

**RECEIVED**

SEP 29 2015

S.C. Supreme Court

**RECEIVED**

SEP 28 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

APPEAL FROM CHARLESTON COUNTY  
COMMON PLEAS COURT  
Appellate Case No.: 2015-000406

---

J. C. Nicholson, Jr., Circuit Court Judge  
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ..... Petitioner,

v.

Town of Mount Pleasant, ..... Respondent.

---

AMENDED BRIEF OF PETITIONER

---

Robert Clyde Childs III  
The Childs Law Firm  
2100 Poinsett Hwy., Ste. E  
Greenville, SC 29609  
(864) 242-9997  
(864) 242-9914 facsimile

J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29609  
(864) 282-1292  
(864) 271-6035 facsimile

*Counsel for Petitioner*

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

APPEAL FROM CHARLESTON COUNTY  
COMMON PLEAS COURT  
Appellate Case No.: 2015-000406

---

J. C. Nicholson, Jr., Circuit Court Judge  
Trial Court Case No.: 2008CP1003308

Stephen George Brock, ..... Petitioner,  
  
v.  
  
Town of Mount Pleasant, ..... Respondent.

---

AMENDED BRIEF OF PETITIONER

---

Robert Clyde Childs III  
The Childs Law Firm  
2100 Poinsett Hwy., Ste. E  
Greenville, SC 29609  
(864) 242-9997  
(864) 242-9914 facsimile

J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29609  
(864) 282-1292  
(864) 271-6035 facsimile

*Counsel for Petitioner*

**TABLE OF CONTENTS**

Table of Authorities ..... ii  
Statement of the Issue on Appeal ..... iii  
Statement of Case ..... 1

**ARGUMENTS**

**I. THE COURT ERRED IN FAILING TO FIND THAT THE TOWN VIOLATED FOIA WHEN IT TOOK ACTION ON MATTERS NOT PROPERLY NOTICED TO THE PUBLIC AND PRESS. .... 13**

A. Listing Matter for Executive Session is Not Adequate Notice of Action. .... 15

B. Later Endorsement Does Not Excuse or Erase the FOIA Violations. .... 18

C. Exigent Circumstances Are Not Sufficient to Avoid FOIA Notice Provisions. .... 20

D. There Are Multiple Instances of Similar Acts of Action Without Notice ..... 23

E. Petitioner was entitled to a Finding that a Violation Occurred ..... 23

The Decision of the Court of Appeals ..... 25

**II. THE COURT OF APPEALS ERRED IN FINDING THAT CERTAIN ARGUMENTS WERE NOT PRESERVED FOR APPEAL ..... 30**

**CONCLUSION ..... 31**

**TABLE OF AUTHORITIES**

Cases

Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991) ..... 13

Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (1986) ..... 26

Hinds County Board of Supervisors v. Common Cause of Mississippi,  
551 So.2d 107 (Miss.1989) ..... 32

Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App. 2007) ..... 13

Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) ..... 25

Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (1986) ... 18,23

Pressley v. REA Constr. Co., 374 S.C. 283, 28788, 648 S.E.2d 301, 303 (Ct.App. 2007) ..... 13

Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000) ..... 25

Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006) ..... 36

Statutes

Section 30-4-70 ..... 19

Section 30-4-80 ..... 20

Other

Robert’s Rules of Order ..... 3

Arizona Open Meeting Law §§38.431.05 ..... 19

SC Atty Gen Op. 2009WL1968596 ..... 24

QUESTIONS PRESENTED FOR REVIEW

- I. DID THE COURT OF APPEALS FAIL TO PROPERLY APPLY THIS COURT'S HOLDING IN *LAMBRIES, II* AND DISTINGUISH BETWEEN REGULAR AND SPECIAL MEETINGS WHEN CONSIDERING AGENDA NOTICE REQUIREMENTS?
  
- II. DID THE COURT OF APPEALS ERR IN FINDING THAT CERTAIN MATTERS WERE NOT PRESERVED FOR APPEAL?

## STATEMENT OF THE CASE

This matter came to Court by way of a Complaint filed by Stephen Brock seeking remedies pursuant to FOIA and the PRRA. The Defendant timely filed an Answer. The matter subsequently went before the Circuit Court as a non-jury matter. A trial was held on January 24, 2011. From that trial an Order was entered was entered on August 22, 2011, by the Honorable J.C. Nicholson, Jr. The Petitioner filed timely post trial motions seeking to alter or amend the judgment. A hearing was held on the post trial motions on January 17, 2012. A Supplemental Order was entered February 8, 2012. A Second Supplemental Order awarding attorney's fees and costs was entered on February 8, 2012. The Petitioner timely filed notice of appeal. A portion of the transcript was inaudible and a Motion to Settle the Record was filed by Petitioner and an Order settling the record was entered on February 1, 2013. The case was heard by the Court of Appeals and an opinion rendered November 5, 2014. Brock filed a petition for rehearing which was denied. Brock petitioned this Court for review. Brock's petition was granted as to two issues.

At trial the Petitioner was represented by Thomas S. Tisdale . On appeal the Petitioner is represented by Robert C. Childs, III, and J. Falkner Wilkes. The Respondent, was represented at trial by Francis Cantwell and is represented on appeal by David Guy Pagliarini..

## STATEMENT OF FACTS

Petitioner, Stephen Brock, holds a BA in Journalism from the University of South Carolina. Brock has been a resident of Mount Pleasant since 1972 and initiated this action in 2008 while on the Town Planning Commission. Brock was chairman of the first Shem Creek Management Committee and served on the Mount Pleasant Planning Commission from 2005 through 2009. 38-40. Brock was in broadcasting for thirty years, the last fifteen of which he was the president and general manager of a local television station in Mount Pleasant. Brock's observations while on the Commission led him to take this action with regard to FOIA issues. R. 194-196.

