah. Well, here is the results.
17 Since November 2009, McFall's Landing has been rented
18 for five hundred and ninety-eight events with over
19 ninety-three thousand dollars of rental fees collected.
20 All right. In 2013 there were only twelve dates --
21 weekend dates when there was not an event taking place
22 at the facility. Currently, every Saturday in April,
23 May, June and July and August of 2014 are booked. This
24 is Gracie's Dance Hall. Council members, I have some
25 copies for you. Would you please pass this down? I
26 have copies for you.

27 Okay. Also I wanted to talk about -- okay.
28 I've already told you about I am asking -- I am
29 inquiring for information for -- from the Ethics
30 Commission so that we can see where we're going. If
31 the Ethics Commission says that it's okay for people
32 who have been told they have a conflict of interest to
33 keep on doing what they've been doing, then it's fine
34 with me. If the Ethics Commission says it's wrong and
35 they cannot do it, then we have to make some
36 adjustments or some changes.

37 Now, about me, about me. Folks, you won't
38 shut me up. Ever since I have been sitting on this
39 thing -- ever since these folks came up here, they have
40 tried to shut me up. It won't happen. If you won't
41 let me talk in here, I'll get on the street corner and
42 I will talk. I know who you are. But just know that
43 you will not shut up Gracie Floyd. I represent twenty-
44 two thousand people and these twenty-two thousand
45 people will be -- they will be represented. All right.
46 So if you're going to try -- don't try to keep me from
47 saying what I need to say. All right. And I always
48 get my stuff. I always ask for permission and they
49 always give it to me. And they always yank it back. I
50 did nothing wrong tonight. I did the same thing that

1 has been done before. But yet I get called for it.
2 I want to tell you something. We have made a
3 big old mistake. Anderson County has made a big old
4 mistake. We don't know how we're going to solve it
5 first, but we've been working on it all day long. Mr.
6 -- I knew that. I was going to get there. Mr. Burns
7 and I have been working on it, along with the Finance
8 Director and some others. We were wrong what we did.
9 What we did was, we took people who have been working
10 for us for years and who have scratched their way up
11 the line and they're making about fifty thousand
12 dollars. We excluded them from the little -- it wasn't
13 a bonus, because you can't say bonus. We excluded them
14 from receiving any of the funds, cost of living
15 increase funds. They were excluded. That's wrong.
16 That was wrong. I look back now at it and it's
17 hindsight. But I'm sure every council member up here
18 will agree with me that those people who have been with
19 us that long who finally make that money, needed to be
20 told that they are important to this process that we
21 do. We should not have excluded them. One thing that
22 we did do, I look back on it now, and I'm wondering,
23 I'm scratching my head, we have people who have retired
24 from Anderson County who have come back to work for
25 Anderson County, okay. It's like they get a retirement
26 check, just like I do, and they get a check from
27 Anderson County, just like I do. Okay. And some of
28 them may even get Social Security, just depends. But
29 they will be getting the five hundred dollar bonus.
30 Not a bonus. Five hundred dollars cost of living. And
31 I'm sure that they want their money, too, but yet still
32 the people who have been here with us the longest, who
33 stay with us, who make nothing, are not getting it.
34 It's not right. I was a part of that, because I was
35 the one who fought for them to get something. And when
36 they got something, I was so happy that I didn't look
37 at the whole picture. And then they started calling
38 me, telling me the mistake. And then they're right. A
39 mistake has been made and I'm going to -- I want them
40 to know that I am trying my best, I'm trying my best,
41 to let's come to some kind of conclusions where they
42 can be included, too.
43 Okay. And the third thing that was said
44 tonight that how one member of the council was treated
45 so poorly and so badly and all of that other kind of
46 stuff, I mean like... That may well have been. That
47 may well have been, okay. But I have been treated just
48 as poorly. Just as badly. All right. But I don't go
49 around whining and crying about it. Well, okay, I hope
50 you got your throat clear. But, anyway, I don't go

1 around whining and crying about it. I accept mine. I
2 will accept mine because I know that the people that I
3 represent know what is going on here. And I know that
4 they are out there supporting me compared to the phone
5 calls and stuff I've gotten today. I know that, I know
6 that.

7 But my last statement is, and I'm not going to
8 take the full thirty minutes, because I will be back.
9 And I have some other things I'm going to say. But if
10 you can't play with the big dogs, if you can't, stay
11 out in the yard and stay under the porch.

12 FRANCIS CROWDER: Is a comment in order?

13 MIKE PITTS: I don't think so. I mean,
14 we -- she was given the floor, that was Ms. Floyd's
15 topic, so I think we ought to move on, Mr. Chairman.

16 FRANCIS CROWDER: All right. Let's move, if
17 you don't mind, let's move on to Item Number 7,
18 ordinance third reading, Mr. Pitts.

19 MIKE PITTS: Yes, sir, Mr. Chairman, this
20 is ordinance 2013-042. This is an ordinance to amend
21 an agreement for the Development of a Joint County
22 Industrial and Business Park of Anderson and Greenville
23 Counties so as to enlarge the park. This is third
24 reading, Mr. Chairman, it places the Murgeon Project
25 into the park on the Anderson County side and a
26 Greenville Project known as Project Rhino.

27 FRANCIS CROWDER: All right. Do I have a
28 motion to ---

29 TOMMY DUNN: Make a motion to move
30 forward, Mr. Chairman.

31 FRANCIS CROWDER: We have a motion by Mr.
32 Dunn, a second by Mr. Waters. Any discussion? Hearing
33 no discussion, in that case, all those in favor, raise
34 your right hand and keep it up, please. Let the record
35 show it was unanimous for all members.

36 All right. Mr. Pitts, Item number 8(a),
37 Resolution 2013-043, please, sir.

38 MIKE PITTS: Yes, sir, this is Ordinance
39 2013-043, Mr. Chairman, an ordinance amending Ordinance
40 #99-004, the Anderson County Zoning Ordinance, as
41 adopted July 20, 1999, by amending the Anderson County
42 Official Zoning Map to rezone from R-20, residential
43 20000 to C-2 Highway Commercial, a portion of the
44 parcel of land, identified at 3031 Highway 81 North,
45 and further identified as a portion of TMS #146-00-08-
46 017. The portion of the parcel to be rezoned consists
47 of plus or minus 5.75 acres and is described as, begin
48 SC Highway 81 Ashley Road intersection and proceeds
49 south twelve degrees twenty-eight degrees forty-nine
50 east, 96.45 feet, thence along South Carolina Highway

1 81 South, thirteen degrees-36-45 west, for a distance
2 of 435.84 feet, thence north 67 degrees-037-09 north,
3 5168.48 feet to a corner, thence north thirteen
4 degrees-27-57 east 468.33 feet to a point, thence south
5 seventy-two degrees -46-00 east 469.35 feet to the
6 point of the beginning. The property is located in the
7 Town Creek precinct shown in Deed Book 20-0, page 234,
8 recorded on 8/1/1985.

9 FRANCIS CROWDER: Thank you, do I have a
10 motion to ---

11 TOM ALLEN: So moved.

12 CINDY WILSON: Second.

13 FRANCIS CROWDER: Motion to move by Mr. Allen,
14 second by Ms. Wilson, is there any need ---

15 TOM ALLEN: Mr. Chair?

16 FRANCIS CROWDER: Yes, sir.

17 TOM ALLEN: Yes, just very quickly. Is
18 it -- I don't know, I'll ask Mr. Pitts, I appreciate
19 the effort he pours into this, is it necessary to read
20 all of that, or is it sufficient to read the first ---

21 MIKE PITTS: I don't believe so. I
22 believe someone in the Planning Commission drafted
23 that.

24 TOM ALLEN: Don't think anybody caught
25 all that. If it's necessary ---

26 MIKE PITTS: That's metes and bounds
27 surveying language.

28 FRANCIS CROWDER: Thank you.

29 MIKE PITTS: Yes, sir.

30 FRANCIS CROWDER: All right. We have a motion
31 and a second. Any requests for discussion, or do you
32 need Mr. West to come forward and make any comments?
33 Hearing no need, all those in favor, please raise your
34 right hand and keep it up while I -- let the record
35 show it was unanimous.

36 Mr. Pitts, number 45, please, sir.

37 MIKE PITTS: Yes, sir. This is ordinance
38 number 2013-045 an ordinance authorizing a fee in lieu
39 of tax and infrastructure improvement credit
40 arrangement pursuant to a fee in lieu of tax agreement
41 between the County and Plastic Omnium Auto Exteriors,
42 LLC for its second expansion; the termination of an
43 existing fee in lieu of tax arrangement between
44 Anderson County, South Carolina and Plastic Omnium by
45 terminating the lease agreement for the Original
46 FILETED and transferring the property subject to the
47 Original FILETED to Plastic Omnium; the conversion of
48 an existing fee in lieu of tax arrangement between the
49 County and Plastic Omnium to a simplified fee type of
50 fee in lieu of tax arrangement and extending the term

1 of the First Expansion FILETED; the conversion of an
2 existing fee in lieu of tax arrangement between the
3 county and Energy Automotive Systems USA, LLC, to a
4 simplified fee type of fee in lieu of tax arrangement
5 and extending the term of the Energy FILETED; an
6 infrastructure financing agreement between the County
7 and Plastic Omnium for property not subject to a fee in
8 lieu of tax arrangement; and infrastructure financing
9 agreement between the County and Energy for property
10 not subject to a fee in lieu of tax arrangement; and
11 other matters relating to the foregoing.

12 FRANCIS CROWDER: All right. Do we have a
13 motion?

14 TOMMY DUNN: Motion.

15 CINDY WILSON: Second.

16 FRANCIS CROWDER: We have a motion by Mr.
17 Allen, a second by who? All right. We have Mr. Dunn
18 made the motion, Mr. Allen second. I will say that the
19 reason Mr. Pitts read all of what he read was because
20 actually there are at least three things going on in
21 this. This is not just a simple ... okay? So, is
22 there a need to have Mr. Burriss Nelson make any
23 comments for council members?

24 CINDY WILSON: Mr. Chairman, may I?

25 FRANCIS CROWDER: Yes, ma'am, Ms. Wilson.

26 CINDY WILSON: It would be nice if you
27 would tell the number of jobs that are going to be
28 created. I think in spite of all the angst and schism
29 thrown around by all of us here tonight, it's so
30 important to know how this county is facilitating and
31 encouraging business development. So important to the
32 future of this county to have good paying jobs and I
33 think it's so exciting to have existing industries
34 expanding. Thank you.

35 BURRISS NELSON: This project, the expansion
36 is creating seventy-five jobs with an average pay of
37 sixteen fifty an hour. That's an approximate payroll
38 of two point four million. Capital investment amount
39 is eleven point five nine five million. That is
40 supporting an existing two hundred and fifty jobs with
41 an annual payroll of eight million dollars. That's the
42 extension of the two fee agreements that we were
43 talking about and the conversion of those lease style
44 fees, extension of those two fee agreements for an
45 additional ????. Thank you, sir.

46 FRANCIS CROWDER: All right. Any other
47 additional discussion? Hearing no requests for
48 additional discussion, all those in favor, please raise
49 your right hand and keep it up. Let the record show it
50 was unanimous. Thank you, Mr. BurrissNelson.

1 I will, before we move to the next item, I
2 think we do need to recognize that we will -- we are
3 entertaining five different agreements tonight to bring
4 new jobs and new capital into the county, either from
5 brand new businesses or from expansions of existing
6 businesses. And I can tell you, if you read the
7 papers, there are few counties in the state that ever
8 have five at one time. And so, Anderson County is
9 extremely, extremely fortunate. And I thank the Lord
10 for that opportunity for jobs.

11 Now, moving on to 2013-046.

12 MIKE PITTS: Yes, sir, Mr. Chairman, this
13 is an Ordinance authorizing Anderson County to enter
14 into a lease agreement with the FAA for space the FAA
15 rents at the airport; and other matters related
16 thereto.

17 FRANCIS CROWDER: All right. Do I have a
18 motion?

19 TOM ALLEN: So moved.

20 FRANCIS CROWDER: We have a motion by Mr.
21 Allen. Who got in the second? Mr. Moore got in the
22 second. All right. Any discussion on this item?
23 Hearing no discussion, all those in favor of the
24 motion, please raise your right hand and keep it up
25 please. Let the record show it was unanimous.

26 Moving on to Ordinance's first reading, 2013-
27 047, Mr. Pitts.

28 MIKE PITTS: Yes, sir, Mr. Chairman, this
29 is an ordinance authorizing the execution and delivery
30 of a fee in lieu of tax agreement and an infrastructure
31 finance agreement by and between Anderson County, South
32 Carolina and a company known to the County at this time
33 as Project Rack with respect to certain economic
34 development property in the County, whereby such
35 property will be subject to certain payments in lieu of
36 taxes and Project Rack will receive certain
37 infrastructure credits in respective investment in
38 related infrastructure; and other matter related
39 thereto.

40 FRANCIS CROWDER: All right. Do we have a
41 motion to discuss? All right. We have Mr. Moore made
42 the motion. Ms. Wilson did you make the second? All
43 right. I think since this is the first reading I would
44 like to request that Mr. Burriss Nelson explain this
45 project, please, sir.

46 BURRISS NELSON: Thank you, sir. This
47 project is an expansion of an existing industry. The
48 company's been in business for over thirty years. It's
49 an international company. Thirteen million dollar
50 expansion with creation of additional hundred and

1 twenty-five jobs. Thirteen dollars an hour, which will
2 bring an additional new payroll of three point two five
3 million. This is a fee agreement. It is thirty year
4 locked millage. Six percent assessment ratio, twenty
5 percent special source revenue credit for five years.
6 And we respectfully bring this before council seeking
7 your approval.
8 FRANCIS CROWDER: All right. Any questions or
9 discussion from the council members? Ms. Floyd.
10 GRACIE FLOYD: Mr. Burris?
11 BURRISS NELSON: Yes, ma'am.
12 GRACIE FLOYD: Could you -- did it tell us
13 in here what these -- what this company will be making?
14 Did I miss that part of it?
15 BURRISS NELSON: They're an existing company
16 that's in the textile business.
17 GRACIE FLOYD: Oh, okay. They are an
18 existing company?
19 BURRISS NELSON: Yes, ma'am.
20 GRACIE FLOYD: How long have they been
21 here?
22 BURRISS NELSON: Thirty years.
23 GRACIE FLOYD: How many years?
24 BURRISS NELSON: They've been here twenty
25 years.
26 GRACIE FLOYD: Did they get a fee in lieu
27 of at the beginning?
28 BURRISS NELSON: Yes, ma'am.
29 GRACIE FLOYD: And now they have asking for
30 another fee in lieu of?
31 BURRISS NELSON: Because of the thirteen
32 million new dollars of capital investment.
33 GRACIE FLOYD: Okay. What was it the first
34 time?
35 BURRISS NELSON: I can't remember, I'm sorry.
36 I'll have to look that up. I apologize.
37 GRACIE FLOYD: Well, it's thirteen million
38 this time. You don't know what they ---
39 BURRISS NELSON: The first capital investment
40 amount did not have a fee agreement when they came
41 because it had to have been in excess of seventy-five
42 million. They've had an additional expansion that was
43 nine years ago that was twelve, fifteen million and I
44 didn't actually do that particular project but it
45 created about sixty or seventy jobs and qualified for a
46 fee agreement.
47 GRACIE FLOYD: Okay. All right.
48 BURRISS NELSON: Now they've got this new
49 expansion which is thirteen million this time and a
50 hundred and twenty-five jobs.

1 GRACIE FLOYD: Okay. How many jobs did you
2 say that this is going to bring in?
3 BURRISS NELSON: A hundred and twenty-five.
4 GRACIE FLOYD: In how long? In what time
5 limit for the ---
6 BURRISS NELSON: Five years.
7 GRACIE FLOYD: Five years, a hundred and
8 twenty ---
9 BURRISS NELSON: They already have more than
10 half of that done.
11 GRACIE FLOYD: Thank you.
12 BURRISS NELSON: Yes, ma'am.
13 FRANCIS CROWDER: Any other council members
14 desire to question Mr. Nelson? Hearing no other
15 council members, all those in favor of 2013-047, please
16 raise your right hand and keep it up until I can -- all
17 right. We have six members for. All those opposed.
18 All those abstaining. Let the record show that Ms.
19 Floyd abstained and the other six council members voted
20 for.
21 All right. Moving on to Item 2013-049, Mr.
22 Pitts. Pardon?
23 MIKE PITTS: ... certain facilities in
24 the county; (2) certain special source revenue credits
25 in connection with the Expansion Project; (3) the
26 execution and delivery of a first amendment to lease
27 agreement and related amended memorandum of lease and
28 option to purchase by and between the County and the
29 Company approving a ten-year extension of the term of
30 such lease agreement and the fee in lieu of tax
31 arrangement set forth therein; (4) the assignment and
32 transfer to the Company of rights, interests, and
33 obligations under the lease agreement and related
34 agreements; (5) the execution and delivery of a special
35 source credit agreement by and between the County and
36 the Company in connection with certain additional
37 existing property in the County; (6) the benefits of a
38 multi-county industrial or business park to be made
39 available to the Company, the Expansion Project, and
40 the Existing Non-FILETED Project and (7) other matters
41 relating thereto.
42 FRANCIS CROWDER: Thank you. Do I have a
43 motion to move forward?
44 TOM ALLEN: So moved.
45 FRANCIS CROWDER: All right. We have a motion
46 by Mr. Allen and a second by Mr. Waters. Thank you,
47 sir. All right. Now I will request that you speak to
48 this particular project since it is first reading,
49 please, sir.
50 BURRISS NELSON: Thank you, Mr. Chairman and

1 members of council. This project opportunity is a
2 company -- international company with over a hundred
3 and twenty years of success. They have several
4 locations in the state of South Carolina, including
5 Anderson County. This expansion of this existing
6 industry will be creating forty-five jobs with an
7 average pay of seventeen dollars an hour. Approximate
8 new payroll of one point five million. They have an
9 existing hundred and fifty employees with an
10 approximate four million dollar current payroll. This
11 new expansion is eleven million dollars. This will be
12 a six percent fee agreement. Thirty years with a forty
13 percent SSRC for fifteen years and the first year's
14 current -- well, current property tax is sixty-eight
15 thousand dollars. Projected new is a hundred and
16 sixty-four thousand with a net increase of ninety-five
17 thousand over the ??? and a twenty year of a hundred --
18 of one point three million in property tax on the new
19 capital investment. This information comes to council
20 as a recommendation from staff and economic advisory
21 board and we respectfully request you give favorable
22 consideration to this project.

