IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2020-000080

Herman Perry Holcomb, Respondent,

v.

City of North Augusta and Mayor and
City Council of North Augusta, Appellants.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN CONSTRUING THE AMENDMENT OF AN EXHIBIT OF A RESOLUTION, ALREADY LISTED ON THE AGENDA, AS AN ITEM THAT WAS "ADDED TO THE AGENDA" IN VIOLATION OF THE STATE FREEDOM OF INFORMATION ACT (FOIA)?

II. DID THE CIRCUIT COURT ERR IN FINDING AND CONCLUDING THAT THE BACKGROUND DOCUMENTS POSTED ONLINE WITH AN AGENDA CONSTITUTED THE MEETING "AGENDA" FOR PURPOSES OF THE STATE FREEDOM OF INFORMATION ACT?

III. DID THE CIRCUIT COURT ERR AS A MATTER OF LAW IN PERMANENTLY ENJOINING THE CITY "FROM FUTURE SIMILAR VIOLATIONS" WITHOUT FURTHER SPECIFICATION OR A CLEAR STATEMENT OF THE VIOLATION?

IV. DID THE CIRCUIT COURT ERR IN AWARDING ATTORNEY'S FEES AS A MATTER OF RIGHT IN A NOVEL FOIA CASE AND WITHOUT THE SIX FACTORS FINDINGS REQUIRED BY OUR CASE LAW?

STATEMENT OF THE CASE

By his Amended Complaint filed on November 28, 2018 (Amended Complaint), the Plaintiff/Respondent Herman Perry Holcomb ("Holcomb") sought injunctive relief and a declaration by the circuit court that the Defendants/Appellants (jointly, the "City") violated S.C. Code Ann. section 30-4-80(A) of the State Freedom of Information Act (S.C. Code Ann. section 30-4-10 et seq.). The violation alleged in the Amended Complaint was that the City Council, by a duly approved motion at a regular Council meeting, added a new project to a list of proposed City projects attached as an Exhibit to a Resolution that was listed on the agenda. The Amended Complaint characterized this action by the Council as "amending the agenda item" [Amended Complaint, paragraph 16] or the Council having "amended the agenda item" [Amended Complaint, paragraphs 15, 18, and 19].

The Answer to the Amended Complaint, among other things, denied any violation of the FOIA by the amendment of the list of projects, and denied that the "agenda" for the meeting was amended. The Answer asserted that only a single page (captioned as "AGENDA: REGULAR CITY COUNCIL MEETING") of Exhibit 1 to the Amended Complaint was the "agenda" and that the remainder of the documents in Exhibit 1 were the agenda packet [Answer, paragraphs 8, 12, 14, 23, and 24]. The Answer further asserted that the amendment of the list of projects attached to the Resolution was not an amendment of an agenda as contemplated by the FOIA [Answer, paragraphs 18, 23, and 24]. Rather, according to the Answer, the amendment at the meeting was an amendment to the internal content of an item already listed on the agenda [Answer, paragraphs 14, 23, and 24].

Concurrently with the filing of the Answer to the Amended Complaint, the City requested an "initial hearing" as provided by S.C. Code Ann. section 30-4-100(A). [Request for hearing].

That "initial hearing" was held before the circuit court on January 15, 2019, at which the parties offered witnesses (Holcomb and former City Clerk Donna Young), introduced documentary evidence, and presented written and oral argument. At the hearing, the parties did not request a need for discovery or for further factual development and requested that the circuit court rule on the merits of the action. At the conclusion of the hearing, the circuit court requested submission of proposed final orders from both Holcomb and the City.

On October 7, 2019, the circuit court signed and filed the proposed Order submitted by the City. [October 7 Order]. That Order found as fact, based on the hearing testimony of former City Clerk Young, that Defendants' Hearing Exhibit 1 (also introduced as the first page of Plaintiff's Hearing Exhibit 5 and the third page of Plaintiff's Hearing Exhibit 6) was the "agenda" for the May 7, 2018, Council meeting and that the remainder of the documents contained in Plaintiff's Hearing Exhibit 6, by whatever name, contained information and documents in addition to the "agenda." [October 7 Order, p. 5]. The October 7 Order also found as fact that the action in question by the City Council at its May 7 meeting was an amendment of a list of projects attached as an Exhibit to a Resolution listed on the agenda. [October 7 Order p. 4]. The October 7 Order concluded that no item was added to the agenda and that no violation of the FOIA occurred. [October 7 Order pp. 6-8].

