ALAN WILSON
ATTORNEY GENERAL

June 28, 2018

The Honorable J. Will Haynie, Mayor
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, SC 29464

Dear Mayor Haynie:

You have requested our opinion regarding a lawsuit brought against the Town of Mount Pleasant. You seek answers to the following questions:

> (1) Under what circumstances can an elected official be held personally financially liable in municipal-related litigation?
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> (2) When a published agenda contains a single Executive Session item with multiple subtopics followed by a single action item related to the entire Executive Session, and council amends the agenda to move one subpart from the Executive Session to the beginning of the meeting leaving the remaining subparts and action item, when is the appropriate time to take the noticed action? To clarify, if the item is voted on at a later time in the meeting and not right after it was discussed, possibly following a separate Executive Session, is the decision by Council valid?

By way of background, you state the following:

> These issues arise out of a lawsuit brought against the Town. The Mayor and council members were named as defendants both in their personal and official capacity following a vote to deny plaintiffs impact assessment during a council meeting. The Town filed a Motion for Summary Judgment requesting dismissal of Mayor and council members based on legislative immunity. The motion was denied. The parties later participated in court-required mediation wherein with the written consent of the Mayor and two council members the parties agreed to a proposed settlement subject to full Council approval at a regular meeting.
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> The agenda for the regular meeting contained the following items for Executive Session:
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> XI. Council Business
> . . .
> C. Executive Session
> 1. Legal and Contractual
> a. Legal advice and consideration of proposed mediation settlement agreement in Middle Street Partners v. Town of Mount Pleasant

b. Legal Advice pertaining to lawsuit entitled Home Depot v. Town of Mount Pleasant

2. Personnel
   a. Appointment to the Planning Commission
   b. Appointment to the Commercial Design Review Board
   c. Discussion related to a personnel matter

D. Post Executive Session
Council may take action upon reconvening from Executive Session.

At the beginning of the meeting, a council member moved to amend the agenda by specifically moving Executive Session item XI.C.l.a., Legal advice and consideration of proposed mediation settlement agreement in Middle Street Partners v. Town of Mount Pleasant, to an earlier position on the agenda (the first item after VII.) The motion was seconded and council voted unanimously to amend the agenda.

The motion to amend did not include or affect the remaining Executive Session items (1.b., 2.a., 2.b., and 2.c.) in section XI.C. or the post executive session action item XI.D.; therefore, they remained in place at the end of the agenda.

When item XI.C.l.a. was reached a motion to enter into executive session was made and seconded. The motion failed 4-4. One councilmember abstained and removed himself from the meeting prior to the discussion and vote. Discussion related to the proposed settlement and the past two years of litigation followed in open session and an additional council member removed himself from the meeting stating a conflict based on him being named personally in this lawsuit.

Following the recusal and discussion in open session on personal liability, in general, and the proposed settlement, legal counsel for the Town was asked for an opinion on the issue of personal liability of council members. Legal indicated that they had an opinion on these particular topics, as well as the strengths and weaknesses of the case and said opinions would be best shared with council in executive session.

A motion to enter into subsequent executive session was made and seconded. The motion passed 4-3. The meeting adjourned into executive session at 9:18 p.m. The two recused council members did not participate in executive session. Additionally, two council members voluntarily decided to not participate in the executive session. Five council members (a quorum) elected to participate in the executive session.

The meeting reconvened at 10:09 p.m. and the Chair stated that no action and no votes were taken in executive session. The Chair also stated there would be another executive session later on the agenda, and the last item on the agenda is Post Executive Session where council may take action. No motions, whether for approval, denial or for any other action related to the proposed Middle Street settlement were made at this time.

Council moved onto the next item on the agenda. Later in the meeting, the remaining matters under item XI.C. were reached. The Chair notified the public of the need to go into executive session to discuss the remaining agenda items (excluding Item XI.C.l.a.):

XI. Council Business

C. Executive Session
1. Legal and Contractual
a. MOVED BY MOTION TO AMEND THE AGENDA
b. Legal Advice pertaining to lawsuit entitled Home Depot v. Town of Mount Pleasant
2. Personnel
a. Appointment to the Planning Commission
b. Appointment to the Commercial Design Review Board
c. Discussion related to a personnel matter
D. Post Executive Session
Council may take action upon reconvening from Executive Session

A council member moved to go into executive session and the motion was seconded. All members of council voted in favor and convened into executive session at 11:36 p.m. The Chair again stated that Council may take action upon reconvening.