Six essential issues were raised below in the case. First, proper use of agendas for meetings and whether the Town is entitled to amend an agenda at will and act on matters not noticed on the meeting agenda. Second, the Town's pattern of conducting executive sessions without announcing specific purpose; (also calls attention to Quality Towing). Third, the Town's pattern of having committee meetings with non-committee members present and participating constituting a meeting; Fourth, does communication by e-mail on matters of public business among Council members constitute a meeting; Fifth, electronic communication is a public document and the town's rules and the public records act, with extensive guidelines, says that public documents cannot be destroyed without a retention policy which the town does not have; e-mail was used for public business and deleted. Sixth, injunctive relief and attorneys fees as allowed under FOIA. R. 77-81.

In this case the Town claimed that Council goes into executive session after announcing its purpose and that it may vote on any item addressed in executive session even if it was not on

the meeting's posted agenda for action. R. 87-95. In deposition, the Town Administrator (Burdette) admitted that the Town may not vote on matters not on the agenda. R. 462-463.

Section 30.34 - Mount Pleasant Town Council Rules of Order - was admitted and the authority of Roberts Rules of Order established as being applicable. R. 104. Roberts Rules of Order sets forth the permissible purpose for special meetings as well as the applicable rules. R. 113.

The Mount Pleasant Town Council has twelve regular meetings a year, one each month. R. 110. Town council also has special meetings, more some months than others. R. 110. During the period of time that the present case covers, a special meeting was held prior to every council meeting. Brock testified that he had read and studied the minutes of all the regular and special Council meetings. R. 111.

S.C. Code Section 30-4-80 requires agenda for special meetings and the purpose of a noticed special meeting must be established in advance and may not be changed. R. 116. The Town's Rules of Order place executive sessions inside regular meetings, but are more often executive sessions are held at special meetings. R. 111. This practice is at odds with the applicable Rules of Order. Pl. Ex. 39, 30.29(A)(6). The Town had a practice of setting special meetings which were held immediately prior to regularly scheduled meetings. The "overriding purpose" of these special meetings was for executive sessions prior to the opening of regular meetings. The Court's Order encouraged the Town to "abandon this procedure in the future" finding that the conduct of Town Council "fails to comply with the spirit of FOIA". R. 13.

Brock testified that the harm from adding matters to a posted agenda during a meeting is



that under the Town's practice, the public can't know in advance what is to be addressed at any particular meeting. R. 117. Petitioner also testified that from his experience, in addition to hindering the public's direct involvement, the Town's practice affected the local news from timely reporting the Council's upcoming actions as the news department relied on published agendas and other announcements to plan daily news coverage. R. 21.

Between July 1, 2007 and June 30, 2008 there were approximately 10 meetings, in addition to those above, at which agendas were improperly amended and matters added without proper notice to the public. R. 138-139. Of those, eight or nine amendments were made at the Special Meetings, one or two at the Regular Meetings.<sup>1</sup> R. 40. During his testimony at trial, the Town Administrator, Burdette, admitted that Council had in the past gone into executive session without properly announcing the purpose of the executive session. R. 340, 344. Burdette stated that amendments to agendas similar to the amendment made regarding the Shem Creek matter are not done "as a matter of course." R. 358, l. 25. Burdette admitted that the public would have no way of knowing in advance what would be considered under an amended agenda. R. 359. Burdette admitted that due to the lack of notice in the agenda, members of the public, whether for or against the appropriation of six million dollars to purchase of the OK Tire property, would have no advance notice unless they were already present. R. 360.

**AUGUST 14, 2007 - R. 619.**

On August 14, 2007 the only noticed event on the agenda for the Special Meeting was "Executive Session". R. 174. The announcement for the executive session was "discussion of

---

<sup>1</sup>There were twenty-two Special Meetings during the period encompassed by the Complaint in this case.

legal and contractual matters associated with property acquisition which is related to recreation leisure services associated with the Shem Creek in other areas, (2) SCE&G right-of-way and (3) legal advice regarding pending cases.” R. 619. The Town attorney stated the cases involved drainage issues and street repair issues in two subdivisions. R. 619. The Town Administrator added that staff would also like to suggest that Council add to the executive session agenda “discussion with legal counsel in reference to legal representation regarding possible pending legal cases”. The town attorney stated that this would only be legal advice. R. 619.

Upon reconvening from Executive Session, Council made several motions: “(1) to direct the Town Attorney to negotiate a piece of property as discussed in executive session; (2) to direct legal counsel to proceed with legal and contractual matters in reference to property acquisition and right-of -way as discussed in executive session; (3) to authorize legal counsel to proceed as discussed in executive session pertaining to Dunes West Boulevard , Old Park and proceed with litigation; (4) to authorize approval of payment for individual attorneys for Town Council members relative to current activities related to their official positions saving and excepting any court finding of type of illegal activity and additionally the fee statement for these attorneys to be received and reviewed by the town attorney and the town administrator through the normal process.” All motions passed. No information other than the executive session agenda and the executive session announcement was available to the public. R. 177-178. There was never any prior notice that Council would take action on any matter after the executive session. R. 619.

**OCTOBER 9, 2007 - R. 613; 636**

On October 9, 2007, the Town held a Special Meeting immediately prior to a regularly scheduled monthly meeting. Announcements for executive session were: (1) legal matters pertaining to the Buist lawsuit; (2) contractual matters pertaining to property acquisition in the vicinity of Town Hall; (3) legal and contractual matters concerning Shem Creek property; (4) a proposed economic development project, and; (5) some personnel matters pertaining to an employee grievance and (5) appointments to Boards and Commissions. R. 613.

Upon reconvening to open session, without formal amendment to the meeting agenda to allow for final action, a motion was made with regard to the Shem Creek property to “authorize the Town Attorney to make a final offer and if not accepted to pursue formal legal action as discussed in executive session.” The motion passed. Two documents related to the “final offer” were presented at trial: (1) Council letter to administrative services requesting funds in the amount of \$2,285,000 dollars for the OK Tire property and; (2) a check dated October 5th payable to the Charleston County Clerk of Court of two million two hundred and eighty-five thousand dollars. R. 184; 636. At the time the letter was written and the check issued (October 5th), there was nothing in Town Council minutes that this action was even being considered for this October meeting. R. 184-185. The property purchase seen in the December 5th Meeting was being decided without public notice as early as this meeting.