On the afternoon of October 8, 2019, the office of the Clerk of Court sent an e-mail to the attorneys for the parties advising that the October 7 Order was filed "in error" and would be removed from public view. [Clerk e-mail attached to Defendants Rule 52/59 Motion]. The circuit court then filed its October 8 Order. That Order was the proposed Order that had been submitted to the circuit court by Holcomb's attorney. The October 8 Order found that documents on the City website at a link entitled "Agenda 050718 Complete" were the "agenda" for the May 7 Council

meeting, and that the City amended the agenda when, by motion at the meeting, it substituted a new project on the list of projects attached to the Exhibit to the Resolution. [October 8 Order pp. 2-4]. The circuit court concluded that the City "must treat what they call an 'agenda' on their website as an agenda for FOIA purposes," and that the City violated the FOIA when it amended the Resolution Exhibit. [October 8 Order pp. 7-8]. The circuit court Order closed by stating that "It enjoins Defendants from future similar violations, and awards Plaintiff reasonable attorney's fees and cost." [October 8 Order p. 9].

The City filed, on October 18, 2019, a motion, pursuant to Rules 52 and 59(a)(2) and (e), SCRCP, for alteration and amendment of findings and judgment or, alternatively, for a new trial. [Defendants' Motion]. The motion was made on ten specific grounds. [Defendants' Motion]. On that same date, Holcomb filed a motion to determine the amount of attorney's fees and cost with supporting affidavits by Holcomb's attorney and Attorney Kenneth R. Moss [Holcomb Motion and Affidavits].

The circuit court held a hearing on the two motions on December 5, 2019. [Motion hearing transcript]. An Order denying the City's motion and awarding Holcomb attorney's fees of $10,518.00 and costs of $699.92 was filed on December 30, 2019. [December 30 Order]. A timely Notice of Appeal by Respondents of both the October 8, 2019 and December 30, 2019 Orders of the circuit court was filed and served on January 17, 2020. [Notice of Appeal].

STATEMENT OF THE FACTS

The action by the City Council at its regular meeting on May 7, 2018, complained of by Holcomb, was its amendment of a list of projects attached as an Exhibit to a Resolution listed on the agenda. Plaintiff's Hearing Exhibit 6 [Plaintiff's Hearing Exhibit 6] (which is identical to Exhibit 1 to Plaintiff's Amended Complaint at pages _ to _) contains the Resolution ("Resolution

No. 2018-11 Identifying North Augusta Projects for the Aiken County Capital Projects Sales Tax[1] IV") and the Resolution's attached Exhibit A (a listing of six broadly described projects). [Record pp. _ to _]. The Minutes for the May 7 meeting [Plaintiff's Hearing Exhibit 7] prepared by then City Clerk Donna Young (who also testified at the hearing before the circuit court), reveal that, following introduction of the Resolution by motion and second, a further motion was made, seconded, and passed unanimously, to

> amend the list of projects to add "New Savannah Bluff Lock and Dam" under the list of projects under the Public Works and Transportation Projects title.
>
> [Minutes, pp. 2-3].

At the merits hearing before the circuit court, Donna Young, the City Clerk at the time of the subject Council meeting, testified that, among her official duties as City Clerk, were preparation of the Council meeting minutes, the meeting agenda, and the other agenda information made available to the Council and the public. [Merits hearing transcript p. 65]. Ms. Young identified Defendants' Hearing Exhibit 1, a single page captioned as "AGENDA: REGULAR CITY COUNCIL MEETING," as "the May 7th, 2018 agenda" and as "the regular agenda." [Merits hearing transcript pp. 65-67 and Defendants' Hearing Exhibit 1].[2] Ms. Young testified that Defendants' Hearing Exhibit 1 was the agenda posted on the City bulletin board in advance of the City Council meeting as the agenda required to be posted by the FOIA. [Merits hearing transcript pp. 68-69].