23 FRANCIS CROWDER: Thank you, sir. Any
24 questions from council members? Yes, Ms. Wilson.

25 CINDY WILSON: There were some references
26 to types of leases that definitely went over my head.
27 Looking at this I don't see any of them defined. Could
28 we get definitions of those by second reading?

29 BURRISS NELSON: Certainly.

30 CINDY WILSON: ?? Nordic lease, synthetic
31 lease. I've been in real estate for a long time but I
32 have not heard of most of those. I have the page
33 number with the definition to make sure I didn't
34 overlook something. On page twenty-five under third
35 party arrangements, it references, you know, of course,
36 we are familiar with sale lease back equipment lease,
37 build-to-suit lease, but synthetic lease, nordic lease,
38 deceased, tax benefit or transfer lease, assignment and
39 some of the others I wasn't familiar with.

40 BURRISS NELSON: Certainly. And I'm not
41 familiar with those terms either.

42 CINDY WILSON: I would not want to turn
43 away business in this county, so desperately as we are,
44 but I think we're close to the time when it would be
45 helpful to have more of a standard set of documents and
46 these -- I mean some of these things are like a hundred
47 and thirty-two pages in our packet tonight. Anyway,
48 just want to make sure we have the county covered and
49 the businesses have felt welcomed and succeed.

50 BURRISS NELSON: I'll speak to that if you'll

1 allow me to. Mr. Pitts and I discussed this particular
2 set of documents numerous times and actually have gone
3 to another -- ask another attorney for additional
4 assistance in helping us be sure we understand the
5 county is covered properly, that the things have been
6 stated the way they should be. We agree that the
7 language is difficult.

8 FRANCIS CROWDER: May I ask myself for
9 permission to speak? Yes, I give -- anyway, before we
10 have the second reading I would like to also have some
11 consultation. Since my company dealt with all kinds of
12 these kinds of agreements, I will assure you, I also
13 got semi-lost in some of the terminology.

14 So anyway, any other council members desiring
15 any questions on this item? Hearing none, all those
16 council members in favor please raise your right hand
17 and keep it up until -- let the record show it was
18 unanimous. Thank you, sir.

19 BURRISS NELSON: Thank you.

20 FRANCIS CROWDER: Item 2013-050, Mr. Pitts.

21 MIKE PITTS: Mr. Chairman, this ordinance
22 simply places a Greenville project into the joint
23 Anderson Greenville park. The project's on the
24 Greenville side.

25 FRANCIS CROWDER: All right. Thank you. Do I
26 have a motion?

27 TOMMY DUNN: Motion.

28 FRANCIS CROWDER: Motion by Mr. Dunn. Second
29 by Mr. Waters. All right. Thank you. Any questions
30 on this particular item? Hearing no questions, I'll
31 assume we're ready to vote. All those in favor of
32 2013-050, please raise your right hand and keep your
33 hand up. Let the record show it was unanimous.

34 Mr. Pitts, 2013-051, please, sir.

35 MIKE PITTS: Yes, sir, this is an
36 ordinance authorizing the amendment of the agreement
37 for development of Joint Country Industrial and
38 Business Park within Abbeville County, South Carolina,
39 Environ Project, executed on January 8, 2008, by and
40 between Anderson County, South Carolina and Abbeville
41 County, South Carolina, providing for the development
42 of a Joint County Industrial and Business Park so as to
43 include additional property in Abbeville County as part
44 of the Joint County Industrial Park; and other matters
45 relating thereto. Same drill as the last one. Mr.
46 Chairman, this places a project in Abbeville County
47 into the joint park.

48 FRANCIS CROWDER: Thank you. Do I have a
49 motion? Motion by Mr. Dunn, second by Mr. Allen. All
50 right. Is there -- are there any questions? Hearing

1 no questions, all those in favor of 2013-051, please
2 raise your right hand and keep it up. Let the record
3 show it was unanimous. Mr. Pitts, we now move to the
4 section called resolutions, R 2013-064.
5 MIKE PITTS: Yes, sir, Mr. Chairman, this
6 is a resolution authorizing the execution and delivery
7 of an inducement agreement by and between Anderson
8 County, South Carolina, and Company A and Company B,
9 collectively Project Choco, whereby, under certain
10 conditions, said Companies will acquire, by
11 construction or purchase or lease/purchase property in
12 Anderson County and Anderson County will provide
13 certain economic development inducements to Company A
14 and Company B for the project and execute certain
15 documents and enact certain further legislation for
16 said companies' project involving an expected over one
17 million dollars in investment and the creation and
18 maintenance of certain jobs.
19 FRANCIS CROWDER: All right. Do I have a
20 motion to move? We have a motion by Mr. Moore.
21 CINDY WILSON: Second.
22 FRANCIS CROWDER: Second by Ms. Wilson. Mr.
23 Burns.
24 BURRISS NELSON: Yes, sir, thank you, Mr.
25 Chairman, members of council. This is a first for us
26 in Anderson County and is a very unique and unusual
27 project that has great potential. It is a incubator
28 type project using intellectual properties that they
29 have franchised from a university. They have been
30 operating and this is also in cooperation with one of
31 our local communities, towns. But this project has
32 been in a facility where there are no property taxes at
33 all charged. Zero dollars in property tax. They have
34 originally created eighteen jobs with annual salaries
35 of seventy-four thousand dollars, creating additional
36 jobs that will pay about thirty dollars an hour.
37 Thirty additional jobs paying thirty dollars, which is
38 about sixty thousand in annual salary. This is an
39 unusual thing, it's been very competitive. We've had
40 to fight other counties to retain this project in our
41 county. And to assist them, to jump from being an
42 incubator type plant or facility to being a
43 manufacturing facility, we are assisting them with
44 their own property tax to offset a hundred and sixty-
45 five thousand dollars of expenses that they have in the
46 purchase of the facility for it to become a taxable
47 property. We will garner zero tax dollars for
48 approximately the first ten years, but they'll create
49 annual payroll of three million dollars instantly with
50 the thirty jobs. Great opportunity. They will have

1 property taxes that they will pay. At the end of
2 twenty years, they'll be, with no additional capital
3 investment, somewhere around two hundred and forty
4 thousand dollars in property tax. This comes as a
5 recommendation from staff and we respectfully request
6 you give favorable consideration to the project.
7 FRANCIS CROWDER: Thank you, sir. Do I have a
8 motion? We have a motion by Mr. Moore.
9 CINDY WILSON: Second.
10 FRANCIS CROWDER: Second by Mr. Allen. Any
11 discussion from council members? No discussion. All
12 those in favor of Resolution 2013-064, please raise
13 your right hand. Let the record show it was unanimous.
14 Thank you.
15 Moving on to 2013-065, Mr. Pitts.
16 MIKE PITTS: Yes, sir, Mr. Chairman, this
17 is a resolution authorizing the execution and delivery
18 of an inducement agreement by and between Anderson
19 County, South Carolina and Project Fleur, whereby,
20 under certain conditions, said Company will acquire, by
21 construction, lease and purchase, certain property in
22 Anderson County and Anderson County will execute fee in
23 lieu of tax agreement(s) and provide certain economic
24 development inducements to the company for the project,
25 and execute certain documents and enact certain further
26 legislation for said company's project involving some
27 ten million dollars in total investment; and matters
28 related thereto.
29 FRANCIS CROWDER: All right. Do we have a
30 motion? We have a motion by Mr. Moore.
31 CINDY WILSON: Second.
32 FRANCIS CROWDER: Second by Ms. Wilson. Mr.
33 Nelson.
34 BURRISS NELSON: Thank you, Mr. Chairman,
35 members of council. This is an existing company
36 expansion, also. Project Fluer is a company with over
37 a hundred years of worldwide manufacturing success,
38 textile industry. They actually started out ??? trade
39 over a hundred years ago. This company will be
40 creating twenty-five jobs with an average salary of
41 twenty-one dollars and sixty-five cents an hour.
42 They'll be -- they already have a hundred jobs in
43 operation today. New payroll will be approximately one
44 million dollars. Capital investment will be
45 approximately ten million dollars. This is a six
46 percent assessment ratio, thirty year with a forty
47 percent SSRC for a five year period. First year's tax
48 -- well, currently they pay a hundred and sixty-three
49 thousand in property tax. New taxes will come about in
50 2014 will be two hundred and sixty-three thousand. The

1 multi-county park portion of that will generate ninety-
2 seven thousand in 2014 for a total of three hundred and
3 sixty-one thousand dollars in 2014 and moving forward.
4 Total new taxes after twenty years, two point one
5 million. This information comes to council as a
6 recommendation from staff and Economic Development
7 Advisory Board and we respectfully request that you
8 give favorable consideration to this project.
9 FRANCIS CROWDER: Thank you, sir. We have
10 additional questions?
11 CINDY WILSON: May I?
12 FRANCIS CROWDER: Yes, Ms. Wilson.
13 CINDY WILSON: Just to ????, but at what
14 point do we lock in the millage on these?
15 BURRISS NELSON: It'll depend on what year --
16 what date we actually finish third reading. Council,
17 their legal council will take a look at the millage
18 rate for current year. Actually, they have a choice --
19 we allow them a choice -- of going to the millage rate
20 which is in effect on June 30, preceding tax year.
21 CINDY WILSON: Okay.
22 BURRISS NELSON: If there's a mil or two
23 difference one way or the other.
24 CINDY WILSON: All right. Thank you.
25 FRANCIS CROWDER: Any other questions?
26 Hearing no other questions, all those in favor of this
27 resolution, please raise your right hand. Let the
28 record show it was unanimous. All right.
29 BURRISS NELSON: Thank you for your support.
30 FRANCIS CROWDER: Thank you, sir. Keep the
31 jobs coming.
32 BURRISS NELSON: Yes, sir.
33 FRANCIS CROWDER: We have Resolution 2013-066,
34 a resolution authorizing the -- oh, I'm -- Mr. Pitts.
35 MIKE PITTS: That's fine, Mr. Chairman,
36 if you want ---
37 FRANCIS CROWDER: No, I don't want to.
38 MIKE PITTS: --- to take it, go right
39 ahead.
40 FRANCIS CROWDER: I do not want to.
41 MIKE PITTS: All right, sir. This is a
42 resolution authorizing the acquisition of certain
43 airport avigation easements; and matters related
44 thereto. And what this resolution does is authorize
45 the county to go forward and acquire avigation
46 easements from those property owners who have reached
47 an agreement with the county as to the amount they're
48 going to be paid for those air rights.
49 FRANCIS CROWDER: All right, thank you. Do we
50 have a motion? Have a motion by Mr. Allen and a second

1 by Mr. Moore. All right. Any discussion on this item?
2 GRACIE FLOYD: Yes.
3 FRANCIS CROWDER: Ms. Floyd.
4 GRACIE FLOYD: Okay, I'd like to -- permit-
5 able. I would like to talk to Mr. Hopkins because he's
6 the one who's going to ???
7 FRANCIS CROWDER: Yes, by all means, Mr.
8 Hopkins.
9 GRACIE FLOYD: Mr. Hopkins, this is
10 authorizing the acquisition of certain airport
11 avigation and easements. Could you explain here? I
12 mean it doesn't say anything.
13 HOLT HOPKINS: This is the tree topping,
14 tree removal safety project off the end of runway 2-3
15 on the Highway 24 side. It's been paid for mostly by
16 federal funds and it's required by the FAA that we do
17 this. But we had like thirty-nine parcels and there's
18 about eighteen of them that have reached an agreement
19 on what they'll accept for the easement and we'd just
20 like permission to go ahead with the closing for just
21 the ones that have voluntarily agreed on a settlement.
22 GRACIE FLOYD: Have you had the meeting yet
23 that was proposed by one council member that we go and
24 meet again with the people that resist that project?
25 HOLT HOPKINS: We've had lots of individual
26 meetings but we have not had a general public meeting
27 or a group, no. Well, we had the one in the very
28 beginning. We met with everybody, invited everybody we
29 could think of to that first meeting prior to meeting
30 with everybody individually.
31 GRACIE FLOYD: Okay. So you do have the
32 majority of the people now that are going to do this,
33 right?
34 HOLT HOPKINS: About half.
35 GRACIE FLOYD: About half of them? Okay,
36 good. All right, thank you.
37 FRANCIS CROWDER: Well, I have a question, if
38 you don't mind.
39 HOLT HOPKINS: Yes, sir.
40 FRANCIS CROWDER: So if we pass this
41 resolution, and about half agree, what does that mean?
42 What happens to the other half?
43 HOLT HOPKINS: We've got to address that in
44 another conversation in the coming weeks or months.
45 FRANCIS CROWDER: But does that mean we
46 proceed with the half that ---
47 HOLT HOPKINS: Well, we'll actually be
48 acquiring the easements from those folks. But the way
49 the grant was written, it was planned for being kind of
50 a two-phase grant because we realized that there would

1 be some we'd have to negotiate further with. Or
2 possibly consider other action.

3 FRANCIS CROWDER: Yes, other actions. Yes,
4 okay, thank you. I appreciate that.

5 All right. Any other questions by any member
6 of council? Hearing none, all those in favor please
7 raise your right hand. Let the record show it was
8 unanimous. At this time, because this next item is
9 going to be rather lengthy, we'll take a five or six
10 minute rest break. Thank you.

11 (BREAK 8:27 PM TO 8:36 PM)

12 FRANCIS CROWDER: On PBS they would say now
13 for the third half of the Howdy Doody Show. Laugh. We
14 need a little levity in life.

15 All right. At this time we have Resolution
16 2013-067, Mr. Pitts.

17 MIKE PITTS: Yes, sir, this is a
18 resolution authorizing the County's attorneys to pursue
19 an appeal in Anderson County versus Preston, et al; and
20 matter related thereto.

21 FRANCIS CROWDER: All right. Thank you. Ms.
22 Wilson.

23 CINDY WILSON: Thank you, Mr. Chairman.
24 This county is close to winning on appeal or at the
25 South Carolina Supreme Court level, the legal challenge
26 before us tonight. This judge has been overturned in a
27 number of other rulings. He even stated that he
28 expected to have his ruling appealed. At least five
29 local attorneys recently who have been following this
30 close have encouraged us to continue the appeal because
31 they believe we have strong grounds for an appeal. For
32 those here tonight who say stop, have you done your
33 math? On a careful mathematical review, consider the
34 cost of what those citizens who want to settle or
35 stopping now will be. The judge who has made these
36 rulings would be the one to award the former
37 administrator somewhere between seven hundred and
38 seventy thousand to maybe more than one million dollars
39 in legal costs. That would be pretty immediate. Then
40 you add to that, losing the ability, through the
41 Freemantle FOI case, to be refunded the one point three
42 million dollars. Are we not now over two million
43 dollars? Then consider opening the flood gates for
44 many more contrived lawsuits brought by that crowd.
45 Don't forget they have the track record of slap suits
46 and frivolous suits. That can cost in addition upwards
47 of two to three million dollars over several years.
48 Our prospects are excellent on appeal. Why would you
49 hand over a million dollars without even trying?

50 We would be remiss if we failed to point out

1 another factor of the increased legal costs is due to
2 Judges Maddox and Couch sitting on these cases and
3 dragging them out for years.
4 Now, let's look at the primary reasons for
5 those of you here tonight who want us to cave and stop.
6 There's some of you who previously benefitted by
7 association with the previous regime. But the most
8 egregious reason some of you believe we should stop is
9 because you have great faith in the veracity of our
10 daily newspaper. How can you take as the gospel truth
11 this paper printing over the years that Anderson County
12 has the administrator council form of government. Did
13 you know that there's no such thing, no form of
14 government under the South Carolina home rule? We have
15 the county council administrator form of government.
16 One prominent local businessman threatened to sue us
17 recently because of our micro-managing under the
18 administrator county council form of government. He
19 was provided a copy of the state law and we've not
20 heard back from him.
21 The paper this morning told you that the
22 county's lost at every major turn. We have won the
23 related cases at circuit court level to the state
24 Supreme Court. How quickly they forget. Shortly you
25 will hear some of last year's Supreme Court hearing on
26 the Freemantle case. After you listen, tell us you
27 don't think we will win. A large portion of the legal
28 costs, the paper has railed against were caused by
29 their then recently retired publisher joining with two
30 convicted felons and another man to sue the county to
31 block inquiries and investigations which are allowed
32 under state law. The circuit court judge labeled their
33 suit as patently absurd. They appealed. The South
34 Carolina Supreme Court heard the case and agreed that
35 their claims were patently absurd. Why didn't the
36 paper remind you of that win by the county? The other
37 man referenced here spoke to the motion to reconsider
38 agenda item a while back and condemned us for spending
39 money on legal challenges. Did he forget his own role
40 in increasing legal costs for this county? Somewhere
41 over three hundred thousand. The related Cunningham
42 case has been mostly won on appeal.
43 This paper did not know that Mr. Ransom was
44 the former administrator's professor at Clemson until I
45 told them. They failed to tell you how those two
46 demagogued me in their class before I was even elected.
47 Students were pretty shocked in telling me about that.
48 And I'm sure you didn't know that our county paid for
49 that tuition.
50 And how about the often printed personal

1 vendetta? Remember how my community and neighbors
2 hired experts to engage the county in questions
3 regarding county sewer proposals. Not just me, but
4 over one hundred affected citizens. The county was
5 told that the Beaverdam line was not needed at that
6 time. The county was advised of the serious
7 environmental, logistical and economic issues their
8 proposal brought unnecessarily. Somewhere between
9 twelve to twenty million dollars worth. Guess what?
10 We were right. There's no consolation in being right.
11 Your sewer fund costs have skyrocketed. There's no end
12 in sight. The sewer fund has been running plus or
13 minus three million dollars loss annually. And don't
14 forget the landfill deal and numerous other deals that
15 you were sold a bill of goods on and ask yourself why
16 the paper attacked me instead of looking at the deals
17 and who really benefitted.