The Town's Rules of Order provide that citizens may speak at all Council meetings on matters on the agenda. R. 654 at §30.29 (E)(7); §30.35 (B)(2). In deposition, the Town Administrator testified that there is always a public comment period before every Council

meeting that anyone could speak if they wished. R. 450-520; 633. Agendas for the special meetings on November 13, November 16, August 14, and October '9 did not schedule public comment periods. R. 613; 629; 631; 633.

**NOVEMBER 13, 2008 - R. 633.**

On November 13th there was a Special Meeting scheduled immediately prior to the regularly scheduled, monthly meeting of Town Council. R. 132. The posted agenda showed only: "Executive Session (1) Legal and contractual matters pertaining to properties near Shem Creek and (2) Personnel Matters - Appointments to Boards and Commissions (3) committees listed for for appointments." Two additions were made to the executive session agenda - "Item C - Legal advice pertaining to Ordinance 07060, pertaining to the comprehensive plan; and "Item B - Legal advice pertaining to an opinion from the Attorney General concerning the planning commission." R. 136; 633.

Council came out of Executive Session during the November 13, 2007, Special Meeting, and, without formal amendment to the agenda to allow for final action, made two motions: (1) a motion to direct the Town Attorney to move forward to and obtain the property on Shem Creek. R. 133-134. (2) a motion to authorize the mayor and members of Council to retain individual attorneys for all lawsuits "now and in the future " paid for by the Town. R. 133-134; 633. Neither action was on the meeting agenda.. The second motion was even not added to or announced for the executive session. R. 134-135; 633.

**NOVEMBER 16, 2008 - R. 629.**

The published agenda for the Special Town Meeting held on November 16, 2007, shows only a single entry: "Executive Session - Legal advice for OK Tire (Shem Creek) property

litigation.” R. 129; 180; 629. In addition that single entry, during the meeting, the Town Administrator asked the Council to amend for executive session to include “personnel matters pertaining to the Clerk of Council” and “personnel matters relating to boards and commissions”. R. 129-130.

The announcement for the executive session did not disclose with specificity that the Town was considering whether to accept a settlement offer on the OK Tire/Shem Creek property, or raising the pay and altering the other requirements for the Town Clerk's position. The public was not informed of the nature of the offer on the OK Tire/Shem Creek matter. R. 180. After returning to open session Council took unnoticed formal actions without having formally amended the agenda. R. 629. A motion was made and approved to “reject the offer tendered in reference to the OK Tire litigation”. R. 629. Another motion was made to adjust the position requirements and compensation of the Clerk of Council “as discussed in executive session”. Testimony of the Town Administrator revealed that the Clerk of Council had apparently tendered her resignation and that the Town intended to change the pay and requirements for that position. R. 364.

The Town Administrator testified that he didn't think the public was entitled to know that the Clerk of Council had resigned or that the Town intended to change the requirements and pay for the position. R. 371-372. The meeting agenda for November 16th contained no notice that the Council would consider personnel matters at the meeting or, that it intended to vote on any matter discussed in executive session. R. 130. All motions passed.

The issue of Shem Creek property was listed in the executive session agenda for the November 16th Special Meeting only as “legal advice”. R. 629. There was no statement in the

required announcement of specific purpose that Council was considering a settlement offer. R. 179-180; 630. The public was not informed of the nature of the settlement offer in regard to the Shem Creek property or that formal action was intended subsequent to the executive session. R. 180; 629. Yet after returning from executive session Council voted without formally amending the agenda to “reject the offer tendered in reference to the OK Tire property litigation.” R. 180; 629.

**DECEMBER 5, 2007 - R. 539.**

The December 5, 2007 Special Town Council Meeting had a posted agenda. R. 117; 539. The December 5th meeting that was held in lieu of the Council’s December 11 regular meeting which was cancelled during the December 5th special meeting. R. 209. Council provided a full agenda for the December 5th special meeting just as it did with a regular meeting. R. 209; 539; 605.

The OK Tire/Shem Creek issue involved a proposed project to develop condominiums on the site of the former OK Tire Store near Shem Creek. The project included the construction of docks on Shem Creek for each Condominium. R. 119. The property proposed for development was owned by local attorney Mark Mason. The Town tried to purchase the property after Mason announced plans for development shortly after the area’s annexation by the Town. R. 119. When Mason would not sell, the Town filed a condemnation action. Mason responded with a counterclaim against the Town, Town Council and Council members as individuals. R. 122. Thereafter, secret settlement negotiations between Town Council and Mason began sometime in October 2007, and were ongoing at the time of the December 5, 2007 Special Town Council Meeting. R. 635; 636.

The Town provided no public notice that the Town had received a settlement offer from Mason or that during the December 5th special meeting that it would consider taking formal action on an agreement to settle litigation and purchase the property for six million dollars. R. 118; 122-125; 539; 543; 629; 633. During the meeting the executive session agenda was amended during the meeting "to receive legal advice pertaining to the OK Tire Store litigation."<sup>2</sup> R. 121; 543. The announcement prior to executive session indicated only "Legal advice regarding the settlement of legal issues and purchase of property known as the OK Tire Store and other properties." R. 120; 543. Without any prior notice of potential formal action and without formally amending the meeting agenda Council returned from executive session and voted to approve a settlement and authorized the Mayor to sign the settlement agreement. R. 121; 543. A separate motion was made adjusting the Town's budget to transfer \$3 million into "the water access acquisition project" with funding to come from "various TIF projects".<sup>3</sup> The motion did not clearly state the purpose of the funds appropriated although it later became clear that it related to the purchase of the OK Tire/Shem Creek property. R. 122. The minutes of the December 5th special meeting did not reflect the contents of the settlement agreement referred to in the first motion and the purchase of land was not mentioned in either motion. R. 123. The Town disclaimed the existence of an emergency on December 5, 2007. R. 459-462.