Young also testified that the documents referred to in Plaintiff's Hearing Exhibit 1 [Record pp. _ to _] as "agenda attachments" and "agenda information" were included with the agenda in

[1] The Capital Projects Sales Tax Act is codified at S.C. Code Ann. § 4-10-300 et. seq.
[2] This page also is in Plaintiff's Hearing Exhibit 5 and Plaintiff's Hearing Exhibit 6. [Plaintiff's hearing exhibits 5 and 6].

the "agenda complete." [Plaintiff's Hearing Exhibit 1 at p. 1 and Merits hearing transcript pp. 67-68]. Young testified:

> Agenda information is additional information. When I post in Document Central, I will post an agenda, I will post an agenda memo, and then I post a document that is entitled, Agenda, whatever the date would be, which in this case would be 050718 Complete. And that information is actually a link . . . I create that document in order to distinguish that we have an agenda, an agenda memo and then a complete. And the complete just means that this is all of the attachments to the back of the agenda and the agenda memo . . .
>
> Q. All right. What do you call these other documents that accompany the agenda on the website? Do you have a name for those?
>
> A. What do I call the documents? That's the agenda packet that would go out to the mayor and council and directors. In order to be more transparent, we started including that on the website in order for the citizens to be able [to] look at any attachments to the agenda.
>
> [Merits hearing transcript p. 67, l. 18 to p. 68, l.13].

The sophistry of Holcomb's position on "what is an agenda?" is illustrated both by statements of Holcomb's position in an exchange between his attorney and the circuit court and by Holcomb's own testimony. This exchange between the circuit court and Holcomb's attorney occurred at the January 2019 merits hearing and prior to Holcomb's testimony at the hearing:

> THE COURT: The page that Mr. Crowe handed up [later introduced as Defendants' Hearing Exhibit 1], it says Agenda Regular City Council Meeting; Call to Order, Invocation; Roll Call; Approval of Minutes; Unfinished Business; New Business; Recognizing Visitors and Adjournment.
>
> You're [sic] position is that that is not really an agenda or that it was not published or?
>
> MS. CARROLL: No, Your Honor, we read that it's - - that is an agenda.
>
> THE COURT: All right.

> MS. CARROLL: And it is our position and it was always Mr. Holcomb's understanding, which he will testify to, that that was an initial summary agenda. That's on the website. There's an agenda tag and then immediately under that, you'll see there's a link, still there now. And it says Agenda 050718 Complete. Complete, the finished agenda. So Mr. Holcomb always took it as and understood it to be that the first paper is the summary or preliminary agenda and that it was completed for the second document. That's what they call it. And if you look at Exhibit 1 to the complaint, I have enclosed the entire tag two, which I said on the website is called the Agenda, with the date, Complete, and it has the North Augusta logo on the top, South Carolina Riverfront, and then it's called Regular Agenda of May 7, 2018.
>
> They call it the regular agenda. That their agenda is more detailed than some other agendas doesn't make it not an agenda. If they call it an agenda, I suggest to Your Honor that it is an agenda.
>
> [Merits hearing transcript p. 17, l. 14 to p. 18, l. 17].
>
> THE COURT: So your position in effect is that everything that is published pertaining to the meeting, that all of the entire posting of things has to be on the agenda or the agenda involved in the posting of items or?
>
> MS. CARROLL: It's our position, Your Honor, that this is a detailed agenda and I am not suggesting—
>
> THE COURT: The detailed agenda consists of 32 pages.
>
> MS. CARROLL: Yes, Your Honor, very large. However, I'm not contest -- I'm not suggesting that it couldn't be amended. I'm not suggesting to Your Honor that some of what is in the agenda isn't -- isn't backup material. What I'm suggesting, our Honor, is that it cannot do what it is specifically prohibited by the statute, which is add an entirely new project. This is a detailed agenda, its got its backup and everything, you know, backup. That puts the information about it.
>
> [Merits hearing transcript p. 19, l. 1-17].

Holcomb himself also plainly was aware of the difference between an agenda and the "agenda complete." His testimony on direct examination included the following:

> I prepare by going to the Agenda Complete, which also contains the agenda. But the agenda is only a summary of what the city's going to discuss at the meeting of council.
>
> The Agenda Complete also has supporting information that gives the public the opportunity to study and to find out more about what the agenda items are going to be discussed.
>
> [Merits hearing transcript p. 44, l. 21 to p.45, l. 3].
>
> Q. And there's another link on there that's called Agenda 050718. How do you--why would you look at the complete one instead of this one?
>
> A. I wouldn't look at that one because that agenda is actually part of Agenda 050718 Complete.
>
> [Merits hearing transcript p. 49, l. 13-17].

