

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,

v.

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

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Aug 21 2020

SC Court of Appeals

Respondent,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY TO BRIEF OF RESPONDENT

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 circuit court’s analytical approach is an exercise in tortuous logic. Its path of reasoning begins with the bald assumption that an agenda item necessarily incorporates, as if by reference, any related agenda background document, so that, for example, the agenda item of a Resolution includes the Resolution document itself. Using this starting assumption, any change in the agenda background document by amendment then becomes an amendment of the corresponding agenda item. If the content of the Resolution document is changed, the agenda also is considered changed by the addition of a new item. Because the amendment to the Resolution adds something new to the agenda in the absence of an exigency or emergency, it violates § 30-4-80(A). As applied by the circuit court in this case, the end result of this contortion is that the simple amendment of a Resolution at a meeting, by proper motion, becomes a violation of the FOIA. This cannot be the law.

The circuit court's declaration, in the concluding paragraph of its October 8 Order, was that “the conduct of Defendants in amending a document represented to the public as an agenda to add an item, without adequate process” violated the FOIA. (R. p. 18). In other words, according to the circuit court, by amending the Resolution to add a new project to the projects listed in an exhibit of the Resolution, the Council added an agenda item to the meeting agenda and violated the FOIA.

According to the Minutes of the May 7, 2018 meeting, the actual action of the Council concerning Resolution 2018-11 was an adopted motion “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.” (R. p. 325). This list of projects was an Exhibit to Resolution No. 2018-11. This Resolution was listed as agenda item 6 on the meeting agenda as identified by the City Clerk. (R. p. 329 and p. 232, line 7-p. 233, line 10). Construed in plain light and without the strained and forced reasoning of Holcomb and the circuit court, the motion at issue simply amended an exhibit to a Resolution; it did not amend the agenda. The Resolution is not the agenda.

The FOIA provision at issue in this case, according to the Amended Complaint, is S.C. Code § 30-4-80(A). As here pertinent, § 30-4-80(A), by its plain language, addresses adding items to the meeting agenda during a meeting.

Although Holcomb rests his FOIA cause of action on violation of § 30-4-80(A) (see, for example, the Amended Complaint’s paragraphs 6 and 16) (R. pp. 25, 26 and 27), the Amended Complaint does not complain of the Council adding items to the agenda (as in the language of the section). Rather, the Amended Complaint complains of Council “amending the agenda item” (paragraph 16) (R. p. 27) or the Council having “amended the agenda item” (paragraphs 15, 18, and 19). (R. p. 27). However, § 30-4-80(A) does not prohibit amending an existing agenda item. The circuit court elaborated on Holcomb’s construction to equate changing or adding a project to the Resolution’s project list to adding an item to the agenda.

The rationale of the circuit court, if followed, would place the City in the position of either accepting and passing a Resolution or Ordinance "as presented" in the agenda packet or not passing it at all. This is because, under the circuit court rationale, amendments to a Resolution or Ordinance would add a new agenda item. The harsh and inflexible restrictions of this rationale are illustrated by a hypothetical in which the Resolution contained in the agenda packet had included the Lock and Dam project and Holcomb had spoken convincingly against it at the Council meeting. Even if the Council agreed with Holcomb's presentation, the Council, under the circuit court's rationale,

would have been unable to amend the Resolution to delete the project because the amendment to the Resolution would have added a new agenda item in contravention of the FOIA.

The FOIA, including § 30-4-80(A), does not prohibit or even address the amendment of resolutions or ordinances that are already listed as agenda items. Without authority, the Orders of the circuit court construe the FOIA to expand procedural restrictions on the legislative functions of public governing bodies. In doing so, the circuit court abused its discretion and committed an error of law. The courts cannot construe a statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. City of Hardeeville v. Jasper County, 340 S.C. 39, 44, 530 S.E.2d 374, 376 (2000).

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.

In the situation of this case, application of the FOIA prohibition in § 30-4-80(A) on adding a new agenda item would require that the text of the Resolution be considered a part of the agenda. However, the FOIA provides no indication that the word "agenda" as used in § 30-4-80(A) is intended to include or incorporate the agenda supporting materials or the agenda background documents. The terms "agenda complete" and "regular agenda" and "agenda packet" are not found in the FOIA.