Mason executed the agreement on December 5, 2007. R. 285; 535. The agreement

---

<sup>2</sup>Throughout minutes, agenda and testimony the property that was the subject of the December 5 meeting of Mount Pleasant Town Council is referred to as OK Tire and/or Shem Creek property and OK Tire/Shem Creek property.

<sup>3</sup>TIFF: tax increment financing fund used for redevelopment projects.

was executed by the Mayor on December 6th. R. 285. On December 6th Town Administrator, Burdette, sent an email to Mark Mason stating: “We are pleased to have settled the matter...Would you and Mr. Smith [plaintiff's partner] consider coming over to Town Hall for a ceremonial signing...”. R. 567. The same day, Mason responded:... “Philip [Smith] and I are also glad to have settled the matter”. R. 288; 567. Burdette emailed the Town Council members: “He [Mason] asked that we consider a ceremony after closing on December 18...” R. 569. The public had no prior notice of the Town’s decision to purchase the OK Tire/Shem Creek property for \$6 million. R. 122. On December 7th, the local newspaper ran an article on the purchase. R. 122.

Although the Town claimed that Mason’s ultimatum forced its action on December 5, Mason was never asked for an extension of time in regard to the Council's consideration of the settlement agreement. Mason testified that had he been asked, he would have consented to additional time to secure a sound agreement. R. 287. Mason was not asked for additional time and, he believed that when the Town had taken whatever necessary procedural steps in advance of the Mayor’s execution of the agreement. R. 286. After it was signed by the Mayor, Mason assumed that it was in final form and binding. R. 285-286. Ratification was never mentioned. R. 286. Mason’s basis for the suit against the Town included fraud and deceit and a FOIA violation. R. 291.

On December 7th, upon learning of the vote to purchase the property a reporter for the local newspaper wrote the Town Administrator stating: “I can't know and the public can't know what's happening at meetings when agendas are amended during the meeting”. R. 629. Brock, as former president and general manager of a television station, testified to the importance of the Town's agenda in the coverage of daily news. R. 21.



**DECEMBER 17TH - R. 543.**

During the December 5th, 2007 Special Meeting, Town Council cancelled its regular monthly meeting scheduled for December 11. R. 567. As of December 5th, no further regular/any at all Town Council meetings were scheduled for the remainder of the year. A regular meeting of Council was scheduled for December 11th but was cancelled during the December 5th meeting. R. 209. The agenda for December 17th indicated the purpose of the meeting was to “confirm settlement agreement”. R. 543. An email notifying Council Members of the purpose for the upcoming December 17th meeting stated: “to confirm your previous action advance notice and avoiding problems with title insurance on the Shem Creek property”. R. 643. At the December 17th special meeting Council voted again to approve the settlement and purchase of the property. R. 543.

The Charleston County Parks & Recreation Commission subsequently obtained an as-is appraisal for the Shem Creek property on October 31, 2008 (10 months following purchase). The property was appraised at only \$3 million dollars. R. 142-143; 639. The appraisal gives the market value of three million dollars for the property, eleven months after Town Council voted to obtain it for six million dollars in public funds. R. 143; 639.

## ARGUMENT

### **I. THE COURT OF APPEALS FAILED TO PROPERLY APPLY THIS COURT'S HOLDING IN *LAMBRIES, II* AND DISTINGUISH BETWEEN REGULAR AND SPECIAL MEETINGS WHEN CONSIDERING AGENDA NOTICE REQUIREMENTS.**

#### *Standard of Review*

Statutory interpretation is a question of law. Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct.App. 2007). This court may decide matters of law with no particular deference to the circuit court. Pressley v. REA Constr. Co., 374 S.C. 283, 28788, 648 S.E.2d 301, 303 (Ct.App. 2007); Lambries v. Saluda County Council, 398 S.C. 501, 728 S.E.2d 488 (Ct.App. 2012); Bellamy v. Brown., 305 S.C. 291, 408 S.E.2d 219 (1991)

#### *Issues Presented*

The Town of Mount Pleasant has a practice of taking formal action on matters that are not noticed by the required posted meeting agenda, nor included in formal amendment of the meeting agenda. Following noticed executive sessions, Town Council routinely takes action on matters noticed and/or added to an executive session agenda for "legal advice" or "discussion". The Town has held that executive session notice is permission to act on any matter from an executive session without a posted agenda or a formal amendment to the agenda providing notice to the public that any formal actions will be taken during the a meeting. Under examination the Town Administrator addressed the practice.

Q. Is that routine operating procedure

A. If there is an executive session, I would say that probably half the time there's an action following the executive session.

Q. So, fifty percent of the time -- what you're testifying to is that fifty percent of the time, probably, in the Town of Mt. Pleasant the Town Council acts on matters that are discussed in executive Council (sic) without any notice to the public whatsoever that action is going to be taken.

A. Well, I think it is implied that when you go into executive session that there's going to be action taken, so I think there some reason to believe that some action may be taken. 303-304.

By its express terms, FOIA requires the posting of an agenda for meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting.

FOIA Section 30-4-80.

The trial court held that Petitioner failed by a preponderance of the evidence to establish a single FOIA violation at meetings of December 5, November 13 and November 16, 2007. With regard to a December 5 Special Meeting of Town Council (Count I - Amended Complaint), Council voted to approve an agreement to settle litigation and purchase property for \$6 million dollars without notice or formal amendment of its meeting agenda. At a subsequent meeting on December 17, with notice, Town Council voted a second time to approve the same agreement. The Court found that the second vote ratified the first vote taken without notice. Although the impetus for the second vote was an apparent FOIA violation, the Court found that ratification excused any violation. Additionally, it proposed that "exigent circumstances" allowed matters

to be added to agendas for votes during meetings. Council failed to formally amend its meeting agenda on December 5 to allow for any action item. Instead, a motion was made and the matter approved following an executive session for “legal advice” on the matter.