Holcomb also testified on cross examination concerning the difference between the agenda and the "agenda complete":

> Q. As I recall your testimony when you started, you said an agenda complete also contains the agenda; is that correct?
>
> A. That's correct.
>
> Q. All right. So agenda complete means something in addition to the agenda?
>
> A. I'm only calling it what the city calls it.
>
> Q. Well, I'm asking you a question about your understanding of your testimony, an agenda complete includes the agenda, but it includes other things as well, correct?
>
> A. That's correct.
>
> **Q. So agenda complete is something more than just an agenda?**
>
> **A. That's correct.**
>
> Q. All right. And I think you said the agenda is only a summary of what's to be discussed; is that right?

A. That's right.

[Merits hearing testimony p. 58, l. 4-21] (Emphasis supplied).

This testimony by Holcomb also is clearly contrary to his attorney's later argument to the circuit court at the motions hearing:

> So the point here is that this statute is to be liberally construed to protect people like Mr. Holcomb. Mr. Holcomb got on the stand and explained that the way that they presented this made him to believe that the agenda complete or, as it is called on its cover sheet, the regular agenda of May 7, 2018, was what he thought was the real agenda; that the one page was the summary, a beginning; it was developed; and this is the agenda that was finally arrived at.
>
> [Motions hearing transcript, p. 17, l. 3-11].

To the contrary, Holcomb's testimony showed that he plainly knew the difference between an agenda and the agenda complete.

Holcomb's cross-examination testimony at the merits hearing further illustrated his awareness of the meaning of an agenda:

> Q. Okay. So there's a thing called an agenda that's included in the agenda complete, right?
>
> A. That's right.
>
> Q. Good. The agenda is a summary of what's going to be discussed, correct?
>
> A. Correct.
>
> Q. The agenda complete contains additional detail, additional information: is that correct?
>
> A. I'll have to explain my answer, Your Honor.
>
> **Q. Well, let me rephrase. Is agenda complete something greater than the document called the agenda?**
>
> **A. Yes.**

[Merits hearing transcript p. 60, l. 3-14]. [Emphasis supplied].

STANDARD OF REVIEW

"The standard of review in a declaratory action is determined by the underlying issues." Brock v. Town of Mount Pleasant, 415 S.C. 625, 628, 785 S.E.2d 198, 628 (2016), citing Nationwide Mutual Insurance Co. v. Rhoden, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). The question of whether the City complied with the agenda and notice requirements of the FOIA appears to be a mixed question of law and fact to be determined by analysis of the language of the applicable statute and the evidence before the Court. See 4 McQuillin, The Law of Municipal Corporations § 13:11 (3d ed.). "Upon review of an action in equity, [the appellate court] may make factual findings based on its own view of the preponderance of the evidence." Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc., 361 S.C. 117, 120-21, 603 S.E.2d 905, 907 (2004), quoted in Lambries v. Saluda County Council, 409 S.C. 1, 7, 760 S.E.2d 785,788 (2014).

The circuit court's Orders turn on statutory interpretation of section 30-4-80(A). "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." Town of Summerville v. City of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." Lambries v. Saluda County Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014), citing Sloan v. S.C. Board of Physical Therapy Examiners, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). "If, based on this Court's assessment, the trial court committed an error of law in its interpretation of FOIA's notice requirement, that would constitute an abuse of discretion by the trial court." Lambries, 409 S.C. at 8, 760 S.E.2d at 788.

An order granting an injunction is reviewed for an abuse of discretion. Lambries, 409 S.C. at 7, 760 S.E.2d at 788 "An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008), quoted in Lambries, 409 S.C. at 7, 760 S.E.2d at 788.

The determination of whether statutory attorney fees should be awarded is treated as one in equity. In reviewing an attorney fee award pursuant to statute, the appellate court may take its own view of the preponderance of the evidence. Hardaway Concrete Company, Inc. v. Hall Contracting Corporation, 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007).