18 And if you want to get a good chuckle about
19 how much you can believe the newspaper, have any of you
20 ever met a Mr. Cindy Wilson? They keep referring to me
21 as Mrs. Cindy Wilson. How do you trust a paper that
22 doesn't give it to you straight or complete? Please,
23 be reminded that the vast majority of Anderson County
24 citizens do want truth and justice. They support an
25 appeal. And shouldn't we all learn in all of this the
26 difference between propaganda and facts?

27 Now, just to give you an idea of where we are
28 and the potential to win on the Freemantle case. His
29 case has not been heard yet and it should prove that
30 the severance agreement is void pursuant to the Saluda
31 County, the Lambries and Saluda County case in which
32 the South Carolina Appellate Court decision held that
33 the county cannot amend the agenda without giving the
34 twenty-four hour notice required by the South Carolina
35 FOI statue. And, of course, our council violated that.
36 It is widely anticipated that we will win. I asked Mr.
37 Freemantle to play a short part of that Supreme Court
38 ruling so you can hear what our South Carolina State
39 Supreme Court -- comments that they made regarding
40 this.

41 **(AUDIO PLAYED IN OPEN COUNCIL SESSION)**

42 CINDY WILSON: So there you see some of
43 what we anticipate. Further, the primary position of
44 the order, the majority vote -- it refers to a majority
45 vote of those members present and voting shall decide
46 all questions, motions and votes. If you'll look at
47 the Order of 11/7/2013 and that would be number 4,
48 Finding 4. However, every attorney and judge knows
49 that codes are read together as a whole and not by
50 pulling out one sentence that is seemingly in your

1 favor. So the orders position on this entire matter
2 will not be upheld on appeal.

3 And I have a question for Mr. Pitts, if you
4 don't mind, please, sir. If this ruling -- if we stop
5 on this ruling now, how do we handle our quorum issues
6 because the way our Codes of Ordinances read now, it
7 pretty much pertains to the qualified votes, the way
8 I've read it. So if we have to go by Judge Couch's
9 rule, we need to change our ordinances? Or how do we
10 ---

11 MIKE PITTS: Ms. Wilson, I don't think
12 it'd be appropriate for me to dispense legal advice out
13 in the open. I'd be happy to talk to y'all in
14 executive session if that's the wish of the body.

15 CINDY WILSON: Sorry, I just put you on
16 guard there. But you see some of the dilemmas. And
17 the primary question that we have before us tonight, do
18 we seek truth and justice, do we spend a few dollars
19 more and go for the appeal? The Supreme Court has
20 basically given us a gift and all we have to do is to
21 appeal. Or do we go ahead and pay out plus or minus a
22 million dollars immediately? Don't even take our
23 chance. Don't forget, this judge knows that he was
24 going to be appealed. He said that, according to
25 comments that we've heard already. So I'll put this
26 resolution in the form of a motion now.

27 FRANCIS CROWDER: All right. We have a motion
28 and a second. Discussion?

29 TOM ALLEN: Mr. Chair?

30 FRANCIS CROWDER: Yes, sir, Mr. Allen.

31 TOM ALLEN: Yeah, I'd like to make a
32 couple of comments on this. This has been a very,
33 very, very difficult decision for everyone and I've got
34 friends on both sides of this question, without a
35 doubt. So regardless of how I vote tonight, I'll
36 probably be in trouble. So I have to ask the sheriff
37 if he would to have a bomb sniffing dog check my car
38 out tonight if you would, sir, before I get in.

39 I want to do just a very brief history of how
40 I view this. And before I do that, I'd like to ask you
41 a question, though, just one question. What charge
42 filed against the previous administration by this
43 county will overturn the actions of November 18, 2008
44 and the decision by the court this past May, 2013.
45 What decision, and I want you to think about that.
46 What charge is going to overturn it.

47 Now here's a very brief history and I'll go
48 through this as fast as Mr. Pitts can read all, I'll go
49 through this, too.

50 When I was running for office originally I did

1 a lot of door-to-door campaigning and during that time
2 I heard a lot of questions such as, where's the money
3 going in Anderson County? We hear credit cards are
4 being illegally used. There are a lot of economic
5 development trips being taken by council members and
6 their associates and county employees with no economic
7 results. Bottom line to all this was the question, are
8 our tax dollars being properly accounted for? My
9 answer to all this was I will investigate and will find
10 out if there's anything illegal going on.

11 When we got into office, here's the second
12 fact, we got into office, we did investigate. We hired
13 Mr. Bob Daniels, who's a CPA, to review the
14 expenditures for the past several years to find out if
15 there were any illegalities. After several months of
16 financial reviews the so-called Daniels report was
17 produced, never was the word illegal used. There were
18 areas in there where expenditures could have been
19 tightened up or credit card usage and so on could have
20 been tightened up and controlled a little bit better,
21 but nothing illegal.

22 As we move on, the next fact is that after
23 that, we didn't find anything illegal in the financial
24 end of it and there are no charges against the previous
25 administration from a financial standpoint of any
26 mismanagement. But after that, we didn't have that, so
27 we heard, well, there's been things going on under the
28 table. Back door deals. Somebody's getting a
29 kickback. Something's going on. We hired two private
30 investigators to go out and question people, which is
31 what they did. They spend several months
32 investigating, talking to folks, checking out numerous
33 rumors. And when they finally finished up, they had
34 nothing illegal.

35 Next fact, at this point, and correct me,
36 sheriff, if I'm wrong, but at this point the sheriff
37 forwarded that information to the state grand jury.
38 All right. I believe that was correct. The state
39 grand jury spent several months and to answer someone's
40 question earlier, the gentleman from Boston, it wasn't
41 the council that dragged this on, it was the court
42 system, judicial system that dragged this on. At any
43 rate, after they looked at it, no true bills. They
44 found no criminal actions. All right.

45 Now, in my opinion, keep in mind, I voted
46 against pursuing this case the very first time, based
47 on the investigations that I just mentioned. I didn't
48 see where any of the charges compiled by the county
49 attorneys were strong enough to allow the court to
50 overturn the actions of November 18, 2008. However,

1 council majority did vote to go ahead with the case.
2 There's a fact. In some of the readings I've done
3 during the past four years, I've found it's very
4 unlikely a court will overturn the vote of a duly
5 elected body, such as a county council, unless there
6 was such an obvious and egregious breach of law that
7 the court would have no choice but to overturn it. In
8 my opinion, this did not appear to be the case on
9 November 18th, 2008. Actually the council at that time
10 could have even voted to give Mr. Preston a larger buy-
11 out. I mean it could have gotten to the point of being
12 ridiculous, but they could have given him more.

13 Another fact, I did vote in favor of allowing
14 this case to go to trial to Judge Couch. I didn't
15 think the county would win, but I did think it would
16 put an end to the case. And since the lion's share of
17 the money had already been spent, then a few more
18 dollars wouldn't hurt anything. I thought this would
19 be the end. I was wrong, it wasn't the end.

20 Another fact. Many people refer to the Cowart
21 -- or I'm sorry, the Piedmont versus Cowart case and
22 say that since the courts overturned that buy-out
23 action then the Preston buy-out should be overturned,
24 too. There's a difference, however, and that was that
25 the action to initiate the buy-out in the Cowart case
26 was voted on in executive session. That's illegal.
27 Can't do that. It also bound the hands of the incoming
28 commission. Can't do that. The Preston case did not
29 do that to us. The vote was not taken in executive
30 session and it didn't tie our hands over a period of
31 time. So to me, there was a difference.

32 Now, the question arises was FOI violated the
33 night of November 18, 2008. When the agenda was
34 amended during the meeting, now this is a fact, FOI
35 states an agenda must be published twenty-four hours
36 before a public hearing. That's true. It said nothing
37 about amending an agenda though, the night of the
38 meeting. However, in June of 2012, the Appellate Court
39 did rule that amending an agenda the night of the
40 meeting, quote, violated the spirit of FOI. Violated
41 the spirit, not a hard and fast law, but it violated
42 the spirit. This ruling came four years after the
43 November 2008 meeting. I really can't see a court now
44 in 2013 making a ruling who would have to be made
45 retroactive back five years. I don't think they can do
46 that. I don't think they can do that especially since
47 amending an agenda the night of the meeting was never a
48 hard, fast law.

49 Now, if we look -- let me go ahead and finish
50 that part very quickly. What I have here, we get these

1 every year, this is a Freedom of Information Act
2 handbook for county government, this is the 2013
3 edition. Here is the actual -- here are some comments
4 and this refers to the Lambries versus Saluda County
5 council case that was mentioned earlier. Here was the
6 ruling. While the court recognizes that no provision
7 in FOI appeared to prohibit the amending of an agenda
8 during a meeting and their decision may create
9 inconvenience in some instances, they held that such
10 actions would, quote, undercut the purpose of the
11 notice requirement in 30-4-80. That's FOI. The court
12 further worried that permitting amendments to the
13 agenda during a meeting could be abused and violates
14 the spirit of FOI. The last sentence to this is,
15 although the case is on appeal, county councils are
16 advised to refrain from amending their agenda during a
17 regularly scheduled meeting. Advised not to amend an
18 agenda during the meeting. That's just advice, that's
19 not a hard fast law.

20 I just have a feeling, again, this is my
21 opinion pretty much, that this could open up a can of
22 worms that nobody really wants to get into because I
23 will bet that a lot of counties in South Carolina
24 amended agendas, violating the spirit of the law, they
25 were just never challenged. But it was never in
26 writing that you couldn't amend it that night.

27 The next opinion I have, let's say the court
28 did rule that FOI was violated that night. The court
29 would then, in my opinion, simply tell Anderson County,
30 hey, don't do that any more. In other words, a slap on
31 the wrist. Don't do that. I don't see anything else
32 coming out of that. I don't think that that minor
33 technicality is going to overturn four years worth of
34 litigation. And on top of that, the judge that's going
35 to be hearing it is Judge Couch. So he's probably not
36 going to slap himself on the wrist and say, whoops, I'm
37 going to overturn everything I've been doing. So I
38 don't think it's going to happen.

39 Finally, it has been said that Chief Justice
40 Jean Toal, after seeing the recording of the November
41 18th meeting said and I'll paraphrase here, it looks to
42 me like council was just in a hurry to get their buddy
43 paid off. Well, it's one thing to say that when an
44 actual judgement's not being made, but when a legal
45 decision has to be written, it has to be based on law,
46 not the way it looks. The night of that meeting, I've
47 said it a hundred times before, it looked to me like a
48 slap in the face to democracy. It didn't look good,
49 but was it illegal? So far, not been proven so.

50 Let me see where I'm at here now. The county

1 has lost and I'm trying to 'quote the newspaper here, in
2 every legal venue. And by that I mean the fact that
3 the grand jury and Judge Couch, we lost in those, we
4 lost all eleven counts when we went before Judge Couch.
5 Now we did some win some other things, some minor slap
6 suits. Those were just things, how can I put it,
7 thrown in our way to keep us off track of where we were
8 really trying to head. Even the other side didn't
9 expect to win those things. They were pretty much
10 irrelevant.

11 The other thing that we need to keep in mind,
12 that having spent nearly three million dollars at this
13 time, that of the one point one four given to Mr.
14 Preston, over three hundred and fifty thousand of that
15 went to state retirement fund. They've already said
16 they're not going to give that back. So even if we won
17 somehow, we get maybe six hundred and fifty thousand
18 back, unless we want to go into another legal battle
19 with the state retirement fund and maybe to get that
20 other three fifty. But it doesn't look very promising.

21 So in summary, if we look back over the past
22 four years, the following steps have been taken. The
23 county initially investigated the finances of the
24 previous administration, found nothing illegal. Could
25 have been tightened up, but nothing illegal and there
26 are no charges in any of the courts saying that there
27 was illegal financial works going on. After that, the
28 two investigators couldn't find any illegal deals going
29 on under the table. No charges to that effect. After
30 that the sheriff sent the information to the grand
31 jury. After several months, they found no criminal
32 activity. So from there it went to Judge Couch and of
33 the eleven counts presented to the court, the county
34 lost all eleven of them. We didn't win a single count.

35 Now, those who wish to appeal, as I see it,
36 are kind of hanging their hopes on a comment that Judge
37 Couch made that there may not have been a quorum that
38 night. Well, we have gone now from where we were
39 initially saying, boy, we got this guy on financial
40 misdoings, or we've got him on underhanded deals behind
41 the back under the table, hard core things that if we
42 could have proven something we'd have a case, if a law
43 had been broken. Now we're down grasping at straws
44 hoping maybe something Judge Couch, I hate to use the
45 word made up, but I can't think of any other one, but
46 kind of a conclusion he came to, hey, there might not
47 have been. I don't know, well, he could turn that
48 over. What if he had not used those words, then where
49 do you hang your hat, if he had never mentioned the
50 question of a quorum. Well, the possible lack of a

1 quorum which there may not have been that night, let me
2 see where I'm at here, that was a comment made by the
3 judge. Then what would we hang our hat on next, I was
4 going to say. Maybe it's the FOI question. Was FIOA
5 violated that night? Would that overturn what happened
6 November 18th? I don't believe the court will overturn
7 the November 18th meeting based on a technicality after
8 four years of litigation, when the FOI question about
9 amending an agenda the night of the meeting was not
10 actually a law. Nor was it determined to be in
11 violation of the spirit of the law until four years
12 later. They're not going to go back and make that
13 retroactive. Do you really think -- okay. Already
14 covered that part. That leaves the comment by Chief
15 Justice Jean Toal, and as I said earlier, this comment
16 was not based on any actual law that was broken and
17 when an actual legal ruling has to be written I don't
18 think she can rule on that comment, that hey this
19 didn't, okay, this didn't look good. Bang, I'm going
20 to rule on it. Not going to overturn anything.

21 FRANCIS CROWDER: Time.

22 TOM ALLEN: All right. I guess the
23 timing was perfect. Thank you.

24 FRANCIS CROWDER: Thank you. Yes, ma'am, Ms.
25 Floyd.

26 GRACIE FLOYD: I would like to make a
27 motion that we extend the time, please, about -- for
28 about ten, fifteen minutes.

29 FRANCIS CROWDER: Have a motion to extend
30 time. Do we have a second? All right. All those in
31 favor of extending time, raise your right hand. All
32 those opposed. We will not extend time. The vote is
33 four to three. For the record, four to three.

34 All right. So, we will now vote on Ms.
35 Wilson's motion. Well, we'll start at the other end.
36 Well, we'll start with Ms. Wilson, how do you vote?

37 CINDY WILSON: In favor.

38 FRANCIS CROWDER: Mr. Allen?

39 TOM ALLEN: Against.

40 FRANCIS CROWDER: Mr. Moore?

41 EDDIE MOORE: In favor. But I don't
42 appreciate y'all using all the time so other council
43 members couldn't voice their opinion.

44 FRANCIS CROWDER: Ms. Floyd?

45 GRACIE FLOYD: Against the motion.

46 FRANCIS CROWDER: Mr. Dunn?

47 TOMMY DUNN: In favor.

48 FRANCIS CROWDER: Mr. Waters?

49 KEN WATERS: Against.

50 FRANCIS CROWDER: All right. Okay. I

1 appreciate Mr. Allen's comments, but I will be voting
2 in favor of the motion. And I will tell you why. Oh,
3 I can't do that because we've run out of time. But I
4 can tell you it's the hardest decision I've ever had to
5 make in my life, almost.

6 So anyway, we will now move on to Item number
7 11, acceptance of the 2014 Full Depth Patching and
8 Single Treatment. Mr. Holt Hopkins.

9 HOLT HOPKINS: Mr. Chairman, we placed in
10 your mailbox about a month ago a list for you to be
11 considering and hoping for any feedback that you may
12 have. But what you have in your packet tonight is a
13 recommended priority list separated out by each
14 district for the roads that we would like to patch and
15 tar and gravel or seal next year in our summer
16 contract.

17 We need -- we request two things. One, that
18 you approve the priority list because if you'll look at
19 the money it exceeds the amount of money each one of
20 you have in your paving accounts. But we will, after
21 tonight, or as soon as you approve the list, we will be
22 able to go to other funding sources and try to get as
23 much of it done as possible. But the second part we're
24 asking you to do tonight is actually allocate as much
25 of your paving account as you can spare towards this
26 list, so we'll know how much more we need to make up.

27 FRANCIS CROWDER: I reckon I should have
28 actually had a motion to discuss, which I failed to do.

29 TOMMY DUNN: I make a motion we move this
30 on the floor.

31 CINDY WILSON: Second.

32 FRANCIS CROWDER: We have a motion by Mr.
33 Dunn, a second by Mr. Moore. Now discussion.

34 HOLT HOPKINS: If you have any specific
35 questions about any roads, ---

36 FRANCIS CROWDER: I do have questions.
37 Personally, I do not want to commit any of my paving
38 money towards that list. I have some projects in my
39 mind that I, at least one or two of them I've talked to
40 you about, that are not on that list. So can a council
41 member reserve the right not to appropriate money to
42 this effort?

43 MIKE PITTS: Yes, sir, I believe as far
44 as the list is concerned, with the priorities you can
45 move, if y'all are approving the list tonight, through
46 action, you can make a motion to amend -- each council
47 member would have the ability to make that motion.

48 FRANCIS CROWDER: Okay. Well, I want to make
49 a motion to reserve the right to put projects on there
50 for District 1.

1 CINDY WILSON: Second. And may I do
2 likewise? I need to have a tour with Mr. Hopkins of my
3 district soon. I think there may be some roads that
4 are in more desperate shape than even the ones that are
5 on here.

6 FRANCIS CROWDER: I will say why I'm taking
7 the position I'm taking. Regrettably a large, well,
8 not regrettably -- I'm a little shaken now -- but a big
9 part of my district is in the city and city roads are
10 not counted for repair on the county's paving list. I
11 find that very hard for the citizens that vote for
12 District 1 to not have some say-so in having their
13 roads paved because, quote, I'm not in the county road
14 system but yet I pay county taxes. So that gives me
15 heartburn.