Upon reconvening from executive session it was announced that no votes were taken in executive session and the Chair moved on to item XI.D. (Post Executive Session.) Motions were made on the various executive session items including a motion to approve the mediation settlement agreement and conceptual plan in the Middle Street Partners v. Town of Mount Pleasant case as discussed in the first executive session and to authorize the Mayor to sign any documents required to perfect settlement on those terms and require Town's legal counsel to proceed accordingly. The motion was seconded and then approved by a vote of 4-3.

We have attached a copy of the full council minutes from the July 2017 meeting. The meeting is also available for viewing at
https://www.youtube.com/watch?v=S21M04wu9Lo&t=7s.

(emphasis added).

Law/Analysis

Legislative Immunity

The doctrine of absolute immunity for legislators in the performance of their legislative duties was recognized by our Supreme Court in Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979). In that case, an action for slander was brought against Senator Frank McGill. The lower court granted Senator McGill's motion for summary judgment "on the ground that the alleged slanderous statements made by respondent concerning appellant were made on an absolutely privileged occasion." 273 S.C. at 143-44, 255 S.E.2d at 342. Such statements were acknowledged to be defamatory and thus "summary judgment for respondent can be sustained only on the basis that the alleged defamatory remarks were absolutely privileged." 273 S.C. at 145, 255 S.E.2d at 342.

In addressing the legal issue of legislative immunity, our Supreme Court referenced the general law of libel and slander in this area:

> [w]hen the court stated in Fulton v. Atlantic Coast Line Railroad Co., 220 S.C. 287, 67 S.E.2d 425, that "the class of absolutely privileged communications is narrow, and practically limited to legislative and judicial proceedings of State, "our decisions show that application of the absolute privilege has not been so narrowly restricted." Judge Russell in Corbin v. Washington Fire and Marine Insurance Co., 278 F.Supp. 393, citing a decision and review of our cases by the late Judge Wyche in Johnson v. Independent Life & Accident Ins. Co., 94 F.Supp. 959, stated the general principle that privilege in libel or slander is based on the considerations of public policy and correctly set forth the general rule governing the application of the absolute privilege in this State, as follows:
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> > While there has been some tendency in the decisions to narrow the absolute privilege, restricting it generally 'to legislative and judicial proceedings and acts of State,' the courts of South Carolina have recognized 'occasions other than those comprising strictly legislative or judicial proceedings,' where, under considerations of public policy, absolute privilege has been upheld.

273 S.C. at 145-46, 255 S.E.2d at 342-43.

The McGill Court then turned to the doctrine of legislative immunity as compared to that of absolute privilege. According to the Court,

> A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties. Accordingly, an absolute privilege is recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry. 50 Am. Jur. (2d), Libel and Slander, Section 223; Annotations: 40 A.L.R. (2d) 941, 26 A.L.R. (3d) 492, 497; Prosser, Law of Torts, 4th ed. p. 781.

Id. While Appellant argued to the contrary, the Court concluded that Senator McGill's statements were uttered in the course of his legislative duties. Thus, in the Court's opinion,

> . . . [t]he matters under inquiry at the meeting in question were of public concern and, in view of the then relationship between the legislative delegation and the county government, related to the discharge of the responsibilities of the legislative delegation. Under the present facts, public policy mandated that legislators be permitted to pursue reports of incompetent or illegal behavior involving appointed county personnel without the necessity of having to justify their actions in a suit for defamation.

273 S.C. at 147, 255 S.E.2d at 147. Accordingly, the Court reasoned that "[t]he trial judge properly granted summary judgment on the ground that the alleged defamatory statements were made on an absolutely privileged occasion." 273 S.C. at 147, 255 S.E.2d at 147-48.