PERTINENT PRINCIPLES OF STATUTORY CONSTRUCTION

The cardinal rule in statutory construction is that a court must ascertain and effectuate legislative intent whenever possible. Joint Legislative Committee v. Huff, 320 S.C. 241, 245, 464 S.E.2d 324, 326 (1995). Legislative intent must prevail if it can reasonably be discovered in language used and construed in light of its intended purpose. Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). Our appellate courts have held that words used in a statute are to be given their plain and ordinary meaning. Worthington v. Belcher, 274 S.C. 366, 368, 264 S.E.2d 148, 149 (1980); Hughes v. Edwards, 265 S.C. 529, 220 S.E.2d 231 (1975). When the terms and language of a statute are plain and unambiguous and convey a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994); City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 475 S.E.2d 747 (1996).

Courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. Timmons v. Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970). Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. Lee v. Thermal Engineering Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002); see also State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000) (citing Black's Law Dictionary).

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN CONSTRUING THE AMENDMENT OF AN EXHIBIT OF A RESOLUTION, ALREADY LISTED ON THE AGENDA, AS AN ITEM THAT WAS "ADDED TO THE AGENDA" IN VIOLATION OF THE STATE FREEDOM OF INFORMATION ACT (FOIA).

The agenda for the Council meeting of May 7, 2018 [Defendants' Hearing Exhibit 1], included as an agenda item under "New Business":

> 6. FINANCE: Resolution No. 2018-11 - A Resolution Identifying North Augusta Projects for the Aiken County Capital Project Sales Tax IV.

This agenda item provided the public with notice that the Council discussion and Council action at the meeting included the subject matter of projects for the Capital Projects Sales Tax. The notice requirements of the Freedom of Information Act ("FOIA"), as here pertinent, are satisfied if the agenda is properly posted on a bulletin board at the meeting site and on the body's public website, and if the written Resolution or Ordinance to be considered is listed on the agenda. The FOIA, including section 30-4-80(A), contains no requirement that a municipality make available to the

public in advance of a Council meeting the background documents on matters listed on an agenda. The circuit court's opinion on what notice or information a municipality should provide before amending a Resolution is not based on the FOIA.

Significantly, the FOIA also does not address, much less preclude, amendment of a Resolution or Ordinance during a Council meeting. Concerning the procedure at a Council meeting, section 30-4-80(A) only addresses **adding new agenda items** to an existing agenda; it does not forbid amendments of items already listed on an agenda. This is apparent from the clear language of the pertinent sentences of subsection (A):

> Once an agenda for a regular, called, special or rescheduled meeting is posted pursuant to this subsection, **no items may be added to the agenda** without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, **an item upon which action can be taken only may be added to the agenda** by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, **it only may be added to the agenda** by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists **if the item is not added to the agenda**. (Emphasis added).

The Resolution at issue was already an agenda item; it was not added to the agenda. The projects listed in the Resolution exhibit were not listed on the agenda. [Defendants' Hearing Exhibit 1]. The content of the Resolution (more precisely, the list of projects in the exhibit to the Resolution) was amended at the meeting; the agenda for the meeting was not amended. Adding a new item to the agenda at a meeting is a markedly different action from amending the content of an item already listed on the agenda.

The agenda for the meeting [Defendants' Hearing Exhibit 1] listed the Resolution identifying sales tax projects as an agenda item (Item 6). The agenda did not list the specific

projects contained in the Exhibit to the Resolution. The Minutes establish that the agenda was not amended, and that no agenda item was added to the agenda. [Minutes]. Further, the purpose of notice to the public underlying the FOIA was served; the public was fairly on notice, by the listing of the title of the Resolution, that projects for the Capital Projects Sales Tax would be the subject of Council discussion and Council action.

Section 30-4-80(A), by its clear and explicit language, restricts only the addition of items to an agenda; it does not prohibit the amendment of the content of an item that already appears on an agenda. The circuit court's acceptance of Holcomb's contentions and argument, that he was entitled under the FOIA to notice of any additional specific projects proposed to be listed in the Resolution's attached Exhibit, embraced a forced construction of the FOIA that expands the clear and explicit language of section 30-4-80(A).