16 HOLT HOPKINS: Mr. Chairman, if I may
17 respond to that. There's only two kinds of roads
18 inside the city. Those are state maintained roads or
19 they are local city streets. The county does not have
20 any jurisdiction or say-so over the streets inside the
21 city. If it is a local road, that is up to the city
22 council to decide what happens on a road. They can
23 close a road, tear up a road, plow it up, whatever they
24 want to do. We don't have that jurisdiction to
25 determine that. In years past, that became a problem
26 when we kind of inserted ourselves in deciding what
27 roads should be paved and along come the utility
28 companies tearing the road right back up the very next
29 week after we paved it. So what we did in the more
30 recent past, when we had funding, we had significant
31 more funding then what we have now, the city council
32 actually adopts two lists each year and put it out.
33 They set the priorities similar to what is before you
34 now on county roads. The city council actually adopts
35 two lists showing their priorities for the various
36 city streets. They send the state maintained list to
37 the state asking them to consider it. They also have
38 the option of going and lobbying the C fund committee,
39 just like we do, for those state road. They have in
40 the past, also, submitted those lists or contacted
41 their county council member directly and asked them for
42 their help to work their priority list.

43 Typically, you know, well, the way the funding
44 was allocated up until the past few years, has been
45 that working with the city council, the county council
46 members would allocate a set amount of money, a
47 percentage of their paving account, so it could be
48 applied to their priority list and assist them in that
49 way. We've taken it even further when we had a paving
50 contract we would be happy to add that in on our

1 contract in some cases. Or they had the option of
2 putting it out there on contract. But again, we've
3 kind of tried to honor their priority setting because
4 it's in their jurisdiction.

5 FRANCIS CROWDER: But has it not been the case
6 in previous councils and this council, for a council
7 member to be able to appropriate that money to a
8 municipality?

9 HOLT HOPKINS: If the town hall or city
10 hall or mayor or somebody ---

11 FRANCIS CROWDER: Parking lot, tennis court,
12 or whatever.

13 HOLT HOPKINS: We can't just -- well ---

14 FRANCIS CROWDER: I'm just saying hasn't a
15 precedence already been established that a council
16 member can direct their paving money to other than this
17 list?

18 HOLT HOPKINS: Yes, sir. You can -- inside
19 of town, or wherever, any project you would like to
20 pick. The reason we're asking that in November about
21 our priority list, we will be spending the next month
22 or two getting a contract together, getting it ready to
23 go out on the streets in February. So we're trying to
24 line up how much funding we have, figure out what
25 roads, or what projects we need.

26 TOMMY DUNN: Mr. Chairman.

27 FRANCIS CROWDER: Yes, sir.

28 TOMMY DUNN: And I -- if I may?

29 FRANCIS CROWDER: Yes, sir.

30 TOMMY DUNN: It sounds like we could talk
31 about this for a good while. Would it be too much and
32 here -- Ms. Wilson and I'm sure other council members
33 got their thing, if you're not ready tonight, to do
34 your road work and be ready to vote on it next council
35 meeting? Would that be too much to ask? If we get
36 ready to get our roads and be ready to vote on it for
37 next council meeting.

38 FRANCIS CROWDER: Thank you. Do you make that
39 in the form of a motion?

40 TOMMY DUNN: We had a motion on the
41 floor, I believe, to move it forward. I'll amend it
42 that we vote on this next council -- I'll amend that
43 original motion that we vote on it next council
44 meeting.

45 KEN WATERS: Second.

46 FRANCIS CROWDER: All right. We have a second
47 by Mr. Waters. All those in favor of the amended
48 motion, raise your right hand. All those opposed. All
49 right. We have six members for and one member opposed.
50 All right. All those on the ---

1 TOMMY DUNN: Original motion.
2 FRANCIS CROWDER: With the amendment. All
3 those in favor of the original motion with the
4 amendment, please raise your right hand.
5 ??:
6 FRANCIS CROWDER: Well, he wants to do it, but
7 it's with the amendment that we table it. Wait and
8 vote on it -- isn't that right?
9 TOMMY DUNN: Yeah.
10 FRANCIS CROWDER: All right. All those for
11 that, raise your right hand. All right. All those
12 opposed. Let the record show it was a vote of six to
13 one. Thank you, sir.
14 HOLT HOPKINS: I'd just add I'd be happy
15 to meet individually any time.
16 TOMMY DUNN: I was just going to say, if
17 you would, make sure you be prepared next meeting, I'd
18 help out and get our contracts up.
19 FRANCIS CROWDER: Sure. I will do that, but
20 it won't be this week. Next week.
21 All right. The next item is report from
22 Animal Welfare Committee. Chairman Tom Allen.
23 TOM ALLEN: Is Drew here?
24 FRANCIS CROWDER: Is Drew here? He left.
25 TOM ALLEN: He's supposed to put ---
26 TOMMY DUNN: Mr. Chairman, while he's
27 doing that, can we take a short recess right quick?
28 FRANCIS CROWDER: Yes, sir, let's have a short
29 recess.
30 (RECESS 9:25 PM to 9:36 PM)
31 FRANCIS CROWDER: We pick back up on Animal
32 Welfare.
33 TOM ALLEN: Yeah, about five minutes.
34 This will be a report on the Animal Welfare Committee.
35 And I think each council member tonight was given our
36 rough draft and this is after three public meetings,
37 very good public meetings, where both sides, I mean we
38 really got into it pretty good and getting input from
39 all those folks as well as the sheriff's department,
40 the animal control people, veterinarians, the
41 magistrates, myself, Mr. Dunn and Mr. Crowder, who were
42 on the committee. We came up with this. Now this will
43 be a paragraph, we're calling it an ordinance, it's
44 going to be a portion of the Animal Control -- we need
45 to redo the entire ordinance, but this will become a
46 part of it. Right now, it's been sent to the legal
47 staff, for them to check and make sure I haven't said
48 anything untoward or illegal or didn't dot all my i's
49 or cross my t's properly. When that comes back, then
50 there's still time for comment. All the council

1 members, anybody else that wants to comment, please
2 feel free to do so. And then we still have to go
3 through three readings of council before this becomes
4 final. So that's where we're at. I think, I hope that
5 most of the animal welfare people were pretty well
6 satisfied with what we've done so far. It's a step
7 forward. A lot of people wanted to take that quantum
8 leap and honestly Anderson County's not ready yet for
9 that quantum leap. And as I said, we have to crawl
10 before we walk and walk before we run. And this is
11 what I think we need to do now. So we'll get this
12 through the legal staff and then we'll go from there
13 with it and anybody that has any comments, please feel
14 free to contact me or Mr. Crowder or Mr. Dunn and we'll
15 be glad to speak with you.

16 Now, can you see that picture real well up
17 there? Showing up pretty good? This is a sad state of
18 affairs. I got this picture I think it was a Saturday
19 night and I didn't sleep. This made me so mad. I was
20 extremely angry when I saw this. This dog was found, a
21 neighbor apparently reported it, someone went out, I
22 guess climbed the fence, went over and got it, tried to
23 rescue it. The dog died the next day. Starved to
24 death. This dog didn't get that way in one day. Where
25 in the heck were the neighbors the previous week or
26 two? Why does this go on in Anderson County? I told
27 some of the people at the Animal Welfare meeting,
28 somebody mentioned they were the silent majority. I
29 said don't be. Raise Cain. Get out here in the street
30 and march. We've got to find some way to get the word
31 out in Anderson County that we're not going to tolerate
32 this.

33 Now, the people that went in there, I don't
34 know who went over the fence and got this dog, but
35 honestly, technically, they were breaking the law.
36 They could have been shot. They had no authority to go
37 in this person's yard and try to save that dog. Leave
38 that up to the animal control people. And I'll ask the
39 sheriff, and I think Gary Brown I've already talked
40 with him, but I want to find out, was this reported to
41 Anderson County? No. It was ... okay, good. Not
42 reported to Anderson County because I wanted to go out
43 there and find out who the owners are. I mean, this is
44 terrible. This is despicable. This is not something
45 that Anderson County should be proud of by any stretch
46 of the imagination. We're a growing county. This
47 county's got a ton of potential. And to have things
48 like this come up, I don't even know how to describe
49 it. But I do not want us tolerating this kind of thing
50 and I hope we can get an end put to this and anyone

1 seeing a dog in any kind of shape like this, or being
2 mistreated, malnourished, whatever, report it to the
3 animal control people. We've only got about, sheriff,
4 you can correct me, what about seven people, about
5 seven people in animal control or at any given time
6 maybe, maybe five of those are on the road. They're
7 swamped every day going out on complaints. They don't
8 sit at the donut shop and eat donuts. You can't find
9 all of these. It's up to the people to report them.
10 Let us know where they're at so we can do something
11 about it. All right. And that's my report on the
12 Animal Welfare Committee. Thank you, Mr. Chairman.

13 FRANCIS CROWDER: Thank you. All right. The
14 next item on the agenda is report from the Personnel
15 Committee. Personnel Committee, you have an update of
16 the information in your agenda packet. We did meet on
17 November 12, 2013. We reviewed the current job
18 description and made some recommended changes. It was
19 unanimous to include these changes to present to
20 council tonight. So do I have a motion to approve?

21 TOM ALLEN: So moved.

22 CINDY WILSON: Second.

23 FRANCIS CROWDER: We have a motion by Mr.
24 Allen, a second by Ms. Wilson. Discussion?

25 CINDY WILSON: May I?

26 FRANCIS CROWDER: Yes, ma'am.

27 CINDY WILSON: Did Mrs. Eddleman have an
28 opportunity to review this?

29 FRANCIS CROWDER: No.

30 CINDY WILSON: Okay. I wondered if maybe
31 there might be anything that she would add to it.

32 FRANCIS CROWDER: Well, actually it's taking
33 the job description and adding a couple of imperatives
34 if you looked at it. For example, we clarified the
35 fact that a future clerk would need to be available up
36 to three evening meetings per week, which has been a
37 weakness in us being able to articulate the people
38 we've interviewed. So that people that just want a
39 daytime job, this is not that kind of job for them.

40 Secondly, we added some increase in technology
41 that they had to be skilled in, you know, different
42 word processing and excel and power point. They had to
43 have the ability to upload data to the website, because
44 we've run into those kinds of problems. And so, if you
45 look at all this, we just tried to really enhance what
46 was already on our job description so that candidates
47 that we advertise for will have some clear insight into
48 what the job entails.

49 CINDY WILSON: Well, this does represent
50 much more comprehensive and clear set of requirements.

1 Thank y'all for the hard work on that.

2 FRANCIS CROWDER: Thank you. Any other? Yes,
3 ma'am, Ms. Floyd.

4 GRACIE FLOYD: I read the two that were
5 sent to my home. The one for the deputy clerk did not
6 include, which I think is very important, a valid
7 driver's license or the ability to obtain one. It says
8 that on the one for the clerk itself, but for the
9 deputy clerk it does not say that. And there are times
10 when the deputy clerk must make the run to the
11 different places that she needs to go to, to get what
12 needs to be done. I know that y'all do a lot of
13 framing for these resolution and stuff that you give to
14 people. Somebody has to go and pick that stuff up. I
15 think it's imperative that the deputy clerk should have
16 a driver's license or the right to secure one. Also,
17 in the old copy, it says lift up to ten pounds. And
18 now, I notice it has been changed to lift or move up to
19 twenty pounds. More than likely this would be a female
20 taking this job and twenty pounds, moving or lifting
21 twenty pounds could be a little bit much for females.
22 Now, you don't have the one in here tonight, I don't
23 see it, for the clerk herself, or himself, or
24 theirselves, if you can say it like that. But I don't
25 know how much she will have to move or lift, but twenty
26 pounds, that's a lot for a lady and if you're saying
27 twenty pounds then are you setting the age at a young
28 age? Maybe there is a middle age person who would like
29 to apply for this job as well. Would she have to lift
30 twenty pounds, too? Also, you have -- you did not put
31 in here that these people must be able to clean up
32 their own office as they are having to do now. Which I
33 think is ludicrous, but this is something else that
34 they have to do. Also, in the other one, you put in
35 there able to obtain a notary public certification
36 within six months. That's all well and good, but it's
37 not up to the person who receives a notary public. She
38 has or he has to get it when they send it to her. I
39 have mine, so I know that it may be it's going to take
40 longer than six months, depends on who the person is
41 going to be, who's going to be to do that. But these
42 are the things I found in the last one you sent me at
43 my house. And this is what I think we need to change
44 in this one.

45 FRANCIS CROWDER: Well, are you suggesting ---

46 GRACIE FLOYD: I'm making a motion that we
47 go back and we include the driver's license, we lower
48 the lift rate from twenty pounds back to ten, to ten
49 pounds, and we extend the certification within one
50 year, the notary public certification for one year.

1 FRANCIS CROWDER: All right. We have a motion
2 to amend. Do we have a second? Hearing no second, the
3 motion dies. So now we will vote. Any other
4 discussion?

5 TOMMY DUNN: Mr. Chairman.
6 FRANCIS CROWDER: Yeah.
7 TOMMY DUNN: I thought it was, but if
8 it's not, I'd like to make a motion we do put the
9 driver's license requirement in there. That needs to
10 be in there.

11 FRANCIS CROWDER: All right. We have a motion
12 and a second. Any discussion?

13 GRACIE FLOYD: I just said that and it
14 wasn't second then, so what makes it okay now? Thank
15 you.

16 TOMMY DUNN: Because you had two other
17 things on there that I studied and I don't go along
18 with, but I do go along with the driver's license
19 thing. So if I voted for yours, I'd have to voted for
20 all three of them and I just want the one. That's my
21 thing.

22 FRANCIS CROWDER: Any other comments?
23 TOM ALLEN: Yes, Mr. Chair.
24 FRANCIS CROWDER: Yes, sir.
25 TOM ALLEN: If I could, Ms. Floyd, I'll
26 take the blame for the twenty pounds, because when I
27 was thinking about this I thought a lot of times they
28 have to lift the boxes that the reams of paper come in
29 for the xerox machine and sometimes boxes of files. I
30 think a lot of times those will be over ten pounds. We
31 may never get to twenty, but I think it's going to be
32 over ten because those boxes of reams of paper, I
33 believe are over ten pounds.

34 GRACIE FLOYD: Thank you, Mr. -- what's his
35 name? Thank you, Mr. Allen. But the thing is this,
36 you have to think about people's health. Okay. You
37 got to think about a woman lifting twelve pounds. I
38 don't think I could do it now and as I look out there
39 in the audience I think that there's some other women
40 who could not lift that much weight. You know, I'm not
41 one them sheroe women, okay, but you know that means
42 that you're going to have to be careful the people that
43 you hire to do this. Or you're going -- we going be in
44 another lawsuit.

45 FRANCIS CROWDER: Well, we have a motion and a
46 second, I believe that we had a second on Mr. Dunn's,
47 didn't we?

48 TOMMY DUNN: Yes, sir.
49 FRANCIS CROWDER: Okay. Any other discussion
50 about his? All those in favor of Mr. Dunn's motion to

1 include the driver's license, please raise your right
2 hand. All those opposed. All those abstaining. I
3 didn't see, I'm sorry. Let the record show that was
4 unanimous.

5 Now, voting for the original motion with the
6 amendment for inclusion of the driver's license. All
7 those in favor raise your right hand. Let the record
8 show it was unanimous. All right. Thank you. That
9 concludes the report of the personnel committee. And
10 so, Mr. Burns, you can get that downstairs. Thank you.

11 Report of the Finance Committee. Chairman of
12 the Finance Committee, the Honorable Tommy Dunn.

13 TOMMY DUNN: Thank you, Mr. Chairman.

14 Item number 14(a) is the Petco grant, approved
15 unanimously from the Finance Committee desire to submit
16 to Petco Holiday wishes grant application. Grant's for
17 one hundred thousand for first place, fifty thousand
18 for second place and twenty-five thousand for third
19 place, five thousand and ten thousand grants ten
20 runner-up organizations. No match is required, it's
21 more like a competition. Awarded funds go to the
22 animal shelter donation account. Submit success story
23 of adopted animals for consideration. Mr. Chairman,
24 this comes in the form of a motion from the Finance
25 Committee.

26 FRANCIS CROWDER: All right. A motion from
27 Finance Committee doesn't require a second. Any
28 discussion? All those in favor of approval raise your
29 right hand. Let the record show it was unanimous.
30 Chairman Dunn.

31 TOMMY DUNN: Mr. Chairman, moving on to
32 Item 14(b) the Broadway water meter reading agreement.
33 Request approval of meter reading agreement between
34 Anderson County waste water and Broadway Water Sewer
35 District. County will pay Broadway Water and Sewer
36 District two dollars per sewer customer for a bi-
37 monthly billing period for the water meter readings.
38 Total cost approximately sixteen hundred and twenty
39 dollars annually. That agreement council approved with
40 Hammond Water at the last council meeting. This will
41 be -- if this is passed and implemented, be a saving
42 for the county and this comes to you from the Finance
43 Committee, unanimous approval.

44 FRANCIS CROWDER: A motion from the Finance
45 Committee doesn't require a second. I won't repeat
46 that after each one. Any questions? Hearing no
47 questions, all those in favor, please raise your right
48 hand. All right. It was unanimous. Moving forward,
49 Mr. Dunn.

50 TOMMY DUNN: Mr. Chairman, next item

1 14(c) transfers. Transfer of fifty-two thousand six
2 hundred and fifty-five dollars and thirteen cents from
3 communication salaries to communications rent to cover
4 rent for communications center for the fiscal year '13.
5 Originally budgeted in the E91 fund, but
6 unable to pay from that fund. They got a ruling from
7 them it couldn't come out of the tariffs, the funds
8 were available from salaries due to vacancies. This
9 comes before you from the Finance Committee two to one
10 vote. Mr. Chairman, notice this was -- this is fifty-
11 two thousand six hundred and fifty-five dollars and
12 thirteen cents is originally cheaper than what was
13 budgeted for the rent of the building originally.