During meetings on November 13 and November 16, 2007, (Count III - Amended Complaint) Town Council violated the notice provisions of FOIA when it voted on matters not on the posted meeting agenda and without formal amendment of the meeting agenda, again, following executive sessions for which matters were announced for “discussion” or “legal advice”.

In addition to the meetings cited in the Amended Complaint, Petitioner testified at trial to ten additional meetings at which matters were voted on without any notice to the public by posted agenda. Two of those meetings, August 14, 2007, and October 9, 2007, were admitted to evidence to demonstrate a pattern of conduct.

**A. Unnoticed Actions December 5, November 13 and November 16, 2007 Violated the Agenda Notice Provision of Section 30-4-80 of FOIA.**

The posted agenda for the December 5th Special Meeting of Mount Pleasant Town Council contained no reference to the ongoing OK Tire Store/Shem Creek, which was added to the Executive Session agenda for “legal advice pertaining to the OK Tire litigation”. There was no notice by posted agenda that any formal action was contemplated in this matter nor was there formal amendment to the open meeting agenda. Following the executive session, the meeting agenda contained only “appointments to boards and commissions”. The minutes reflect that Town Council convened its executive session at 9:25PM. The OK Tire matter was announced for the Executive Session as “legal advice on settlement of legal issues and purchase of property”

- substantively different from the amendment to the executive session agenda earlier in the meeting.

By the time Council reconvened in open session at 10:03PM, Plaintiff and the press had left the Council meeting understanding from the meeting agenda that the executive session was the last business of the evening, other than appointments to boards and commission. When the open session reconvened, without notice, two motions were made on the OK Tire matter. While the Order states "Town Council adopted a motion to settle the OK Tire litigation which included spending \$6 million in public funds to purchase the property", this is an error. The executive session agenda (as amended) does not mention purchase of property. There was no mention that purchase of the OK property was a condition of the settlement. Two motions were made. The first was to accept a settlement agreement on the OK Tire litigation. The second motion appropriated \$6 million for an unspecified purpose. The property was appraised several months later by the Charleston County Parks and Recreation Commission at \$3 million dollars.

The press frustration over the unnoticed action was expressed in an email from a reporter at the local newspaper to the Town Administrator; "I can't know and the public can't know what is happening at meetings when agendas are amended during the meeting". R. 629.

Despite finding that the Council took formal action without meeting FOIA's 24 hour notice requirement, the trial court declined to find a FOIA violation. It did so based on two grounds: (1) the alleged existence of exigent circumstances; and (2) that the FOIA violation was somehow erased when the vote on the settlement agreement, including the purchase of real estate, was ratified/endorsed/affirmed on December 17th. Neither of these grounds are supported by law or fact. The Town admitted at trial and in deposition that no emergency existed on

December 5. "And the meeting we're talking about on December 5, '07, was not an emergency meeting was it?" "No, sir." R. 460, L.18-22.

Absent agenda notice, the public could not have known the intention of Town Council to settle litigation and spend \$6 million for the property.

In addition to the December 5th meeting, meetings on November 13 and November 16, 2007, exhibited the same pattern on the part of the Town voting on matters from executive sessions noticed and/or announced for discussion or legal advice.

On November 13, 2008, Town Council held a Special Town Council meeting immediately prior to a regularly scheduled meeting. The single matter on the agenda for the Special meeting was "Executive Session". R. 633. Upon reconvening in open session, a motion was made and approved to authorize the Mayor and members of Council "to obtain their individual attorneys for all lawsuits now and in the future...".

A second motion directed the Town Attorney "to move forward with discussions as discussed in executive session for a piece of property near Shem Creek". The "discussions" may or may not have referred to an unnoticed action from October for a nearly three million dollar offer on the former site of the OK Tire store on Shem Creek and an accompanying authorization for legal action if the offer was rejected. As with the December 5 meeting, Council took formal action without meeting FOIA's requirement for posted agenda to provide notice to the public of actions to be taken and without formal amendment of the open meeting agenda. The Court in this instance, did not hold that the circumstances constituted an emergency, nor did it cite "exigent circumstances". There was no later ratification and no agenda notice to the public or press that

these actions or would be considered for formal action in violation of S.C. Code Section 30-4-80.

On November 16, 2007, the agenda provides Executive Session and Adjournment as the order of business. Upon reconvening to open session, Council voted on three matters without required notice and agenda amendment. The meeting agenda did not notice that the Council would vote on anything. Council voted to raise the salary of the Clerk of Council, reject a settlement offer on the OK Tire property, and write a letter to the Chairman the Planning Commission suggesting he resign. The lower court did not apply the exigent circumstances finding to this meeting or any Council meeting other than December 5, instead issuing a broader ruling in its Second Supplemental Order. R. 20. There the lower court held that FOIA does not preclude formal action without notice:

Plaintiff argues the Order on the merits did not address the issue of whether a matter may be added to an agenda for executive session may be acted upon by public body upon reconvening to open session. To the extent this issue was not addressed in the previous Order, I find that FOIA does not preclude such action.

The votes taken without notice constituted violations of the 24 hour notice provisions under S.C. Code Section 30-4-80. Additionally, Council voted without formal amendment to the open meeting agenda.

**B. Liability of a Public Body for Violations of FOIA is Not Excused By Subsequent Actions to Resolve Actions Undertaken During Those Meetings.**

Ruling on the December 5 meeting, the trial Court further erred by holding that a FOIA violation was excused or somehow erased simply because the Council took “the same action on the same matter” at its December 17 special meeting which “ratified any defective action on the issue which occurred at the earlier (December 5) meeting when agenda was not timely posted”

confirming the absence of notice. As a basis for this holding, the trial court relied on Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986). This was erroneous for two reasons. First, it misconstrues the holding of Multimedia, Inc. v. Greenville Airport Comm'n, 287 S.C. 521, 339 S.E.2d 884 (Ct.App. 1986) Second, the 1987 FOIA amendment eliminated ratification from FOIA entirely.