Moreover, Holcomb's own allegations in pleading belie the applicability of the FOIA. The contentions in his Amended Complaint explicitly relate to amending an existing agenda item, and not, as described in section 30-4-80(A), amending the agenda to add a new item. The operative allegations of the Amended Complaint (in paragraphs 15, 16, 18, and 19) [Amended Complaint] are that, at the Council meeting, the Council "amended the agenda item." However, S.C. Code section 30-4-80(A), by its clear and repeated language, only addresses adding items to the agenda, not amending an agenda item. Section 30-4-80(A) was the sole basis for Holcomb's FOIA action. [Amended Complaint].

In finding a FOIA violation, the circuit court transformed the FOIA's restrictions in section 30-4-80(A) on "adding to the agenda" into a prohibition on amending the content of a Resolution already listed on the agenda. The circuit court undertook that expansion of section 30-4-80(A) without the benefit of legal authority, in opposition to the hearing testimony, and contrary to the

clear language of the FOIA and the plain meaning of the word "agenda." Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. Timmons v. Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970).

Resting on the notion that no change can be made at a meeting to published agenda packet materials except in case of emergency, the circuit court's orders clearly limit the ability of local legislators to amend the wording of Resolutions and Ordinances during the course of a meeting. The Orders of the circuit court represent a judicial intrusion into the legislative procedure of local governments that is not supported by a reasonable reading of the FOIA or any other State statutes. The circuit court plainly erred in misconstruing, rewriting and expanding the subject of section 30-4-80(A).

II. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE BACKGROUND DOCUMENTS POSTED ONLINE WITH AN AGENDA CONSTITUTED THE MEETING "AGENDA" FOR PURPOSES OF THE STATE FREEDOM OF INFORMATION ACT.

As part of the reasoning in its Orders, the circuit court also conflated the meaning of the word "agenda" to include agenda background documents (the "agenda packet") that were made available to the public in advance of the meeting. Holcomb's basic grievance, as illustrated by his hearing testimony, was that he did not receive what he felt was adequate advance notice of the City Council's amendment, at the Council meeting, of a list of proposed capital projects contained in an Exhibit to a Resolution on proposed capital projects directed to the County Council. Because the list of proposed capital projects in the Resolution Exhibit was contained in the agenda packet, Holcomb contended that the motion by the City Council at its meeting to amend the list of proposed projects was the equivalent of an amendment of the agenda.

The circuit court Orders (like Holcomb's controlling contention) rest on a forced statutory construction that expands the meaning of "agenda" to include the complete packet of supporting documents concerning the agenda items. The rules of statutory interpretation, as set out earlier in this brief, disapprove of such forced construction. Courts must apply the terms of a statute according to its literal meaning, without resort to subtle or forced construction in an attempt to limit or expand the scope of the statute. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994).

The circuit court's expansive definition of "agenda" is not supported by the law or the facts and should not be allowed to stand. The core of Holcomb's argument was that the City should have provided him more advance notice that a project (of which he disapproved) would be added to the project list. However, the FOIA, and the only section of the FOIA relied on by Holcomb in this case, do not address that situation. The FOIA simply does not provide the requirement sought by Holcomb and fashioned by the circuit court's interpretative stretch.

The agenda for the Council meeting on May 7, 2018, is represented by Defendants' Hearing Exhibit 1. [Defendants' Hearing Exhibit 1]. The word "agenda" is not defined in the FOIA; however, its plain and ordinary meaning is consistent with the Black's Law Dictionary definition of "agenda" (submitted to the Court by Defendants' attorney at the hearing) as "a list of things to be done, as items to be considered at a meeting, usu. arranged in order of consideration." Black's Law Dictionary, "Agenda" (10th ed. 2014). This definition is further supported by the testimony of the City Clerk and, indeed, by the testimony of Holcomb, as discussed in the Statement of Facts above.

Additionally, the arguments advanced below by Holcomb and his attorney, and adopted by the circuit court in its Orders, that the City "must treat what they call an 'agenda' on their website

as an agenda for FOIA purposes" [Order of October 8, 2019 p. 8] are circular and unavailing. The City calls the single page list of items for the meeting an "agenda" (see the heading of Defendants' Hearing Exhibit 1 of "AGENDA: REGULAR CITY COUNCIL MEETING") [Record, p. _]. Other modifying adjectives added by the City to the word "agenda" (as in "regular agenda" or "agenda complete") or added by Holcomb and adopted by the circuit court (as in "detailed agenda" or "summary agenda" or "initial summary agenda" or "preliminary agenda") do not implicate the FOIA. The FOIA does not use those terms and does not address amendments or additions to documents described by such word combinations.