14 FRANCIS CROWDER: Okay.

15 CINDY WILSON: May I, Mr. Chairman, issue
16 my ---

17 FRANCIS CROWDER: Yes, Ms. Wilson.

18 CINDY WILSON: This is my minority position
19 in that vote. Please note that the following concerns,
20 and I put back up at each of your desks, express
21 regarding this transfer date much further back and
22 could well have been avoided if only County Council had
23 an internal auditor. And that would be providing us
24 with regular budget to actual finance reports across
25 the county's numerous departments and accounts. My
26 position in this matter does not reflect on our
27 excellent partnership and cooperation that this county
28 enjoys with Anderson University. However, it does
29 reveal continued questions of the increased expenses
30 because this body agreed to pay an extra forty --
31 fifty-four thousand dollars rent to a private
32 institution. We have many buildings that could use
33 better maintenance and more use. The county continues
34 to pay utilities at the Tower Street location and at
35 the airport and we also spent more than a hundred
36 thousand dollars to upfit the rented space at the old
37 Duke Power building, which, of course, came from grants
38 and the funds from the insurance reserve book, excuse
39 me, I guess it was the insurance reserve fund there.
40 Or from the insurance company. Plus more than fifty-
41 five thousand dollars to rent the space for
42 communications department at the airport. We were told
43 at the time that the county would be saving fifty-four
44 thousand dollars by renting from Anderson University.
45 I ask you to please show me the savings. It is now
46 apparent that great expenses have been added. You have
47 your backup at your desk and that's why I'll be voting
48 against this transfer. Thank you.

49 FRANCIS CROWDER: Any other? All those in
50 favor of the Finance Committee's recommendation, please

1 raise your right hand. Three, four, five. All right.
 2 All those oppose. Five to two. All right.
 3 TOMMY DUNN: Mr. Chairman, moving on to
 4 the next item. Transfer of eleven thousand three
 5 hundred and seventy dollars and sixty-three cents from
 6 Roads and Bridges to salaries for Roads and Bridges
 7 overtime to cover overtime work during the heavy
 8 rainstorms. The ditching crews had to work overtime
 9 due to the large number of work orders received.
 10 Transfer of four thousand dollars from engineering to
 11 software in the sewer fund to cover cost of a QS1
 12 software for utility building. Mr. Chairman, that
 13 comes in the form of a motion from the Finance
 14 Committee unanimous approval.
 15 FRANCIS CROWDER: Any discussion? Hearing no
 16 discussion, those in favor, please raise your right
 17 hand. Those opposed. All right. Let the record show
 18 it was unanimous. Is that correct? All right.
 19 TOMMY DUNN: Mr. Chairman, next on the
 20 item is the transfer of five hundred dollars from bad
 21 debt expense to the SCAC fees to cover estimated fees
 22 associated with the GEAR program which assists in
 23 collecting bad debt. Again, this comes from the
 24 Finance Committee with unanimous approval.
 25 FRANCIS CROWDER: Any discussion? Hearing no
 26 discussion, all those in favor, please raise your right
 27 hand. Let the record show it was unanimous.
 28 TOMMY DUNN: Mr. Chairman, next is 14(d),
 29 we've already took that matter -- took care of it.
 30 Item 14(f1) and (f2) was also previously handled. Item
 31 14(e) the personnel matter was tabled by the Finance
 32 Committee. That was a salary adjustment in a certain
 33 department and we would table that until we get some
 34 information and some clarity with the department head
 35 and personnel, so that matter has been tabled.
 36 FRANCIS CROWDER: Thank you.
 37 TOMMY DUNN: That concludes our report,
 38 Mr. Chairman. Thank you.
 39 FRANCIS CROWDER: Thank you, sir, you and your
 40 Finance Committee, we appreciate it. Moving on to
 41 appointments. Mr. Waters, do you have any appointments
 42 tonight?
 43 KEN WATERS: I think everyone has a copy
 44 of this application. It's for -- my representative on
 45 the EMS board passed away about four months ago, so the
 46 application you have, it has Anderson District 1.
 47 Well, we are District 1 in the school districts, so I
 48 think they were confused, so Carole Burger, I'd like to
 49 appoint her to the EMS committee and just change the
 50 County Council District to 6, if that's okay.

1 CINDY WILSON: Second.
2 GRACIE FLOYD: ???
3 KEN WATERS: On the front page, about the
4 fourth line down, fourth or fifth line down, it says
5 District 1 and we are District 1 in the school
6 district, so I think she was just confused when she
7 filled out this application and if you'd just change
8 that to a 6, then ---
9 TOMMY DUNN: I'll second that.
10 FRANCIS CROWDER: We have a motion and a
11 second. Any discussion? All those in favor of Ms.
12 Burger, raise your right hand. Let the record show it
13 was unanimous. Mr. Dunn?
14 TOMMY DUNN: Mr. Chairman, I have no
15 appointments at this time. Thank you.
16 FRANCIS CROWDER: Ms. Floyd?
17 GRACIE FLOYD: None.
18 FRANCIS CROWDER: Mr. Moore?
19 EDDIE MOORE: None.
20 FRANCIS CROWDER: Mr. Allen?
21 TOM ALLEN: None at this time.
22 FRANCIS CROWDER: Ms. Wilson?
23 CINDY WILSON: None.
24 FRANCIS CROWDER: Francis Crowder, I have none
25 at this time.
26 Moving on to requests by council members. Ms.
27 Wilson.
28 CINDY WILSON: We're broke.
29 FRANCIS CROWDER: You're broke? All right.
30 Mr. Allen?
31 TOM ALLEN: Yes, I'd like to do two if I
32 could. One is for GAMAC. I attended their event last
33 Sunday and they do a fantastic job over there. I'd
34 like to contribute five hundred to GAMAC. Yeah.
35 RUSTY BURNS: Mr. Allen, they're having an
36 event at the airport, a USO show, and they are
37 requesting sponsorships on that. So you might -- they
38 will certainly appreciate your consideration for that
39 specific activity.
40 TOM ALLEN: So, to make it for that
41 specific activity, and they don't want me to go sing?
42 Or anything?
43 RUSTY BURNS: No, but they will be ---
44 KEN WATERS: No, just send money.
45 TOM ALLEN: Not giving them any money,
46 then.
47 TOMMY DUNN: Just send your money.
48 TOM ALLEN: We'll make that specific for
49 the GAMAC USO event at the airport then. All right.
50 And the second one is fifty-five hundred out of my

1 recreation account and this is for North Pointe
2 Elementary for the new track around the facility and
3 they're going to match that over there.
4 FRANCIS CROWDER: All right. We have a motion
5 from Mr. Allen. Do we have a second?
6 CINDY WILSON: Second.
7 FRANCIS CROWDER: Second Ms. Wilson. Any
8 questions? Hearing no questions, all those in favor,
9 raise your right hand. Got one left. I'm sorry. Let
10 the record show it was unanimous.
11 TOM ALLEN: That was all I had.
12 FRANCIS CROWDER: All right. Let's see, Mr.
13 Moore.
14 EDDIE MOORE: None at this time.
15 FRANCIS CROWDER: All right. Ms. Floyd?
16 GRACIE FLOYD: ???
17 FRANCIS CROWDER: Mr. Dunn?
18 TOMMY DUNN: District 5 has none.
19 FRANCIS CROWDER: Pardon?
20 TOMMY DUNN: District 5 has none at this
21 time.
22 FRANCIS CROWDER: Mr. Waters?
23 KEN WATERS: None at this time.
24 TOMMY DUNN: Mr. Chairman?
25 FRANCIS CROWDER: Yes, sir.
26 TOMMY DUNN: At this time, I'd like, if
27 there are no objections from the Honorable Council of
28 District 1, I'd like to appropriate seven hundred and
29 fifty dollars out of District 1's account to the
30 Anderson University that was requested for in our
31 packets.
32 CINDY WILSON: Second.
33 FRANCIS CROWDER: All right. We have a motion
34 and a second. Any discussion? All those in favor,
35 raise your right hand. Let the record show it was
36 unanimous. I have one additional one. The GAMAC for
37 the USO Sweetheart Dance. I don't dance, but I'd like
38 to -- you gave them seven hundred and fifty? Five
39 hundred? I'd like to appropriate five hundred dollars
40 out of my rec account. I make that in the form of a
41 motion.
42 CINDY WILSON: Second.
43 FRANCIS CROWDER: We have a motion and second.
44 Any discussion? All those in favor raise your right
45 hand. Thank you.
46 GRACIE FLOYD: I have an allocation from my
47 paving account I'd like to do.
48 FRANCIS CROWDER: All right.
49 GRACIE FLOYD: Okay. Sometime ago money
50 was given to District 2 City Council. It was done for

1 city council to pave roads. This was in 2008. It's
2 2013 now, about to be 2014, and the money is just
3 sitting there and District 2 really could use the money
4 now for other things. So I would like for -- I would
5 like to, how do you say it, un-appropriate the money
6 that's left in the fund for the city council. That's
7 in the form of a motion.
8 FRANCIS CROWDER: We have a motion. Do we
9 have a second? We have a second. Any questions? All
10 those in favor raise your right hand. Let the record
11 show it was unanimous.
12 GRACIE FLOYD: Okay. And I think I have
13 one more. This is for funds to be placed under the --
14 under District 5, fifty thousand dollars under District
15 5 to assist with the sidewalk project that is going to
16 be adjourning my sidewalk project next year. This is
17 giving -- this is being appropriated to District 5 from
18 District 2 in, in the fact for next year, if District 5
19 -- not the council member -- but if the council member
20 from District 5 speaks for District 5 saying that he
21 would do an appropriation next year for District 2.
22 You got to say it out loud.
23 TOMMY DUNN: Yes, ma'am.
24 GRACIE FLOYD: Okay.
25 TOMMY DUNN: Second.
26 FRANCIS CROWDER: Have a motion and a second.
27 So we're committing this year's money and next year's
28 money. I'm kidding. All those in favor please raise
29 your right hand.
30 TOMMY DUNN: Mr. Chairman?
31 FRANCIS CROWDER: Yes, sir.
32 TOMMY DUNN: If you would, and I forgot,
33 I've been putting this off, I'd also like to
34 appropriate fifty thousand dollars out of District 5's
35 paving account and this is the matching of Federal fund
36 grant for some road work behind Westside High School on
37 Jackson Street, joins Ms. Floyd's -- it'll link on Ms.
38 Floyd's district. I put that in the form of a motion.
39 CINDY WILSON: Second.
40 FRANCIS CROWDER: We have a motion and a
41 second.
42 GRACIE FLOYD: Discussion. Yes. This is
43 in the essence of teamwork for Anderson County. I
44 think this is the first time that District 2 and
45 District 5 has had the chance to work together to
46 complete a project that's going to enable that entire
47 section there to benefit from those children having
48 sidewalks to walk on coming home and to school.
49 TOMMY DUNN: Thank you.
50 FRANCIS CROWDER: All those in favor, raise

1 your right hand. All those opposed. Let the record
2 show it was unanimous.

3 TOMMY DUNN: Thank you, Mr. Chairman.
4 FRANCIS CROWDER: Thank you, sir.
5 Administrator's report.

6 RUSTY BURNS: Nothing at this time, Mr.
7 Chairman.

8 CINDY WILSON: Mr. Chairman, may I make a
9 comment on the administrator's report? We really need
10 to look at page seventeen A-4. We had a visitor to our
11 county called one of our staff members after hours to
12 find out how she could get a kayak into the Saluda
13 River and I thought that was very nice that ... beyond
14 the call of duty to assist a tourist. And she wrote a
15 very, very nice thank you note and I think that
16 reflects very positively on us. I wanted to make a
17 comment. Thank you.

18 FRANCIS CROWDER: All right. Citizens'
19 comments, Mr. Pitts.

20 MIKE PITTS: Yes, sir, Mr. Chairman,
21 first up is Brooks Brown, IV. Next name -- I don't see
22 Mr. Brown. Ralph Driver is the next name. Rick
23 Freemantle.

24 RICK FREEMANTLE: Evening, Mr. Chairman. Had
25 I played the clip a little bit longer, you would have
26 heard the Chief Justice further extend her remarks by
27 saying that Judge Cordell Maddox here in Anderson
28 County made an error in law big time in regards to the
29 FOI case. She also went on to say it was a clear
30 violation of FOI. I believe there was one other
31 justice, it might have been Beatty, that said that.
32 You know, you can tell an awful lot about the person
33 standing in front of you by watching how much
34 immorality they are willing to accept. Because of this
35 trial that went on, we know that Preston was involved
36 in a Paeans scheme. Responsible for thousands --
37 hundreds at least, almost a thousand people, of losing
38 their money. He played a part in that. One question
39 we don't know the answer to and I'm dying to find it
40 out, and hopefully will get a chance to do that, how
41 many of them council people sitting on that council
42 that night that gave him the one point fourteen million
43 dollars were invested with him? We won't find that
44 out, had we stopped. Now, we've got an opportunity
45 maybe through the FOI or through this county case, to
46 find that out.

47 We know Mr. Preston adorned Mr. Wilson's
48 daughter handsomely with a contract and you say that
49 you know what happened that night didn't have any
50 binding effect on the council. The heck it didn't, you

1 were stuck with that contract for three years. Had to
2 pay it off. We know Preston violated his oath to God.
3 Had a lot of talk about God tonight. I take God
4 seriously. Violated his oath to God, his promise to
5 his wife and the moral turpitude clause of the Anderson
6 County hiring contract. We know he told a subordinate
7 employee with whom he carried on his little eight year
8 affair to sit down and shut up about a bogus made-up
9 investigation to cover up his immorality. That's
10 obstruction of justice.

11 You're never going to get to the bottom of
12 these things and clear them up if you don't stand up,
13 stand tall and put right before worrying about a few
14 dollars. We know that the council members held secret
15 meetings about a personal issue, which was a clear
16 violation of law. We know all of this from the
17 proceeds of that trial. Some folks in here may not
18 know there are several cases now that have been stayed.
19 That means they have been put on hold, they've been put
20 on hold by a joke of a judge who is obviously part of
21 the good old boy system. And if you think for one
22 minute I'm going to stand still and allow him to
23 continue down his road without doing anything about it,
24 you're clearly misunderstanding. Come hell or high
25 water, that case will be heard, I don't care if it's
26 ten years from now. And I got a feeling we'll get a
27 good decision out of it. I think it's very telling
28 that the same judge who is responsible for this
29 ignorant decision he passed down on your case ---

30 MIKE PITTS: Time, Mr. Chairman.

31 RICK FREEMANTLE: --- is responsible for
32 holding my case without even giving me a court date.

33 MIKE PITTS: That's time, Mr. Chairman.
34 Next up is Charles Crowe.

35 CHARLES CROWE: I don't know why I'm always
36 having to follow him. But I have a couple of things I
37 want to say and it's as short as I can be because I
38 know everybody's tired.

39 FRANCIS CROWDER: We are.

40 CHARLES CROWE: We are. I can look and
41 tell. But the thing of it is, I want to know. I
42 didn't hear, is it going to be in the minutes of how
43 those votes went tonight? Who voted which way? Not
44 just four to three. I didn't hear you go down the line
45 like you normally do and say so-and-so so-and-so. The
46 question is if it's going to be in the minutes. Okay,
47 I'm getting the nod. If it's going to be in the
48 minutes, then I won't go down the line, but I'd like to
49 thank Mr. Dunn, Mr. Crowder, Mr. Moore, and Ms. Wilson
50 for standing up for the citizens of this county. It

1 wasn't us who delayed the justice in this matter. It
2 wasn't us who put it off all these years. It was
3 either our crooked judicial system or our judicial
4 system that needs some work done on it. Or either
5 somebody with some fat pocketbooks and some good
6 lawyers. But I can tell you this, after hearing the
7 meeting tonight. I can tell you this. Ron Wilson had
8 some sharp, high priced lawyers, but I heard one speak
9 tonight from that council up there, from that council
10 roost, that he couldn't have got a better lawyer to
11 defended him. So thanks a lot.

12 MIKE PITTS: Mark Powell.
13 MARK POWELL: Mark Powell, District 7. We
14 had a council member go through her sheet and name off,
15 I don't know, three items that were frivolous lawsuits.
16 She left off five others. A large percentage, million
17 bucks, you include Michael Cunningham especially. And
18 that alone, I mean, I don't understand when people say
19 a law wasn't broken. Y'all have rules on how you hire
20 people. You go out for contract. Maybe it didn't come
21 out of a pocketbook, but reflect back and also
22 understand, no, we didn't get a true bill from the
23 grand jury, but what we did get is the grand jury I
24 think three different seasons, maybe four, and
25 Councilman Wilson asked if you listened to the tape.
26 If you just take what happened on the merits of it was
27 a council meeting and can a council member do what they
28 want to do if they all agree with it? Yeah. It's not
29 illegal. But if you listen to Ron Wilson, I, Ron
30 Wilson, myself as a person, as the chairman of the
31 Personal Committee and as a council member, and
32 modifying the agenda -- nobody else knows about this.
33 They didn't hear that. He said nobody else knows about
34 it. But yet, Larry Greer whips out a hundred and
35 twenty-seven accounts on how to pay for it. Gracie
36 Floyd knew it was going to happen because she had the
37 hiring contract. The grand jury didn't hear any of
38 that. I don't think any of them listened except for
39 the Supreme Court justice and everyone of them when I
40 was down in Columbia said, yeah, we listened to it.
41 And it was a terrible thing. But if you think what
42 they did just on the basis of can they get by with it?
43 Okay, and you talk about whether it's FOI and whether
44 it should be twenty-four hours. You want to punish
45 somebody for hurting their dog and you modify the
46 agenda to do that, no big deal. But if you spend one
47 point something million dollars, cause a ruckus that
48 this has caused, yep, it needs twenty-four hour notice.
49 So I think that's what the FOI's looking for. It's
50 looking for the long term stuff.

1 And it was pointed out to me that this is the
2 second time that a council member when the pledge is
3 being done, doesn't look at our flag as the pledge is
4 being made and it's rather disgraceful, if you catch
5 who that might be. Thank you for your votes. The ones
6 of you who didn't vote, I understand it was hard. For
7 the ones of you who did vote for it, it was equally
8 hard. I'll thank each one of you for giving it
9 consideration. I can't believe some people think they
10 can think what a judge might do. You had to be there
11 to see her expression, to see the anguish on her face
12 on how disgusted she was on how we in Anderson County
13 got treated. Apparently Anderson County judges, they
14 don't care how we get treated. I don't understand why,
15 ---

16 MIKE PITTS: That's time, Mr. Chairman.

17 MARK POWELL: --- but now we will.

18 Thank you.

19 MIKE PITTS: Dan Harvell.

20 DAN HARVELL: Dan Harvell, District 3.

21 Mr. Chairman and members of council, I didn't say it
22 when I came up here earlier tonight because I didn't
23 want to sacrifice a few seconds of my time, but I was
24 really too sick to be here tonight, but this situation
25 was of such gravity that if I'd had to be rolled in
26 here with a wheelchair I would have been here. I would
27 have left after the vote, but those of you that stood
28 strong, those of you that had the courage to do what
29 you did, you deserve my thanks and you deserve my
30 staying long enough to tell you thanks. I appreciate
31 from the bottom of my heart and I know I speak for
32 many, many people when I say this, it takes a lot of
33 courage to do what is the right thing sometime in the
34 face of so much fire you just feel like it's time to
35 give up and go home, pack your bags and maybe even get
36 out of government all together. But that's not the
37 answer to anything. We need people to stand strong,
38 just like four of you have done tonight, and I'm proud
39 of you for doing it. And I just thank you for that.
40 Have a good evening. Thank you.