Moreover, the General Assembly is familiar with the concept of an "agenda packet" as a term defined and used in Regulation 12-604.3 ("Agenda Packets") in the Regulations for General Retention Schedules for Municipal Records, S.C. Code of Regulations R. 12-604.3. "Agenda packets" are described in R. 12-604.3 as the "[r]ecord of items submitted for municipal council's consideration." It is clear that the Legislature, had it intended to do so, could have used the term

“agenda packet” in § 30-4-80(A), or elsewhere in the FOIA, to include the actual “items submitted for municipal council’s consideration” in the definition of “agenda.”

Rather, the only reasonable indication from the language of the FOIA (including § 30-4-80(A)) is that the word “agenda” was and is intended to be given its plain and ordinary and dictionary meaning of “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 consistent with the merits hearing testimony of both former City Clerk Donna Young and Holcomb and with statements of Holcomb’s counsel at the merits hearing.

As discussed in our main brief, 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.” (R. pp. 232-234 and 329). She also testified that the one-page 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 § 30-4-80(A) of the FOIA. (R. pp. 235-236).¹

The former City Clerk also testified that the documents referred to in Plaintiff’s Hearing Exhibit 1 (R. p. 286) as “agenda attachments” and “agenda information” were included with the agenda in the “agenda complete.” (R. p. 286 and pp. 234-235). Young explained the significance of the “agenda complete” in her testimony:

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

¹ Curiously, given their view of what constitutes an agenda, neither Holcomb nor the circuit court contended, in argument or in the Orders, that the entire 32-page “agenda complete” was the “agenda” that should have been posted on the bulletin board pursuant to § 30-4-80(A).

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.

(R. p. 234, line 18-p. 235, line 13). (Emphasis added).

As discussed and quoted at length in our main brief, Holcomb's testimony at the merits hearing revealed that he was well aware of the difference between an "agenda" and the "agenda complete" consisting of an agenda and its attachments. He testified, for example, that "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." (R. p. 211, line 21-p. 212, line 3). Similarly, Holcomb's counsel acknowledged at the merits hearing that the one-page document offered as Defendants' Hearing Exhibit 1 "is an agenda" and that the "agenda complete" includes agenda backup information. (R. p. 184, line 14-p. 185, line 17 and p. 186, lines 1-17).

Without the benefit of supporting evidence, the circuit court adopted the argument of Holcomb's attorney that the "agenda" in this case was something more than the one-page agenda identified by the City at the merits hearing. The circuit court concluded that "Defendants must treat what they call an 'agenda' on their website as an agenda for FOIA purposes." (R. p. 17). However, the circuit court failed to consider that the testimony and documentary evidence of both parties showed that the City only called the one-page Defendants Hearing Exhibit 1 the "agenda."

It is clear that other documents, whether called the “agenda complete” or the “regular agenda” or the “agenda packet,” included documents in addition to the “agenda.” The circuit court’s interpretation of the word “agenda” and its interpretation of the use of the word “agenda” by the City are unsound and are unsupported by the facts and the law.

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.

Holcomb offers no argument in his brief that the circuit court injunction complies with Rule 65(d), SCRCP. As discussed in our main brief, the circuit court's injunction in its October 8 Order consists of seven words, is not specific in its terms, does not describe the acts enjoined in reasonable detail, and does not set out the reasons for its issuance. The circuit court abused its discretion in issuing a vague and confusing injunction that violates Rule 65(d).

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 City urges that S. C. Code § 30-4-100(B) provides for a discretionary, and not a mandatory, award of attorney’s fees and costs. While Cockrell v. Trustees of the District 20 Constituent School District, 299 S. C. 155, 156, 382 S.E.2d 923, 924 (1989), addressed the status as the prevailing party as the “only prerequisite” for such an award, it also clearly reiterated, as the statute provides, that “it is within the trial judge’s discretion to award attorney fees and costs to the respondents.” Moreover, an FOIA fee award “must be reasonable and supported by adequate findings.” Burton v. York County Sheriff’s Department, 358 S.C. 339, 357-58, 594 S.E.2d 888, 898 (Ct. App. 2004).

CONCLUSION

For the reasons stated in this reply brief and in their main brief, the City of North Augusta and its Mayor and City Council urge that this Court 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,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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