The spirit and purpose of the FOIA is not served by "gotcha" rationales (by either the litigants or the circuit court) in which words with otherwise plain meanings are given "Alice in Wonderland" meanings. A court "roster" of cases does not include, as part of the roster, every document filed in every listed case; a roster is a list of cases. Similarly, an agenda for a meeting, in common and plain English, is a list of things to be considered at the meeting. The agenda is not the content of every item listed on the agenda, even if background information is attached. If the General Assembly had intended an expansion of the definition of "agenda" beyond its common and plain meaning, to include other terms containing the word "agenda" (as in agenda packet, agenda memo, agenda backup, detailed agenda, or even "agenda complete"), it could have provided such a definition. In the absence of such an expanded legislative definition, the circuit court should not adopt the suggestion of a litigant and supply one.

III. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN PERMANENTLY ENJOINING THE CITY "FROM FUTURE SIMILAR VIOLATIONS" WITHOUT FURTHER SPECIFICATION OR A CLEAR STATEMENT OF THE VIOLATION.

The injunction portion of the October 8 circuit court Order is contained in the final paragraph of the Order. In that paragraph, the circuit court first "declares the conduct of Defendants in amending a document represented to the public as an agenda to add an item, without adequate process, a violation of FOIA." The Order then provides "It [the circuit court] enjoins Defendants from future similar violations, and awards Plaintiff reasonable attorney's fees and costs." [10/8 Order p. 9]. The language of the circuit court injunction is prohibitory and permanent and vague.

Ground 8 of the City's Rule 52/Rule 59 motion raised the issue that the injunction was erroneous and an abuse of discretion due to vague terms that did not fairly inform the City of the actions to be enjoined and an absence of findings or conclusions to support the injunction. [Rule 52/Rule 59 Motion, pp. 5-6]. At the motion hearing, the City reiterated all motion grounds. [Motion Hearing pp. 5, 11 and 18]. However, the December 30 circuit court Order did not address this ground or elaborate in any way on the nature of the injunction. Consequently, the City is left as subject to a vague injunction and at peril of a subsequent contempt action.

Rule 65(d), SCRCP, provides, in pertinent part:

> (d) **Form and Scope of Injunction or Restraining Order**. Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . .

The circuit court's injunction consists of seven words, is not specific in terms, does not describe the acts enjoined in reasonable detail, and does not set out the reasons for its issuance. The injunction plainly violates Rule 65(d).

A prohibitory injunction issued without evidence "supporting the need for this sweeping restraint order" and without weighing the "need for a limitation and the potential interference with the rights of the parties" is an abuse of discretion. Eldridge v. City of Greenwood, 308 S.C. 125, 128, 417 S.E.2d 532, 534 (1992), quoting Gulf Oil Co. v. Bernard, 452 U.S. 89,102, 101 S. Ct. 2193, 2201, 68 L.Ed.2d 693, 704 (1981). An injunction should not be overbroad or provide relief more sweeping than is necessary. 27 S.C. Jur. Injunctions § 12 (2020), citing Eldridge.

The circuit court Orders provided no findings or conclusions attempting to justify the need for an injunction after a declaration. The October 8 Order did cite, in footnote, Donahue v. City of North Augusta, 412 S.C. 526, 773 S.E.2d 140 (2015), another FOIA case involving the City. The FOIA issue in that case was whether the announcement of the ground for an executive session sufficiently stated its "specific purpose" as required by S.C. Code section 30-4-70(a). However, the circuit court's Orders offered no rationale relating the two cases or otherwise explaining why an injunction about amendment to Resolutions was considered "appropriate" in the language of the footnote.