41 FRANCIS CROWDER: All right, thank you. Is
42 there any other item on the agenda? Council comments.
43 Ms. Wilson, do you have any?

44 CINDY WILSON: Just very quickly. The
45 night of November 18th, Mr. Waldrep and I had items on
46 the agenda. One of them was to freeze the hiring of
47 those twenty-six positions that helped -- ended up
48 funding part of the severance. We did not know at that
49 time that it was set up to fund a severance. Now,
50 leaving that behind us, it's important for us to note

1 the good things that have happened with our council
2 since 2009. We've got better competitive bidding
3 procedures, we've got just better policies all around.
4 We've worked hard to have good policies here. And we
5 adhere to an open and transparent local government.
6 And how can anyone argue with jobs that we didn't get
7 even during the boom time. And this took a lot of
8 teamwork and I'm very grateful that I work with you
9 gentlemen. Thank you, so much.

10 FRANCIS CROWDER: Mr. Allen.

11 TOM ALLEN: Yeah, just a couple of last
12 comments. I appreciate everything everybody's had to
13 say tonight. And indeed, this was an extremely
14 difficult decision for me, anyway, as to what we had to
15 do tonight. But I just wanted to make a couple of
16 notes. I gave a lot of facts out tonight. I did this
17 all myself. Somebody accused me of having Candy Kern
18 write it for me, but she really didn't. I did this all
19 on my own. A lot of the things that were mentioned
20 tonight regarding Mr. Preston, yes, he was involved in
21 a Paeans scheme. He had an affair with a subordinate.
22 There were so-called secret meetings. Now, depending
23 on how you define that, it was admitted in the court
24 case that three people met down in Greenwood. Does
25 that constitute a -- it's not a quorum, I mean, if I
26 meet with two or three other council members out here
27 in the hallway or in the bathroom and nobody sees us,
28 is that a secret meeting? So depending on how you
29 define that, technically it wasn't a secret meeting
30 because it wasn't a quorum. A lot of things were wrong
31 that night. And I've said it a hundred times, it
32 looked like a slap in the face of democracy that night.
33 But the point I was trying to make from all this in
34 stating the facts is, we haven't proven anything yet.
35 You know, if we had one concrete thing we could drive a
36 nail into and say, aha, there it is, we got it. We
37 don't. And that's all I'm trying to say. I don't know
38 that the FOI thing will work, I don't know that the
39 quorum question will work. Simply because of the way
40 the FOI thing, as I read to you and we've all got
41 copies of this, we all get them, the Freedom of
42 Information Act, it violated the spirit of, and you
43 really shouldn't do it, but that wasn't determined
44 until four years after 2008. You think the court's
45 going to go back retroactively? I don't know, I really
46 don't think so.

47 So that's all I tried to do, is present the
48 facts tonight. A lot of things looked kind of grim and
49 dirty back in the previous administration, but we've
50 got to be able to prove those in a court of law. Not

1 just on appearances. And that's all I had, Mr.
2 Chairman.

3 FRANCIS CROWDER: Mr. Moore?

4 EDDIE MOORE: Thank you, Mr. Chairman. I
5 really hate that councilwoman from District 2 left, but
6 I really wanted to make a point. She kept driving home
7 the point about the money that was spent and
8 everything. You know, if she was really concerned
9 about the money, her personal attorney that was here on
10 numerous occasions during 2009, and they delivered
11 numerous frivolous lawsuits on us, okay. It costs us
12 thousands of dollars to defend ourselves. And she said
13 there's no need to go to appeal. There's no need to go
14 to appeal. Well, if she really felt that strongly
15 about it, why did her attorneys appeal twice when we
16 won on our decision that we had a right to do an
17 investigation? And it went all the way to Supreme
18 Court and we won the whole way. I wish we had a
19 newspaper that would actually publish everything
20 instead of just bits and pieces and parts of it.

21 And the other thing I wanted to touch on, too,
22 everybody keeps driving home about the money, the
23 money, the money. I want to tell you something, this
24 country will be lost if we put a price on justice,
25 because just like the sheriff back there, he'll tell
26 you right quick, and I was reading not too long ago in
27 one paper, it's already upwards now to prosecute one
28 person that breaks in your house, by the time they get
29 through prosecuting and putting them in jail, whatever,
30 they're going to spend thirty something thousand
31 dollars. Do you want them to quit prosecuting people
32 that breaks in your house? I don't think so. You
33 start putting a price on justice, this whole country's
34 going to sink. And if you don't stand for something,
35 you ain't nothing. And that's the way I feel about it.
36 Thank you, Mr. Chairman.

37 FRANCIS CROWDER: Thank you. Mr. Dunn.

38 TOMMY DUNN: Thank you, Mr. Chairman. I
39 want to thank my fellow council members tonight, all of
40 them. Ones that voted in favor and ones that voted
41 against. I respect your decisions and I like to think
42 we were friends before and we're friends afterwards.
43 This was a tough decision for everybody and everybody
44 had to make their own decision. It would have been
45 very easy for me to vote tonight with the three that
46 opposed. But I think for the long run, or for the
47 short term, look at it right now for Anderson County,
48 it was best in you like it or not, to move this forward
49 and it will come to light in a few days why we had to
50 do this.

1 But I do want to have just a few quick facts I
2 was going to get out tonight because of some things
3 that's being said. Number one, we do more than the
4 Joey Preston lawsuit. We've done a lot, look at the
5 jobs, go down the list. We can chew chewing gum and
6 walk at the same time. I'm for one not obsessed with
7 the Joey Preston thing, like other people are. Hadn't
8 heard that mentioned. One thing about the legal thing,
9 you lost twice. There is a due process. But whoever
10 go through the channel. That's everybody's process.
11 We got a case that we won twice; they've appealed it
12 for the very same reason. That's their right to get
13 it. Anybody thought Judge Couch was going to change
14 his mind on his ruling, is absurd. Reason I done this
15 before, because of the Freemantle case. See that was a
16 new ?? to the case to see how it would go give a
17 chance. But it was said about the money. Just a few
18 things I would like to get out. Before we come on
19 council the five previous years, the attorney fees was
20 almost over four million dollars. Nobody never has
21 said that. Nobody never wants to talk about that. And
22 one reason they don't because they don't know that.
23 One thing we've done since council's come on, is open
24 and transparent government. I know some of you
25 sometimes don't think so, but you got a right -- this
26 is all public information. It's on the thing,
27 nothing's hidden. Before you had to really dig down
28 and nobody never asked for these and when they did ask
29 for them, they couldn't get the information we paid for
30 attorneys. That's just a fact, that's not no throwing
31 stones or nothing, that's just a bona fide fact.
32 Second things that was brought up tonight was
33 about how much somebody paid for that. Why I've even
34 brought this to Mr. Burn's attention on numerous
35 occasions about FOI requests and how ridiculous some of
36 them get because we helping people sue us to get free
37 information. But said, no, we don't need to do that.
38 Before, as y'all very well know, some of you, you
39 didn't get nothing free in the county. You asked for
40 something you paid for it. Not only didn't you pay a
41 fair price you, in my opinion, you paid an outrageous
42 price for what they wanted to charge for you.
43 Secondly, about our employees. I think we got some
44 great county employees and I wish we could do more.
45 This year we offered to give a five hundred dollar one
46 time pay, hope we give it around Christmas. But just
47 anybody wants in this business note, like business,
48 over the last five years, Anderson County has absorbed
49 five thousand seven hundred and fifty-nine dollars and
50 fifty-two cents per employee on insurance. When city

1 employee, they don't. We pay one hundred percent of
2 the insurance. We've absorbed that. Anyway you want
3 to look at that, if you're in the business world,
4 that's a pay raise. They're not having to eat that.
5 Next thing I would like to bring out, the
6 buses. I don't reckon nobody that wants to ride a bus
7 or CAT bus has been denied that bus. That bus service
8 ain't stopped. This council, I believe the majority of
9 them and the administration is working diligently to
10 bring this to an end. We've gotten no fictitious
11 number, we ain't got to decided nothing by December.
12 We ain't got to decide nothing by January, but we will.
13 We're working on this and getting very close. The only
14 thing I think some of us has said and I know they all
15 probably are places, but I don't know of many places
16 besides Clemson that you can ride anything free. I
17 don't think it's a problem to ask somebody to pay a ??.
18 I think in a way in this world that's what's wrong.
19 There's too many free rides going around and you need
20 to have to pay a little something or other. And it
21 might take a -- I just strongly believe that.
22 And like again, I do want to appreciate the
23 citizens for coming and speaking their thing but the
24 only, too, I'd like to say is everybody trying to know
25 the facts and spread them around. You know this thing
26 gets out three million dollars. And that's, and you
27 can say that, but that's not exactly right. But we got
28 up tonight a couple of speakers got up to five million
29 dollars. Sort of like the old saying you know the
30 Germans, if you say it three times it comes true when
31 you try to do it. Well, that three million dollars, a
32 little bit over that, one thing like Mr. Allen said, I
33 done a lot of door to door when I was running for
34 county council the first time, too. People wanted to
35 know where the money was spent. I never told nobody,
36 nobody was a crook, never said nobody was this or that.
37 I said we'll find out do our best to find out where the
38 money's at. That's where part of that money went, to
39 find out. And we've, as Ms. Wilson alluded to tonight,
40 we have tightened up and changed procedures and due to
41 that was because of the Bob Daniel report, finding out
42 to do that. Other things was, defending ourselves.
43 Call it what you want to. Call what you want to and
44 you say well it wouldn't have happened if you hadn't
45 done this. Well trivial lawsuits. And I might make a
46 lot people mad by saying this, but if we hadn't done
47 what we done, if we hadn't defended one lawsuit, I
48 think we got the best administrator in the state of
49 South Carolina working for us and we wouldn't have had
50 that if we hadn't done what we done, too. So I'm very

1 proud of that and I won't take a back seat for it.
2 Thank you, Mr. Chairman.

3 FRANCIS CROWDER: Thank you. Mr. Waters.

4 KEN WATERS: Yes, sir. And I'll have to
5 agree; this was probably one of the toughest decisions
6 coming in here, knowing who I was going to have face
7 and do what I did. I did talk with my constituents and
8 I do listen to them. I listen to everybody, now, and
9 that's the reason I voted the way I did. I did a lot
10 of research, done a lot of reading and check on that.
11 I stay quiet up here a lot of times because we run out
12 of time before I get a chance to -- and that's okay.

13 Now, to move on, walking and chewing chewing
14 gum at the same time as Mr. Dunn said. Look at where
15 we were at seven years ago and look at where we're at
16 today. You guys know a lot of stuff because we tell
17 you. We're open, we're honest with you and if you'll
18 notice, I don't call anybody a crook either. I don't
19 do that, because you know why? I'm worried about what
20 we're doing to keep taxes lower. Today I had someone
21 call me today and they said that our taxes are lower
22 than Greenville County. That's true because we -- I
23 went over with the assessor and I sat down with him a
24 couple hours and checked into that. There's a couple
25 of places over there that their taxes are lower in
26 Greenville County, but you know what, I don't know that
27 I'd want to live over there. And so, all this is set
28 up in districts.

29 We've come a long way with Anderson County,
30 and working with these guys, I have the most respect
31 for them because they can vote the way they want to. I
32 respect that, just like they respect me for the way I
33 vote. I appreciate all the administrator's done, work
34 close with him. Mike Pitts. Mike Pitts, he's one of
35 the smartest people I know. I talk with him quite a
36 bit, he and I don't always agree. And I tell you what,
37 there's one thing about the man I will say this. I saw
38 him at Home Depot one night. He's the only man I've
39 seen go in Home Depot and be clean. When I go in
40 there, I'm dirty. But anyway, I appreciate the
41 opportunity to do this and it's been fun, enjoyed it.
42 I've got a lot of things done up in District 6 and got
43 a lot of things done in Anderson County. Look at the
44 jobs. Look at the people that's coming here, instead
45 of other places. Think about this. We're looking at
46 over five hundred jobs in the last month that we've
47 offered fee in lieu ofs. We're looking at well over
48 close to probably twenty million dollars in payroll in
49 the next few years. Those jobs somebody didn't
50 mention, that weren't mentioned, that's on those jobs,

1 is benefits and medical care. You know, I think it's
2 pretty good to have a job with medical care. And I
3 think that's how we get medical care, is by getting a
4 job and working and then you get medical care and I
5 think that's the way it should be. And just like I
6 said, working with the different departments when you
7 get started doing this you always miss one. Roads and
8 Bridges, Transportation, working with the people out at
9 the Civic Center. I think I can say this, and Mr.
10 Burns, if you'll back me up, we're looking real good
11 out at the Civic Center. We're not breaking even yet,
12 but we have cut that way down. And that's this council
13 and the workers in Anderson County. It's almost 10:30
14 and so I'm going to go ahead and say, appreciate all
15 the hard work and I'm ready to go home whenever you
16 are.

17 FRANCIS CROWDER: Well, actually they've
18 covered the waterfront and do I have a motion to
19 adjourn? All those in favor, raise your hand. Let the
20 record show it was unanimous of the members present.

21
22

(MEETING ADJOURNED AT 10:30 PM)

The South Carolina Court of Appeals

Anderson County, Appellant,

v.

Joey Preston and the South Carolina Retirement System,
Respondents.

Appellate Case No. 2013-002499

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied; however, the attached opinion is substituted for the previous opinion, Op. No. 5940, which is withdrawn.

Thomas C. Hoff J.
H. Ben W. W. J.

FEW, A.J., not participating.

Columbia, South Carolina

cc:

James Theodore Gentry, Esquire

Troy A. Tessier, Esquire

Candy M. Kern-Fuller, Esquire

FILED

August 16, 2017

Lane Whittaker Davis, Esquire
Justin Richard Werner, Esquire
Wade Stackhouse Kolb, III, Esquire
Alice Witherspoon Parham Casey, Esquire
The Honorable Roger L. Couch

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anderson County, Appellant,

v.

Joey Preston and the South Carolina Retirement System,
Respondents.

Appellate Case No. 2013-002499

Appeal From Anderson County
Roger L. Couch, Circuit Court Judge

Opinion No. 5490
Heard June 11, 2015 – Filed May 31, 2017
Withdrawn, Substituted and Refiled August 16, 2017

AFFIRMED IN PART AND REVERSED IN PART

James Theodore Gentry, Troy A. Tessier, and Wade
Stackhouse Kolb, III, of Greenville, and Alice
Witherspoon Parham Casey, of Columbia, all of Wyche
Law Firm, for Appellant.

Candy M. Kern-Fuller, of Upstate Law Group, LLC, of
Easley, and Lane Whittaker Davis, of Nelson Mullins
Riley & Scarborough, LLP, of Greenville, for
Respondent Joey Preston.

Justin Richard Werner, of Columbia, for Respondent
South Carolina Retirement System.

WILLIAMS, J.: On November 18, 2008, the Anderson County Council (the 2008 Council) voted to approve a severance agreement (the Severance Agreement) for outgoing county administrator Joey Preston. Anderson County (the County) filed the instant action against Preston seeking rescission of that agreement. Following a nonjury trial, the circuit court entered judgment in favor of Preston on all causes of action as well as his counterclaim against the County. The County appeals the circuit court's decision, raising numerous issues on appeal. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Prior to the vote on Preston's Severance Agreement, the political environment in Anderson County was "toxic."¹ Throughout his tenure, Preston was involved in constant litigation—both individually and in his capacity as county administrator—with members of the council he served.

The 2008 Council was comprised of Chairman Michael Thompson and Council members Larry Greer, Ron Wilson, Gracie Floyd, Robert Waldrep, Cindy Wilson, and Bill McAbee. In June 2008, primary challengers ousted three incumbent members of the 2008 Council: Tommy Dunn defeated Thompson, Tom Allen defeated McAbee, and Eddie Moore defeated Greer. Some of the primary victors, as well as Waldrep and Cindy Wilson, ran on platforms calling for examination into and possible reform of the financial and governance practices of the Preston administration.

From June to December 2008, Waldrep and Cindy Wilson held a series of meetings with Moore, Dunn, and Allen at Waldrep's office. During these meetings, the participants laid out an agenda for the incoming Council (the 2009 Council) that included firing the law firm for the County and hiring a new one; hiring a financial investigator or auditor; designating Moore as chairman; drafting resolutions for the first meeting; implementing a hiring freeze; and addressing the position of county administrator and various other personnel matters.

¹ While the circuit court cited numerous examples of troublesome behavior that reflected the "leadership wasteland" existing in Anderson County, we focus only on the events relevant to resolving the issues on appeal.

Cunningham's employment contract, investigate the manner in which he was hired, and review the actions taken by the 2008 Council on November 18, 2008.³

Thereafter, the County sued Preston, alleging causes of action for (1) violation of the State Ethics Act,⁴ section 2-37(g) of the Anderson County Code of Ordinances (the County Code), and the common law; (2) violation of public policy; (3) breach of fiduciary duty; (4) fraud; (5) constructive fraud; (6) negligent misrepresentation; (7) capriciousness, unreasonableness, and fraud; (8) fundamental and substantial breach of the Severance Agreement; (9) breach of fiduciary duties relating to back-dated documents; (10) constructive trust; and (11) unjust enrichment. The County later amended its complaint to include additional factual allegations. Preston filed his answer to the amended complaint, asserting counterclaims against the County and SCRS.⁵ The County then filed a reply to Preston's counterclaims.