Multimedia interpreted the ratification provision of Section 30-4-70(a)(1), Code of Laws of South Carolina, 1976, as it existed prior to the 1987 amendments, as it provided that “[a]ny formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective.” Section 30-4-70(a)(5), Code of Laws of South Carolina, 1976. Multimedia held only that where a formal action was taken in executive session, such action would be valid if subsequently ratified in open session pursuant to Section 30-4-70(a)(5). Subsequent to Multimedia, however, the ratification provisions relied on in Multimedia were removed from FOIA.

Cases from Arizona were cited in Multimedia and Herald with reference to “ratification”. The Arizona Open Meeting Law (OML) §38.431.05 has since been amended providing a detailed process for ratification of only a “prior action”, not an OML violation.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for the sanctions under the open meeting law such as civil penalties and attorney's fees.

(Section 7.11.2, Arizona Agency Handbook)

The trial court’s reliance on Multimedia and Herald and the cases underlying those decisions for any theory of ratification to erase the FOIA violation in this case was therefore in error. R. 5, Footnote 18.



In this instance, the “action” (the settlement agreement and purchase of property) was signed, sealed and delivered on December 6. While a potential defect in the agreement (as opposed to the FOIA violation) from unnoticed action may have been “cured” by a vote at a properly noticed meeting, allowing a public body to expunge a FOIA violation by this means would fatally weaken FOIA. Public bodies could violate FOIA at will, then schedule a later meeting to erase the violations.

With regard to the meetings of November 13, November 16, August 14, and October 9, no later "ratification" was undertaken.

**C. The December 5th Action Failed to Qualify as a Recognized Exception to FOIA's Notice Requirement Pursuant to Section 30-4-80.**

By its express terms, FOIA requires the posting of an agenda for special meetings at least 24 hours in advance of the meeting:

All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but *not later than twenty-four hours before the meeting*. The notice must include the agenda, date, time, and place of the meeting.

Section 30-4-80. *Emphasis added.*

Although an emergency meeting is an exception to FOIA's 24 hour notice rule, it is the only exception to the rule. The Town Administrator admitted, and the record shows, that the December 5th meeting was not an emergency meeting. R. 362-364; 460-462. As a result, the December 5th meeting did not qualify as exempt from FOIA's notice requirement and therefore constituted a violation under Section 30-4-80.

In its order the trial court did not expressly hold that the meeting was exempt from notice provisions of Section 30-4-80 as an emergency meeting. Instead, it created a completely new rule

to exempt the Town's notice from FOIA's notice requirements by holding that: "exigent circumstances sometimes require the late addition of one or more items to a meeting agenda for the proper and expeditious conduct of public business". (Of note, Council failed to formally add any action item to its open meeting agenda on December 5<sup>th</sup>). For this proposition the trial court cited to Herald. Unfortunately, Herald does not address this issue, nor does Herald support such a rule. The trial court's order has misconstrued Herald and created a rule contrary to the spirit and purpose of FOIA.

In addition to the trial court's error in its application of law, the record in this case fails to support the court's ruling that matters can be voted on for the proper and expeditious conduct of public business as a basis for exemption from FOIA's notice requirements. A review of the record makes clear that no emergency or exigency existed on December 5<sup>th</sup>. In fact, the record shows that the Town had apparently been considering various settlement offers involving Mason for months. On more than one occasion Council took formal action on the OK Tire/Shem Creek matter without the matter being on the agenda for action. The December 5<sup>th</sup> actions relating to Mason were only a continuation of the Town's pattern of conduct, rather than any emergency justifying a notice violation. The lack of any emergency is apparent upon review of the minutes of that meeting.

The agenda and minutes of the December 5<sup>th</sup> meeting show a substantial number of matters addressed at that meeting. After the local band played and high school coaches made announcements the meeting recessed for thirty minutes. Ironically, the meeting reconvened with an announcement by Town Attorney Young that the Town was in compliance with FOIA. Despite having a six million dollar contract in hand that supposedly demanded emergency action,

Council went on to conduct routine business for two hours without any announcement of the pending matter or that they would be taking emergency action that night.

It was not until the end of the meeting at 9:30 p.m. that the OK Tire/Shem Creek matter was first mentioned. And even then it was only mentioned as one of the purposes for an executive session. When the open session reconvened after 10:00 p.m. two motions were made and approved relating to the OK Tire/Shem Creek matter. Clearly, had this been an emergency warranting the suspension of FOIA's notice provisions, the existence of the emergency and potential action would have been announced at the beginning of the meeting and the agenda amended to include an emergency action.

FOIA's notice provision provides that notice be given as soon as practical. In this case, even if an emergency existed, the Town still violated the notice provision by making no announcement during the meeting of the supposed emergency or that emergency action would be taken at the meeting. Had it done so, at least the press and public that was in attendance would have been alerted two hours prior to the action. By the time Council reconvened in open session at 10:03PM, the Petitioner and the press had left the Council meeting with the belief that other than appointments to board and commissions, the executive session would be the last business of the evening. This belief was reasonable in light of the published agenda and the limited scope of an executive session.

The December 5th meeting is especially egregious as it resulted in the expenditure of six million dollars of public funds by the Town in a blatant violation of FOIA's notice provision. The facts relating to the history of the OK Tire/Shem Creek matter seen in other meetings shows that

the OK Tire/Shem Creek matter escaped public scrutiny and input as a result of the Town's repeated FOIA violations.

The trial court's ruling that exigent circumstances exempted the Town from the notice requirement are therefore without factual support as well as contrary to the law. Here, the trial court's ruling frustrates the overriding purpose of FOIA to provide the citizens of Mount Pleasant with advance notice of potential actions by the Town's Council.

**D. There Are Multiple Instances of Similar Acts of Action Without Notice**

To illustrate pattern, Plaintiff introduced evidence of two meetings in addition to those of December 5, November 13, and November 16, 2007, which demonstrated a pattern of taking formal action on matters noticed for executive session and/or added to executive session agendas but not noticed on the meeting agenda for action as required by FOIA Section 30-4-80.

The posted agenda for the August 14, 2007 Town Council Special Meeting, which immediately preceded a regularly scheduled meeting, contained a single item of business - Executive Session.