The City faces inherent difficulties in complying with the circuit court's vaguely worded permanent injunction. What is "similar" to amendment of an Exhibit to a Resolution? Is it prohibited to amend any background or backup document provided or posted with the agenda? Are any documents referenced in the agenda necessarily incorporated by that reference as part of the agenda? Does the injunction mean that the language of documents similar to the Ordinance and contract included in Plaintiff's Hearing Exhibit 6 [Plaintiff's Hearing Exhibit 6, pp. __ to __] cannot be altered at a meeting? Does the injunction require that any Ordinances, Resolutions, contracts or budgets, that are part of the agenda packet and are sought to be changed or amended by the Council, must be continued to another meeting unless an emergency exists? Are all motions

to amend an Ordinance or Resolution prohibited by the FOIA? The circuit court injunction is so lacking in specificity and detail that it constitutes an abuse of discretion.

IV. THE CIRCUIT COURT ERRED IN AWARDING ATTORNEY'S FEES AS A MATTER OF RIGHT IN A NOVEL FOIA CASE AND WITHOUT THE SIX FACTORS FINDINGS REQUIRED BY OUR CASE LAW.

The FOIA, in S.C. Code Ann. section 30-4-100(B), provides for a discretionary, not mandatory and automatic, award of attorney's fees: "If a person or entity seeking relief under this section prevails, **he may be awarded** reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, **the court may in its discretion award** him reasonable attorney's fees or an appropriate portion of those attorney's fees." (Emphasis supplied). The October 8 circuit court Order indicated only that it was awarding attorney's fees and costs because Holcomb prevailed in the action. [October 8 Order, p. 7]. The December 30 circuit court Order awarded the amount of $10,518 in attorney's fees and $699.92 in costs based only on the finding and conclusion that the fees and costs "are reasonable and appropriate." [December 30 Order, p. 3].

The two circuit court Orders reveal no exercise of discretion by the circuit court in the making of the award, no consideration of the City's position on the novel and unprecedented basis for the case, and no specific findings of fact on the six relevant recognized factors to be considered in granting an award. Voelker v. Hillock, 288 S.C. 622, 344 S.E.2d 177 (Ct. App. 1986); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d (Ct. App. 1990); Baron Data Systems Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989). In reviewing an attorney fee award pursuant to statute, the appellate court may take its own view of the preponderance of the evidence. Hardaway Concrete Company, Inc. v. Hall Contracting Corporation, 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007).

CONCLUSION

The amendment of an Exhibit to a Resolution that is already listed on a meeting agenda does not equate to an item "added to the agenda" within the meaning of the FOIA. The FOIA does not preclude, or even address, the amendment of Resolutions or Ordinances at a municipal council meeting. As an undefined word in the FOIA, "agenda" should be given its common meaning of "a list of items to be considered." The word "agenda" does not, in common parlance, include the background materials for the agenda.

For the reasons stated, this Court should reverse the judgment of the circuit court, including the circuit court's issuance of an injunction and the award of attorney's fees and costs.

Respectfully submitted,

May 26, 2020

/s/Danny C. Crowe

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2020-000080

Herman Perry Holcomb, Respondent,

v.

City of North Augusta and Mayor and City Council of North Augusta, Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on Respondent, Herman Perry Holcomb, by electronic mail and by having a copy of it deposited in the United States Mail, postage prepaid, on May 26, 2020, addressed to his attorney of record, Dionè C. Carroll, Esquire, Carroll Law Offices, PA, 107 Pendleton Street, NW, Aiken, South Carolina 29801; dione@carroll-law-offices.com.

May 26, 2020

/s/Danny C. Crowe

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May 26, 2020

Via E-Mail Only to ctappfilings@sccourts.org
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Herman Perry Holcomb v. City of North Augusta, and Mayor and City Council of North Augusta
Appellate Case No. 2020-000080

Dear Ms. Kitchings:

Please find enclosed for filing the Initial Brief of Appellants with Proof of Service and the Designation of Matter to be Included in the Record on Appeal with Proof of Service. Once filing is complete, I would appreciate receiving a filed stamped copy for our files.

By copy of this letter to the attorney for Respondent, I am hereby serving a copy of the Initial Brief of Appellants and the Designation of Matter to be Included in the Record on Appeal on Ms. Dionè Carroll.

With kind regards,

/s/Danny C. Crowe

Danny C. Crowe

DCC/dmb
Enclosures

cc: Dionè C. Carroll, Esquire (via email and U.S. Mail)
Kelly F. Zier, Esquire (via email)