On December 12, 2011, the case was designated as complex and assigned for all purposes to the Honorable Roger L. Couch. After hearing arguments, the circuit court denied the parties' cross-motions for summary judgment in all respects on October 23, 2012. As to Preston and the County, the court found summary judgment was inappropriate because genuine issues of material fact existed regarding the claims and counterclaims asserted. The matter was tried without a

³ In *Bradshaw v. Anderson County*, our supreme court held South Carolina Code section 4-9-660 (1986) of the Home Rule Act expressly authorized the 2009 Council—operating under a council–administrator form of government—to directly engage professionals "for the purpose of inquiries and investigations." 388 S.C. 257, 263, 695 S.E.2d 842, 845 (2010). The court found the 2009 Council had the authority to investigate the 2008 Council's business and financial practices, "especially concerning contracts related to the former and current County Administrators." *Id.* at 258, 695 S.E.2d at 842. According to the court, it would be absurd to require the county administrator, "who is answerable to the council and not the electorate, to investigate himself." *Id.* at 263, 695 S.E.2d at 845.

⁴ S.C. Code Ann. §§ 8-13-100 through -1520 (Supp. 2016).

⁵ SCRS asserted cross-claims against Preston in its answer to the County's amended complaint. While the circuit court retained SCRS as a party—finding the extent of its liability was a question of fact—the court excused SCRS from appearing with the parties' consent. The parties also settled Preston's false arrest and abuse of process counterclaims and stipulated to their dismissal prior to trial.

jury from October 29, 2012, to November 5, 2012. In its May 3, 2013 order (the Final Order), the court granted judgment in favor of Preston on all causes of action as well as his counterclaim against the County.

In the Final Order, the circuit court disqualified four 2008 Council members for improperly participating in the votes approving the Severance Agreement. The court found Thompson voted in violation of section 2-37(g)(4)(e) of the County Code because he was seeking future employment from the County through Preston at the time of the vote. The court likewise found Ron Wilson's vote violated subsections 2-37(g)(4)(a) and (e) because Ron Wilson's daughter had recently received a substantial financial benefit from Preston after he extended her personal services contract with the County. Although Waldrep and Cindy Wilson voted against the Severance Agreement, the court found their votes violated section 2-37(g) because both had a "financial interest greater than that of the general Anderson County public" and their participation created "a substantial appearance of impropriety." Given that "Preston agreed not to pursue any further claims against any County Council member," the court found Waldrep and Cindy Wilson "had a direct economic interest"—regardless of the vote's outcome—and should not have participated while he maintained a lawsuit against them individually.

After disqualifying four of the seven members, the court—relying upon *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), and section 2-37(g)(3) of the County Code—nevertheless found "a majority of those present and properly voting approved Preston's Severance Agreement." The court also held, *inter alia*, (1) public policy neither rendered the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor was it a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and the filing of a petition.

In light of the circuit court's Final Order, the County filed a motion to alter or amend the judgment as well as a motion to amend its complaint. Preston filed an answer, and the County submitted a reply. Richard Freemantle, a third party, filed

a post-trial motion to intervene. The circuit court, however, denied all of the parties' post-trial motions in an order (the Post-Trial Order) dated November 8, 2013. This appeal followed.

ISSUES ON APPEAL

- I. Did the circuit court err in concluding Preston owed no fiduciary duty to inform the County of improper votes and finding his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation?
- II. Did the circuit court err in finding a single tainted vote did not require invalidation of the Severance Agreement's approval or mandate its rescission?
- III. Did the circuit court err in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum?
- IV. Did the circuit court err in holding future payments from SCRS to Preston were not available in fashioning a remedy?
- V. Did the circuit court err in holding rescission was an unavailable remedy?
- VI. Did the circuit court err in finding the County acted with unclean hands?
- VII. Did the circuit court err in concluding the County could not invoke its equitable powers because an adequate remedy at law existed?
- VIII. Did the circuit court err in holding the County breached the terms of the Severance Agreement by bringing the instant lawsuit?

STANDARD OF REVIEW

Because the County's main purpose in bringing the instant lawsuit was to rescind the Severance Agreement, this action is equitable in nature. *See ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (per curiam). In an equitable action, this court reviews factual findings and legal conclusions de novo. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). "Therefore, we may find facts according to our own view of the preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, we are free to decide

"question[s] of law with no particular deference to the circuit court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Our de novo review, however, does not require this court to disregard the circuit court's findings or "ignore the fact that the [circuit] court is in the better position to assess the credibility of the witnesses." *Ripley Cove*, 406 S.C. at 412, 751 S.E.2d at 669 (quoting *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011)). Further, this broad scope of review does not relieve the appellant of the burden of demonstrating the circuit court erred in its findings. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

LAW/ANALYSIS

I. Preston's Knowledge of Conflicts of Interest

First, the County contends the circuit court erred in finding Preston's failure to inform the 2008 Council of Thompson and Ron Wilson's conflicts of interest prior to the Severance Agreement's approval did not constitute a breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation.

A. Breach of Fiduciary Duty

The County argues Preston—in his capacity as county administrator—owed the highest duty of loyalty and breached this duty by knowingly allowing Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes in favor of his Severance Agreement. According to the County, Preston had a duty to make these conflicts of interest known because he was still employed as county administrator when he attended the vote affecting his own interest. We disagree.

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

"A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so

reposing." *Id.* at 251, 599 S.E.2d at 472. "The evidence must show the entrusted party actually accepted or induced the confidence placed in [it]." *Id.*

In the instant case, the circuit court held Preston owed no fiduciary duty to disclose information about his employment claims to the 2008 Council because Preston and the County had assumed adverse positions by October and November of 2008.

Although Preston owed the County a fiduciary duty throughout his employment as county administrator,⁶ in this particular context, the County had no foundation for believing Preston would not act in his own interest to achieve the best possible settlement of his claims against the County. *See generally Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (explaining that, for a plaintiff "[t]o establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing"). The parties clearly had opposing interests throughout settlement negotiations and remained adverse to one another during the 2008 Council's vote on the Severance Agreement. Moreover, in preparation of litigation, the County and Preston each retained attorneys to represent their respective interests. In light of these facts and circumstances, we are unable to find any basis upon which the County could have reasonably believed Preston would act on its behalf—instead of representing his own interests—while trying to settle his employment claims against the County. Because the parties were directly adverse to one another, we hold Preston owed no duty to disclose Thompson and Ron Wilson's conflicts of interest during the vote on his Severance Agreement. *See id.*; *see also Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App. 2006) ("[A]dverse parties who have retained professional counsel . . . do not owe fiduciary duties to one another.").

⁶ *See, e.g., Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985) ("It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." (quoting *Berry v. Goodyear Tire & Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978))).

Our holding is further supported by the State Ethics Act⁷ and the County Code,⁸ neither of which give Preston a legal duty to disclose Council members' conflicts of interest. To the contrary, the relevant provisions imposed only a positive legal duty on Council members—not the county administrator—to disclose their own personal conflicts and abstain from voting if necessary. Further, when questions on conflicts of interests did arise, the County Code instructed members to seek guidance from the county attorney, not the county administrator. *See* Anderson County, S.C., Code of Ordinances § 2-289 (2000) (providing when an official "has

⁷ *See, e.g.*, Act No. 248, 1991 S.C. Acts 1616–17 ("No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest." (current version at S.C. Code Ann. § 8-13-700(B) (Supp. 2016))).

⁸ *See, e.g.*, Anderson County, S.C., Code of Ordinances § 2-288(a)(6) (2000) ("A councilmember who has a financial or other private interest in any legislation shall disclose on the records of the county council the nature and extent of such interest. . . . A councilmember shall disqualify himself from voting if the matter under consideration involves his personal or financial interest to the extent such interest conflicts with his official duties and would impair his independence or judgment."); § 2-37(g)(4) ("No member [of Council] shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public, or in which he/she is otherwise disqualified by any state or county law or regulation. Each member shall make known, in the manner required by law, any such disqualifying interest and refrain from voting upon or otherwise participating, in his capacity as a county officer, in matters related thereto."). Subsection 2-37(g)(4) further provides, in relevant part, that a "member shall be deemed to have a personal or financial interest" in the following situations: the member "has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or direct descendant) has such an interest;" the member "has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter;" the member "is so deemed by any state law or regulation;" or the member "cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety."

doubt as to the applicability of a provision of [the ethics] division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given").

Based on the foregoing, we affirm the circuit court's finding that Preston owed no fiduciary duty to disclose Thompson and Ron Wilson's conflicts of interest during the 2008 Council's vote on his Severance Agreement.

B. Fraud, Constructive Fraud, and Negligent Misrepresentation

The County further contends Preston's failure to disclose the facts that rendered Thompson and Ron Wilson's votes improper amounted to fraud, constructive fraud, and negligent misrepresentation. We disagree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [that person] or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). To establish fraud, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35–36, 694 S.E.2d 43, 45 (Ct. App. 2010) (quoting *Schmauch*, 354 S.C. at 672, 582 S.E.2d at 444–45). "Failure to prove any element of fraud is fatal to the action." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004)). Nondisclosure is fraudulent when a party has a duty to speak. *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445.

The duty to disclose may be reduced to three distinct classes: (1) whe[n] it arises from a preexisting definite fiduciary relation between the parties; (2) whe[n] one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; [and] (3) whe[n] the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. at 673–74, 582 S.E.2d at 445–46 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (quoting *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985)). "To establish constructive fraud[,] all elements of actual fraud except the element of intent must be established." *Id.* at 506, 431 S.E.2d at 263. "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." *Id.* at 505, 431 S.E.2d at 263 (quoting *Giles*, 285 S.C. at 288, 328 S.E.2d at 918).

When no confidential or fiduciary relationship exists, "and an arm's length transaction between mature, educated people is involved," a party has no right to rely on the other's representations. *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993). "This is especially true in circumstances whe[n] one should have utilized precaution and protection to safeguard his interests." *Id.* at 516–17, 431 S.E.2d at 270.

In a negligent misrepresentation action, a plaintiff must prove six elements:

- (1) the defendant made a false representation to the plaintiff,
- (2) the defendant had a pecuniary interest in making the statement,
- (3) the defendant owed a duty of

care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001).

"Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." *Id.* at 42, 557 S.E.2d at 681.

In the instant case, we find the circuit court properly determined the County failed to meet its burden of proving the claims for fraud, constructive fraud, and negligent representation. Because the Severance Agreement's negotiation constituted "an arm's length transaction between mature, educated people"—all of whom were represented by counsel—we hold the County had no right to rely upon any false representations allegedly made by Preston. *See Ardis*, 314 S.C. at 516, 431 S.E.2d at 270. Preston also had no fiduciary duty to disclose Council members' conflicts of interest, and thus, his silence did not constitute fraud. *Cf. Moore*, 360 S.C. at 251, 599 S.E.2d at 472; *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445. As noted above, the elected officials—not Preston—owed positive legal duties to disclose their own personal conflicts of interest and disqualify themselves from voting under both the County Code and the State Ethics Act. Moreover, our courts have repeatedly recognized the general rule that fraud cannot be predicated on misrepresentations as to matters of law, much less mere mistakes of law. *See First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945); *Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Ct. App. 1987). Given that the parties were clearly in adversarial positions at the time of the vote, the County had no basis for believing Preston owed it a legal duty to disclose information adverse to his claim, nor did it have a right to rely upon Preston's representations.

Based on the foregoing, we affirm the circuit court's finding that Preston's silence during the November 18, 2008 meeting did not constitute fraud, constructive fraud, or negligent misrepresentation. *See Robertson*, 350 S.C. at 348, 565 S.E.2d at 314 (noting that "[f]ailure to prove any element of fraud is fatal to the action"); *Woods*, 314 S.C. at 506, 431 S.E.2d at 263 (noting that, to prove constructive fraud, "all elements of actual fraud except the element of intent must be established");

Stewart, 348 S.C. at 42, 557 S.E.2d at 680–81 (requiring that, to establish negligent misrepresentation, a plaintiff must have "justifiably relied on the representation").

II. Tainted Votes

The County further contends the circuit court erred in finding a single tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission. We disagree.

The County does not advocate for a general rule that would require South Carolina courts to overturn legislation due to a single tainted vote; rather, the County argues courts should apply the single tainted vote rule in rare cases involving egregious circumstances. Specifically, the County contends Ron Wilson and Thompson's tainted votes required invalidation of the 2008 Council's approval of the Severance Agreement in the instant case because the following extraordinary factors were present: (1) the agreement conferred a private benefit on one individual and was not a law of general application; (2) the agreement was passed by a "simple motion," rather than in the form of an ordinance that would require public notice and three readings; (3) the process by which the agreement was passed involved procedural irregularities; (4) members failed to disclose conflicts of interest; (5) the motion was presented by a member with a conflict of interest; and (6) approval of the agreement was not subject to the normal process of political redress.

The County relies upon several cases from other jurisdictions to support its proposed application of the single tainted vote rule. *See, e.g., Dowling Realty v. City of Shawnee*, 85 P.3d 716, 721–22 (Kan. Ct. App. 2004) (remanding the case to the trial court with directions to send it back to the city planning commission because a local government officer, who advocated approval of his project to "the governmental body of which he . . . [was] a member without identifying himself . . . as having a substantial interest in the project," acted in violation of Kansas ethics rules); *Appeal of City of Keene*, 693 A.2d 412, 415–16 (N.H. 1997) (voiding the county commissioners' denial of the city's request for a determination of public necessity on the grounds that a judicial action by a tribunal is voidable when a member is disqualified but still participates, regardless of whether the disqualified member's vote produces the outcome); *Thompson v. City of Atlantic City*, 921 A.2d 427, 430–43 (N.J. 2007) (voiding a settlement agreement between the mayor and the city as contrary to public policy based upon the involvement of several parties with conflicts of interest).

While we recognize courts in other jurisdictions have invalidated governmental actions based upon a single tainted vote, we are unable to find any South Carolina authority to support this court taking such an extraordinary action. In fact, our precedent suggests South Carolina does not follow the single tainted vote rule. In *Baird*, our supreme court considered whether a court has jurisdiction to invalidate an ordinance based upon tainted votes. 333 S.C. at 535, 511 S.E.2d at 77–78. There, a group of doctors sued Charleston County, arguing a bond ordinance was invalid because a county council member with a conflict of interest voted on the matter in violation of the State Ethics Act. *Id.* at 535, 511 S.E.2d at 77. In determining whether invalidating the bond ordinance was an appropriate remedy for a State Ethics Act violation, the court found the following:

[T]he vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77–78 (citation omitted).

We read the second sentence in the above quote from *Baird* to also stand for the proposition that a court does *not* have jurisdiction to invalidate an ordinance if, after excluding the improper vote, the requisite number of votes to pass the ordinance still exists. Because *Baird* indicates we do not follow the single tainted vote rule in South Carolina, we find the circuit court properly declined the County's invitation to apply it in the instant case. Accordingly, we affirm the court's finding that one tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission.

III. Absence of a Quorum

Next, the County argues the circuit court erred in finding its quorum argument was not preserved, and in addressing the merits of the claim, ruling a quorum existed—despite the invalidation of four votes—because the Severance Agreement was passed by a majority of those Council members present and voting. We agree.

As a preliminary matter, we must determine whether the County properly raised the quorum argument below such that it is preserved for appellate review.

"A post-trial motion must be made when the [circuit] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enft Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); *see also* J. TOAL, A. WALKER & M. BAKER, *APPELLATE PROCEDURE IN SOUTH CAROLINA* 189 (3d ed. 2016) ("Post-trial motions are . . . utilized to raise issues that could not have been raised at trial.").

After entry of the Final Order, the County filed a motion to reconsider, arguing the circuit court's "invalidation of four total votes mean[t] there was no quorum for the vote on [the Severance Agreement], rendering the vote void." In the Post-Trial Order, the court found the quorum issue was not preserved because the County failed to present the issue to the court, despite having ample opportunity to raise it.

Unlike the circuit court, we find the prospect of a quorum being destructed did not exist until the court invalidated four Council members' votes in the Final Order, and in doing so, granted relief that was not requested by either party. Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated. The County repeatedly argued in favor of invalidating the votes of Thompson, Ron Wilson, and McAbee. Nevertheless, invalidating three votes would not have destroyed the quorum.

At trial, the circuit court noted the issue of whether Cindy Wilson and Waldrep had conflicts of interest "has come up as an allegation" and stated as follows:

I didn't remember this being alleged or discussed during our pretrial motion period, that the two votes I want to say that weren't in favor because one time it was an abstention and one time it was a vote against, should also not count because they had a dog in the fight. I don't know whether that's ple[aded]. I don't know if it[] just wasn't argued. It's come up as an argument now, and I . . . went over the pleadings before we started, and I started off with hearings going over those, and I don't recall that being something that was ple[aded], but maybe it has been. I don't know. So, I'm [going to] ask you about that, and I'll give you a chance to tell me about your side of it in just a minute, Mr. Davis.

The court, however, never ruled at trial on whether Cindy Wilson or Waldrep's votes were invalid based upon their conflicts of interest. The court did not find

Cindy Wilson and Waldrep were disqualified from voting due to conflicts of interest until it issued the Final Order. Therefore, once the court decided to invalidate Thompson and Ron Wilson's votes, along with Cindy Wilson and Waldrep's votes, the quorum issue arose.

Because the argument regarding Cindy Wilson and Waldrep's votes was not raised prior to trial or ruled upon during trial—and the County argued only for the disqualification of Thompson, Ron Wilson, and McAbee—we find the question of whether a quorum existed first arose when the circuit court invalidated the votes of four Council members due to conflicts of interest in the Final Order. Accordingly, we hold the County's Rule 59(e) motion was the proper means by which to raise the argument that the Severance Agreement should be invalidated because the 2008 Council passed it in the absence of a quorum. *See Fryer*, 369 S.C. at 399, 631 S.E.2d at 920; *TOAL ET AL.*, *supra*, at 189. Further, while the circuit court initially found the quorum issue was not preserved, we note the court also addressed the merits of the parties' quorum arguments in the alternative. Based on the foregoing, we find the County's argument is preserved for appellate review because it was properly raised to and ruled upon by the circuit court.

Turning to the merits, the County argues the circuit court erred in finding the 2008 Council's approval of the Severance Agreement was valid because—contrary to the court's findings—the disqualification of four Council members destroyed the quorum necessary for conducting valid business. We agree.