The agenda contains no notice to the public or press that any action would be taken. R. 619.

Council further failed to formally amend its agenda to add action items. The Minutes of the Special Meeting show that despite the absence of notice, Council voted to further negotiations on a "piece of property", to proceed with legal and contractual matters in reference to an undisclosed property acquisition and right of way, and authorized payment for individual attorneys for all council members. All of the actions at the August 14th Special Meeting constituted violations of FOIA's notice provisions.

Similarly, the October 9th Special Town Council Meeting resulted in numerous actions without any prior notice. Most notable was an offer for the OK Tire Property. R. 613. The minutes do not disclose that Council is appropriating \$2,285,000 for the purchase - learned by the public some time after the meeting. The motion for the unnoticed "legal action" action authorizes the town attorney to institute an unspecified action in the event the offer is not accepted. All matters were voted on without notice by posted agenda or amendment to the agenda at the open meeting.

**E. Petitioner was Entitled to a Finding that a Violation occurred.**

The clear and unmistakable intent of FOIA is expressed in the purpose outlined in Section 30-4-15:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

§ 30-4-15. *Findings and purpose*

The standard of "liberal construction" urged for FOIA is not necessary to recognize the violations of the notice provisions of FOIA in the meetings cited in the Amended Complaint or the two meetings allowed in evidence to demonstrate a pattern of taking action on matters without notice.

In a 2009 opinion of the Attorney General of South Carolina posed circumstances that parallel events in this case:

...interpreting section 30-4-80(a) to permit last minute changes to agendas gives public bodies the ability to post agendas with only non-controversial items and later amend those agendas to include more controversial matters without notice to

the public. Accordingly, we believe this reading would deny the public some of the protection FOIA seeks to afford.

Op. S.C. Atty. Gen., 2009 WL 1968596.

FOIA was enacted to prevent the government from acting in secret. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156; 547 S.E.2d 862 (2001). In this case Council's failure to provide notice of action items allowed it to act without public scrutiny, input, inquiry, objection, comment, or knowledge is - for all practical purposes, in secret and precisely what FOIA was created to prevent.

Due to the magnitude, regularity, and nature, the FOIA violations at issue are substantial and can simply not be minimized. There is no ambiguity in the 24 hour notice requirement of FOIA for special meetings and, aside from emergencies, no exceptions. As a consequence, there is simply no legal or factual basis to find that the Council was in compliance with FOIA. The trial court erred in failing to find or otherwise excusing or erasing, FOIA violations where lawful and proper notice was not provided.

Here the Petitioner was entitled to a finding that the Town repeatedly violated the notice provisions of FOIA Section 30-4-80.

### **The Decision of the Court of Appeals**

In the decision below the Court of Appeals failed to recognize any distinction between the notice requirements for regular meetings and the notice requirements for special meetings. The court of appeal's decision is therefore contrary to this Court's decision in *Lambries II* which clearly makes a distinction between regular and special meetings when evaluating FOIA's notice

requirements. In *Lambries II* this Court this Court stated: “. . . a “special” meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call.” Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) [*hereinafter referred to as Lambries II*]. In contrast, the Court of Appeals stated in its opinion below that FOIA allows a public body to add items to a special meeting agenda. In the instant case, there was no indication on the special meeting agenda that the matters scheduled for discussion in executive session would subsequently be acted upon in open session and agendas were never formally amended to allow for final action. The Court of Appeals creates a new rule that the public must guess whether matters on an executive session agenda, not on the following special meeting agenda, might be voted on after the executive session. This finding conflicts with *Lambries, II*.

The Court of Appeals’ error lies in part in its finding that the Town gave the public sufficient notice of pending issues by way of its executive session announcements, allowed the public to present its comments on the topics, and never took action during executive session. The record fails to support these conclusions. Here, the public was not given notice, nor did the special meeting agendas of November 13 and November 16 (R. p. 629; R. p. 633) allow public comments. While the December 5 meeting agenda allowed for public comment, it served little purpose since the vote to spend \$6 million was unnoticed on the meeting agenda. (R. p. 543).

In this case the posted agenda for the special meetings of November 13 and November 16 indicated that Council would only hold executive sessions. There was no notice that Council might take formal action during the open session of the special meetings. Agendas for these meetings noticed executive session as the only object of the call, however, in violation of 30-4-

80, unnoticed votes were taken at these special meetings. Allowing unnoticed action violates to the 24-hour notice provision of FOIA applicable to special meetings under 30-4-80 and is contrary to the reasoning in *Lambries II* which unambiguously distinguished the notice requirements for regular meeting agendas from those for special meetings:

"Moreover, although the specific types of meetings are not defined in FOIA itself, in light of the General Assembly's references to these different meetings in Section 30-4-80(a) and its general references in section 4-9-110 to meeting requirements, we believe the General Assembly made an intentional delineation because the terms do have commonly understood distinctions in the common parlance for procedures governing public bodies." Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) (Lambries II),

*Lambries II*, which was decided after the briefing of this case in the Court of Appeals, recognized that the permissible topics of a special meeting are limited to the "objects of the call" on the noticed agenda. Because all of the meetings at issue in this case were special meetings, a properly noticed agenda is required under *Lambries II*. To be proper: "Such notice must be posted as early as is practicable *but not later than twenty-four hours before the meeting*. The notice *must include the agenda*, date, time, and place of the meeting." S.C. Code Section 30-4-80. (*Emphasis added*)

Finding no definition of "agenda" in state law, the Court of Appeals failed to give any weight to the agenda requirement under 30-4-80 or to consider the applicability of the *Robert's Rules of Order*, the Town's adopted rules of order, as a guide to the definition of agenda provided therein: . . . "the terms order of business, orders of the day, agenda, and program refer to the closely related concepts having to do with the order in which business is taken up in a session and the prescheduling of particular business". (§41(15) *Robert's Rules of Order, Newly Revised, 10th Edition*).



*Lambries II* establishes that special meetings must be noticed with agenda 24 hours before the meeting, and importantly, the meeting action is limited to the object of the call.