In the Post-Trial Order, the circuit court found a quorum was present and the vote was valid for the following reasons: (1) a quorum is determined based on a person's presence at the meeting, not on voting ability; (2) "the County's Code did not require a majority of Council to vote on an issue to be a valid vote, but rather a majority of those present and voting to carry the question"; (3) "the County's prior interpretation and usage under its own Code . . . allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site"; and (4) "the County Code expressly incorporated [the Freedom of Information Act⁹] and the State Ethics Act—both of which define quorum without reference to voting disqualifications—into County meeting procedures."

Section 2-37(g)(3) of the County Code provides, "Except where otherwise specified in these rules, a majority vote of those members present and voting shall

⁹ S.C. Code Ann. §§ 30-4-10 through -165 (2007 & Supp. 2016).

decide all questions, motions, and other votes." Section 2-37(d) defines a quorum as follows:

A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

In the instant case, the circuit court invalidated four of the Council member's votes. The County Code, however, provides no guidance for situations in which a vote is invalidated due to a member's conflict of interest. For issues of parliamentary procedure not addressed in the County Code, it provides as follows:

In all particulars not determined by these rules, or by law, the chairperson or other presiding officer shall be guided by the previous usage of county council or by parliamentary law and procedure as it may be collected from Roberts [sic] Rules of Order, latest edition.

Anderson County, S.C., Code of Ordinances § 2-37(g)(12) (2000).

The County Code states the Council may not take a vote during the temporary absence of a quorum, but it does not specifically address what happens when such a vote is taken. Therefore, we look to *Robert's Rules of Order*, which provides, "In the absence of a quorum, any business transacted . . . is null and void." HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER § 40, at 347 (11th ed. 2013).

Although *Robert's Rules of Order* renders any business transacted in the absence of a quorum null and void, it does not address the effect of an invalidated vote on the calculation of a quorum. Nevertheless, South Carolina courts have repeatedly addressed this issue as it relates to various governing bodies. In *Garris v. Governing Board of South Carolina Reinsurance Facility*, for example, our supreme court considered the effect of a disqualified vote in a corporate context and stated the following:

In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (citations omitted).

Prior to *Garris*, our supreme court repeatedly stated the general rule that a corporation's director or board member with a personal interest in a corporate matter may not be "counted to make a quorum at a meeting where the matter is acted upon." See *Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 186, 64 S.E.2d 524, 529 (1951); *Fid. Fire Ins. Co. v. Harby*, 156 S.C. 238, 246–47, 153 S.E. 141, 144 (1930); *Peurifoy v. Loyal*, 154 S.C. 267, 288, 151 S.E. 579, 586 (1930).

Likewise, in *Baird*, our supreme court addressed the effect of a disqualified vote in the context of a county council vote. 333 S.C. at 535, 511 S.E.2d at 77–78. Specifically, the *Baird* court considered the issue of "whether invalidation of a bond ordinance [was] a proper remedy for a violation of the State Ethics Act." *Id.* at 535, 511 S.E.2d at 77. As previously noted, the court stated "the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining *the necessary majority for valid action*." *Id.* (emphasis added). *Robert's Rules of Order* defines a quorum as "[t]he minimum number of members who must be present at the meetings of a deliberative assembly *for business to be validly transacted*." ROBERT ET AL., *supra*, § 3, at 21 (emphasis added). When read in conjunction with the definition of a quorum in *Robert's Rules of Order*, we interpret the court's language in *Baird* to mean a council member who is disqualified due to a conflict of interest may not be counted toward a quorum.

Based upon our review of the relevant authority, we find a council member who has a personal interest in a matter—and votes on the matter—is disqualified from the vote and may not be counted toward the quorum. Our position is supported by South Carolina precedent relating to both corporate boards and county councils. See *Baird*, 333 S.C. at 535, 511 S.E.2d at 77–78; *Talbot*, 259 S.C. at 82, 190

S.E.2d at 764; *Gilbert*, 219 S.C. at 186, 64 S.E.2d at 529; *Fid. Fire Ins. Co.*, 156 S.C. at 246–47, 153 S.E. at 144; *Peurifoy*, 154 S.C. at 288, 151 S.E. at 586.

Applying the rule to the facts of this case, we find the disqualification of Thompson, Ron Wilson, Waldrep, and Cindy Wilson—based upon their individual conflicts—required the court to remove them from its calculation of the quorum. Under the County Code and *Robert's Rules of Order*, a quorum—a majority of those members present and voting—was required for the Council to validly transact business. See Anderson County, S.C., Code of Ordinances § 2-37(d), (g)(3); ROBERT ET AL., *supra*, § 3, at 21; see also *Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942) ("[A] majority of a whole body is necessary to constitute a quorum . . . , and no valid act can be done in the absence of a quorum."). After removing the improper votes, however, only three of the seven Council members could be counted toward the quorum. Given that four members must be present and voting to constitute a quorum, we find the Severance Agreement is null and void because the 2008 Council approved the agreement, as well as the motion to transfer monies to fund it, without the quorum necessary for taking valid action. Accordingly, we hold the circuit court erred in failing to remove the four disqualified members' votes from its quorum calculation.

Although some may argue this creates an impracticable framework, we note the 2008 Council had several procedural options at its disposal through which it could have passed the Severance Agreement in spite of a majority of Council having personal conflicts. For instance, members with conflicts could have *abstained* from voting, and their abstentions would have allowed them to be counted toward the quorum without tainting the entire vote. Unlike in the case of a recusal—in which a member physically leaves the room to avoid participation—when a member properly abstains, it does not have the effect of defeating a quorum because the member is still physically present. See generally *Gaskin*, 198 S.C. at 513–14, 18 S.E.2d at 456 ("If a quorum is present, a majority of a quorum is sufficient to act and bind the entire body. The members *who are present at a meeting cannot by a mere refusal to vote* defeat the action of the majority of those voting." (emphasis added) (citation omitted)). In this case, because four Council members were *disqualified*, those members are not counted for purposes of the quorum, and therefore, are treated as if they were not present at the meeting. See *Garris*, 333 S.C. at 453, 511 S.E.2d at 59 ("A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.").

Based on the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum. Therefore, we reverse the circuit court's holding regarding the quorum issue.

IV. Availability of Future Payments from SCRS

The County contends the circuit court erred in declining to have Preston's monthly retirement benefit from SCRS placed in a constructive trust and redirected to the County. The circuit court did not reach the merits of this issue in the Final Order. Instead, the court held that, given its previous findings, the County's "cause of action for constructive trust no longer remain[ed] viable." In light of our holding in Part III, *supra*, we reverse.

V. Rescission

The County contends the circuit court erred in finding rescission was unavailable because the parties cannot be returned to their status quo ante. We disagree.

"Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *Ripley Cove, LLC*, 406 S.C. at 413, 751 S.E.2d at 669 (quoting *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009)).

A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) whe[n] the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) whe[n] the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) whe[n] the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) whe[n] the mistake is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a wrong to enforce the agreement, sustained by competent evidence of the clearest kind.

King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984). Nevertheless, as our supreme court has noted, "there can be no rescission of a nonexistent contract." *Davis v. Cordell*, 237 S.C. 88, 98, 115 S.E.2d 649, 654 (1960). A cause of action seeking rescission and damages assumes a valid contract, whereas one attacking the contract as void assumes no contract existed. *Id.* at 98, 115 S.E.2d at 653–54.

"In the absence of fraud[,] which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King*, 282 S.C. at 313, 318 S.E.2d at 129.

"When a party elects and is granted rescission as a remedy, [the party] is entitled to be returned to status quo ante." *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

"Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore [the party] to the position occupied prior to the making of the contract." *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989). Because rescission returns the parties to the status quo ante, this necessarily requires any party damaged to be compensated. *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

In *Griggs v. E.I. DuPont de Nemours & Co.*, the U.S. Court of Appeals for the Fourth Circuit stated "the inability to compel full restoration of benefits received under the instrument to be rescinded does not automatically preclude the granting of equitable rescission." 385 F.3d 440, 452 (4th Cir. 2004). The court considered various authorities to determine whether a rescissionary remedy could be fashioned that would eliminate the prejudice stemming from one party's delay in seeking rescission. *Id.* at 452; *see also, e.g., Henson v. James M. Barker Co.*, 555 So. 2d 901, 909 (Fla. Dist. Ct. App. 1990) ("In the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief."); 24 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:51 (4th ed. 2002) ("Where circumstances permit, some courts also have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer. This is the most practicable and satisfactory disposition of many cases."). After reviewing these authorities, the Fourth Circuit granted rescission based on the following reasoning:

Because Griggs's delay in seeking rescission has lessened the likelihood that he will be able to recover the tax payments made on the lump-sum distribution, our remedy properly forces Griggs, not DuPont, to bear the

risk that the tax payments will not be fully recovered. Under these circumstances, Griggs's delay in seeking rescission works no prejudice on DuPont, thus making it proper and equitable to grant rescission without requiring Griggs to make complete restoration of the benefits he received in connection with his initial lump-sum election. At the same time, because the relief we describe allows Griggs to rescind his lump-sum election and instead receive a monthly payment for life (albeit in a lesser amount), DuPont's breach of fiduciary duty does not go unremedied.

Griggs, 385 F.3d at 452–53 (footnote omitted).

In light of our invalidation of the Severance Agreement, we find rescission is an unavailable remedy because the contract never existed. *See Cordell*, 237 S.C. at 98, 115 S.E.2d at 654 (noting "there can be no rescission of a nonexistent contract"). We further find rescission inappropriate because the parties cannot be returned to their status quo ante. *See Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. Although the County would benefit from a return of the monies improperly allocated to fund the void Severance Agreement, Preston cannot be returned to the county administrator position and—at this stage—it is unclear what remedies, if any, he would be entitled to under his Employment Agreement because the circuit court has not ruled upon its validity.

The County relies upon *Griggs* and cites cases from other jurisdictions—as well as secondary sources—in support of its argument that "equity is not as straight-jacketed" as the circuit court suggested. *See, e.g., East Derry Fire Precinct v. Nadeau*, 924 A.2d 390, 393–94 (N.H. 2007) (finding that, when a party was "an active participant in the scheme" to create a fraudulent severance agreement approved by commissioners at a meeting, rescission was appropriate even though it deprived the party of a severance he would have received anyway, based on later events, had he stayed on the job); 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault."). We find these authorities distinguishable, however, because the record in the instant case does not support a finding that Preston engaged in fraudulent conduct, *see Nadeau*, 924 A.2d at 393–94, breached a fiduciary duty, *see Griggs*, 385 F.3d at 453, or was at fault, *see* 17B C.J.S. *Contracts* § 652. Accordingly, we find the County failed to demonstrate why the facts and circumstances of this case

justify this court employing an exception to fashion a remedy that does not fully return the parties to their status quo ante.

Based on the foregoing, we affirm the circuit court's finding that rescission is unavailable as a remedy in this case because the parties cannot be returned to their status quo ante.

VI. Unclean Hands

The County further argues the circuit court erred in finding it acted with unclean hands in this matter and could not invoke the court's equitable powers to rescind the Severance Agreement. We agree.

A party with unclean hands is precluded from recovering in equity. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005). "A party will have unclean hands whe[n] the party behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000)). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). "[T]he rule must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a [c]ourt of equity." *Id.*

In the Final Order, the circuit court found the record was "replete with evidence of the County's unclean hands" and proceeded to list the conduct it believed supported this finding. After providing a lengthy list of actions, the court concluded:

[W]hen taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as [c]ounty [a]dministrator.

We hold the circuit court erred in finding the County had unclean hands for two reasons. First, the listed actions taken by incoming members of the 2009 Council are irrelevant to the analysis of this issue because those individuals had not been sworn into office yet, and therefore, had no authority to act on behalf of the County. While the court acknowledged these individuals' conduct could not be

attributable to the County, it nevertheless included their conduct in the list and used such conduct as a basis for finding the County had unclean hands. To the extent the circuit court relied upon the actions of the incoming Council members, we agree with the County's contention that it "confused the political rhetoric of primary winners with actual County conduct."

Most of the remaining conduct the circuit court cited concerns actions taken by Waldrep and Cindy Wilson toward Preston during his tenure as county administrator, for which he sued both of them in their *individual capacities*, not their capacities as Council members. We find the conduct of two Council members acting in their individual capacities may not, however, be imputed to the County. Accordingly, we hold the circuit court erred in considering the conduct of "others" in reaching its conclusion. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738 (noting "[t]he expression 'clean hands' means a clean record with respect to the transaction with *the defendants themselves* and *not with respect to others*" (emphasis added)); *see also* 30A C.J.S. *Equity* § 118 (2015) ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible . . .").

Second, we find the listed conduct had nothing to do with the subject matter of this litigation. In the Final Order, the circuit court primarily focused its analysis upon the actions of two individual Council members, Waldrep and Cindy Wilson, dating back to 2005. In concluding the County had unclean hands, the court specifically found the behavior of Waldrep and Cindy Wilson—along with incoming members of the 2009 Council—"prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance."

As noted above, the County was not responsible for the conduct of its incoming Council members, and thus, their conduct prior to taking office is irrelevant here. We find the court's reliance upon meetings that took place between incoming Council members in 2009 misplaced because the instant matter concerns actions leading up and relating to the November 18, 2008 meeting of the 2008 Council. What occurred after this meeting among individuals not yet sworn into office simply has no bearing upon the resolution of this issue. More importantly, much of the conduct referenced by the circuit court was already litigated in separate matters not before the court.

For these reasons, we hold the circuit court erred in considering conduct that—although indicative of "the atmosphere that surrounded the actors in this case"—was irrelevant to the subject matter of the instant litigation. *See Arnold*, 201 S.C.

at 532, 23 S.E.2d at 738; *Anderson*, 365 S.C. at 493, 617 S.E.2d at 756. We find the court ignored the requirements of *Arnold* and *Anderson* in concluding such conduct prejudiced Preston in the execution of his duties as county administrator because, simply put, Preston's ability to execute his duties as county administrator has nothing to do with this case. The instant litigation focuses on whether improper conduct at the November 18, 2008 meeting of the 2008 Council requires this court to invalidate the approval of Preston's Severance Agreement and rescind the agreement itself. Furthermore, Preston had already relinquished his position as county administrator before the 2009 Council decided to bring this action.

Based on the foregoing, we hold the circuit court erred in finding the County could not invoke its equitable powers to rescind the Severance Agreement because the County had unclean hands. Although we agree rescission is unavailable as a remedy in this case, we reverse the circuit court's finding that the County had unclean hands.

VII. Adequate Remedy at Law

The County contends the circuit court further erred in finding equitable relief was unavailable in this case because an adequate remedy at law existed. We agree.

Generally, equitable relief is available only when no adequate remedy at law exists. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* Our supreme court has consistently held that "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002).

In the Final Order, the circuit court concluded if the County "wished to question the legality of the Severance Agreement," then it could have accomplished this goal by bringing a declaratory judgment action challenging the legality of the 2008 Council's actions "without suing Mr. Preston directly for rescission."

Contrary to the circuit court's findings, the County argues it could not have received the complete relief sought—the return of all monies appropriated to fund

the Severance Agreement—without the court invalidating the vote, rescinding the contract, and imposing a constructive trust on Preston's monthly retirement benefits. The County's main purpose in bringing this action was to seek the above equitable relief, not merely to question the legality of the Severance Agreement. Because the anti-alienation provision in section 9-1-1680 of the South Carolina Code (Supp. 2016), only allows a party to reach a retiree's benefits in a constructive trust case, we find no adequate remedy at law existed as to this equitable claim. Regardless of whether rescission was available, the County could not have received complete relief without the court invoking its equitable powers to place Preston's retirement benefits in a constructive trust. Thus, we find a declaratory judgment action would not have afforded the complete relief sought in this action. *See Santee Cooper*, 298 S.C. at 185, 379 S.E.2d at 123 (noting "[a]n adequate remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity" (citation omitted)). Further, as noted above, a declaratory judgment action can be equitable in nature—and indeed, would have been given the relief sought in this case.

Accordingly, given that no adequate remedy at law existed, we reverse the circuit court's finding that the County could not invoke its equitable powers because the County could have challenged the Severance Agreement's legality via a declaratory judgment action instead of directly suing Preston.

VIII. Breach of the Severance Agreement

In light of our previous holding that the Severance Agreement is invalid because it was approved during an absence of a quorum, we find Preston can no longer succeed on his breach of contract counterclaim. Accordingly, we reverse the circuit court's finding that the County breached the covenant not to sue provision in the Severance Agreement by bringing the instant action. We decline to address whether attorney's fees are appropriate because the circuit court found this issue "should be held in abeyance pending the final disposition of this case and the filing of any petition as required by law."

IX. Remaining Issues

Finally, because our resolution of prior issues is dispositive in this appeal, we decline to rule upon whether the circuit court erred in finding the Severance Agreement was not unreasonable and capricious; a product of fraud and abuse of power; or void as against public policy. *See Futch v. McAllister Towing of*

Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Like the circuit court, we are mindful of the separation of powers concerns attendant to the judicial branch of government overturning the action of a duly elected county council, and therefore, take this opportunity to clarify that nothing in this opinion shall be construed as passing judgment on the merits or propriety of the 2008 Council's decision. Our decision hinges on the narrow question of whether the 2008 Council had legal authority to approve the Severance Agreement when four of the seven members, despite having clear conflicts of interest, improperly cast their votes on the matter. We hold the 2008 Council had no such authority because it could not legally act in the absence of a quorum. As a result, the Severance Agreement is null and void.

We affirm the circuit court's finding that Preston owed no fiduciary duty to inform the 2008 Council of improper votes and his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation. The circuit court also properly declined the County's invitation to apply the single tainted vote rule because *Baird* demonstrates South Carolina does not follow such rule. We hold the court erred, however, in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum, and accordingly, we reverse. Although we agree with the circuit court that rescission is not an available remedy because the parties cannot be returned to their status quo ante, we reverse the court's finding of unclean hands. We further reverse the court's finding that the County ~~could not invoke its equitable powers because an adequate remedy at law existed.~~ Lastly, we reverse the court's holding that the County breached the terms of the Severance Agreement by bringing the instant action.

AFFIRMED IN PART and REVERSED IN PART.

HUFF, J., concurs. FEW, A.J., not participating.