The Court of Appeals erred in holding that FOIA accepts unnoticed action at a special meeting when the action follows an executive session, and such a ruling is contrary to the plain language of the statute and this Court's ruling in *Lambries II*. The Court of Appeals' opinion states:

From the posted and amended agendas, the public and the press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and may take some action upon reconvening to open session...and once those agenda were amended, it seems Town Council could certainly act on the agenda items upon reconvening to public session.

Opinion No. 5279, S.C. Ct. Appeals, Filed November 5, 2014.

Contrary to the Court of Appeals' opinion, the public and press had no such notice of action at the Town Council special meetings and meeting agendas were never formally amended. An executive session is a closed-door meeting within an open meeting. The agenda for executive session cannot become the *de facto* agenda for an open special meeting. The special meeting must have an agenda posted 24 hours in advance, and any action is limited to that which is posted on the agenda. FOIA does not allow for an executive session to serve as notice or to give permission for the public body to act when returning to open session in a special meeting. A special meeting agenda that notices only an executive session cannot allow unnoticed action in open session and still comply with the provisions of 30-4-80.

The Court of Appeals further erred in holding that Brock did not appeal from the trial court's finding that Town Council could amend its special meeting agendas in violation of the 24 hour notice requirement, and then take formal action. Brock clearly presented the issue to the trial court. (R. p. 49-53). The trial court found that any agenda could be so amended. (R. p. 19-20). The Court

of Appeals' finding focuses on amendment of executive session agendas, while overlooking the fact that this is an argument on the improper amendment of special meeting agendas. Brock has argued that Council violated FOIA by taking action on matters not properly on the special meeting agendas. Brock agrees the Town may discuss any topic in a properly announced executive session, subject to provisions of 30-4-70. Notice requirements in FOIA (30-4-80) do not allow for executive sessions agendas to satisfy agenda notice for special meetings.

The Court of Appeals decision fails to distinguish agenda notice between special and regular meetings. The reasoning of *Lambries II* shows this to be error: "By mandating an agenda for regularly scheduled meetings and forbidding County Council from amending its agenda, the Court of Appeals is, effectively, treating a regularly scheduled meeting as a called, special, or rescheduled meeting." Contrary to *Lambries II* the Court of Appeals has held: "To the extent Brock's notice issue is preserved, Section 30-4-80 does not support his position. That section requires public bodies to post agendas for special meeting twenty-four hours before the meetings; however, it does not specifically require the agenda to include what action the public bodies plan to take." This simply eviscerates Section 30-4-80 and is contrary to the entire analysis in *Lambries II*.

The Court of Appeals misperceived important aspects of Brock's argument. Brock's argument is that Town Council must notice any matter to be taken up at a special meeting. The Court of Appeals, found that unforeseen matters may arise during the course of any meeting which could require an executive session. This is not in dispute for regular meetings where a matter for executive session arises and leads to an action. However, the executive sessions in this case did not arise during a meeting. They were scheduled events. Contrary to the decision of the

Court of Appeals, Brock argues that formal action *following an executive session at a special meeting* must be included on the meeting agenda to meet the notice requirements of FOIA.

The Court of Appeals mistakenly perceived that Town Council voted to amend the special meeting agendas at issue. Even if *Lambries II* made no distinction between regular and special meetings, the Court of Appeals' decision would still be in error as there was never an formal amendment to any meeting agenda, except executive sessions for which no agenda is required. Instead, at every meeting in this lawsuit, Council adjourned from executive session to open session and voted without having amended the agenda and without any notice to the public. Even had there been a formal amendment of the special meeting agenda, the actions, without 24 hour notice, would be violations of FOIA and in conflict with the reasoning of *Lambries II*.

The Court of Appeals erred in holding Brock's argument as to "ratification" not being raised or preserved. The issue of ratification was raised and ruled on by the trial court in its order denying Brock's Motion for Reconsideration. (App. 133-134). The trial court ruled that any violation at the December 5 Special Meeting was cured or ratified by the December 17 Special Meeting. The FOIA violation of the December 5 meeting could not be cured by the subsequent meeting. Although a subsequent, properly noticed meeting might cure any contractual deficiencies between Mason and the Town as to the purchase of the property, it could not erase the FOIA violation existing on December 5, nor Brock's right to have a declaration as to the violation of FOIA. Ratification was eliminated from FOIA and the term removed with 1987 amendments to FOIA that followed Multimedia from 1986.

## **II. THE COURT OF APPEALS ERRED IN FINDING THAT CERTAIN ARGUMENTS WERE NOT PRESERVED FOR APPEAL**

The Court of Appeals erred in finding that “Brock’s arguments regarding the trial court’s rulings on: the applicability of Multimedia, Herald, and ratification provisions; exemptions to FOIA’s provisions: and the alleged repeated FOIA violations are not preserved.” The Court of Appeals erred in holding that “the trial court’s supplemental order did not rule on other issues. Accordingly, because those arguments on appeal were not presented nor ruled upon by the trial court. . .”. The record shows that Brock’s Motion for Reconsideration addressed each issue raised on appeal to the Court of Appeals. (App. 163-167). The trial court’s second supplemental order states: “Other issues raised by Plaintiff in his motion for reconsideration to alter finding or amend the judgment are denied”. (App. 133-134). The issues were therefore sufficiently preserved for the Court of Appeals to consider. They are also part and parcel of the issue that was ruled on by the Court of Appeals. It was therefore error for the Court of Appeals not to consider these arguments in its determination of Issue I above.

### **CONCLUSION**

Based on the foregoing, the relevant portions of the lower court’s decision and the ruling of the Court of Appeals should be reversed.

Respectfully submitted,



J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29609  
(864) 282-1292  
(864) 271-6035 facsimile

Robert Clyde Childs III  
The Childs Law Firm  
2100 Poinsett Hwy., Ste. E  
Greenville, SC 29609  
(864) 242-9997  
(864) 242-9914 facsimile

*Counsel for Petitioner*

September 25, 2015.