Moreover, another decision is relevant. In South Carolina Public Interest Foundation v. Courson, et al., 420 S.C. 120, 801 S.E.2d 185 (Ct. App. 2017), the Court of Appeals held that legislators were absolutely immune from the assessment of attorneys fees and costs on the basis of legislative immunity. The Court traced the evolution of the doctrine of legislative immunity as follows:

> [f]urthermore, South Carolina recognizes the longstanding doctrine of legislative Immunity for legislators carrying on their legislative duties. See Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (holding a legislator was absolutely immune from liability for comments made during the performance of his legislative duties). Legislative immunity "has long been recognized in Anglo-American law," being rooted in the "'Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and [ ] 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" Bogan v. Scott-Harris, 523 U.S. 44, 48-49. 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 372, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). Legislative immunity protects legislators from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good." Tenney, at 377, 71 S.Ct. 783. The public good is undermined by any restriction placed on a legislator's ability to exercise legislative discretion, including the fear of personal liability. See Bogan, at 52-53, 118 S.Ct. 966. Although few South Carolina cases discuss legislative immunity, this court has addressed similar public policy considerations for immunity for other types of public officials carrying out their official duties. See Williams v. Condon, 347 S.C. 227, 242-43, 553 S.E.2d 496, 505 (Ct. App. 2001) (noting qualifying a prosecutor's immunity would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (quoting Imbler v. Pachlman, 424 U.S. 409, 427-28, 96 S.Ct. 984, 47 L.Ed.2d (1976))); O'Laughlin v. Windham, 330 S.C. 379, 384 S.E.2d 689, 692 (Ct. App. 1998) ("[J]udicial immunity is vital for the continuation of an independent judiciary and for the preservation of judicial integrity."); id. at 385, 498 S.E.2d at 692 (holding the adoption of the Tort Claims Act did not modify common law judicial immunity in part because of the "presumption of legislative intent to preserve common law principles"). Therefore, because nothing in the plain language of the statute indicates the General Assembly intended to waive legislative immunity, legislative immunity prevents the state action statute from applying to Senators.

420 S.C. at 125, 801 S.E.2d at 187-88.

Furthermore, in Health Promotion Specialists, LLC et al. v. South Carolina Board of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013), the Supreme Court applied legislative immunity to the South Carolina Board of Dentistry, giving members absolute immunity. At issue, was the propriety of the Board's "legislative action," in this case, the enactment and enforcement of the Board's "emergency" regulations relating to dental hygienists. It was there contended that the Tort Claims Act (§ 15-78-10 et seq.) required that immunity is an affirmative defense and the "Board failed to prove as a matter of law that it was entitled to this immunity." 403 S.C. at 634,

743 S.E.2d at 814. However, the Supreme Court noted that the Tort Claims Act "'expressly preserves all existing common law immunities.'" 403 S.C. at 635, 743 S.E.2d 689, 691 (Ct. App. 1998). In the Court's view, the Board of Dentistry "constitutes a governmental entity that can invoke the protections of the TCA." 403 S.C. at 636.

According to the Supreme Court, the trial judge "properly found the Board's promulgation of the Emergency Regulation constituted a legislative or quasi-legislative act that was protected from liability under . . . [the TCA]." See § 15-78-60(1), (2), (4). Moreover, the Court found that the Board was entitled to common law legislative immunity, noting that:

> . . . the Board's entitlement to immunity is supported by common law that interprets and applies principles of legislative immunity, a doctrine that has not been supplanted by the TCA. See Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) ("A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties."); see also Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001) (discussing principles of legislative immunity as established by the United States Supreme Court in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)).

Accordingly, the Court held that the Board of Dentistry "was immune from the tort claims asserted by Health Promotion." 403 S.C. at 637, 743 S.E.2d at 815.

Courts have also concluded that members of a city council are entitled to absolute legislative immunity for actions taken in their legislative capacity. As was stated by the Court in Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004),

> [t]his Court has recognized that individuals acting in a legislative capacity are immune from liability for those actions. In re Perry, 60 S.W.3d 857, 859 (Tex.2001). Legislative immunity applies to legislators at the federal, state, regional, and local levels of government – including city council members – who are performing "legitimate legislative functions." Bogan v. Scott-Harris, 523 U.S. 44, 53, 118 S. Ct. 966, 140 L.Ed.2d 79 (1998) (stating that legislative immunity extends to local legislators); Tenney v. Brandhove, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (noting that legislative immunity only protects actions within "the sphere of legitimate legislative activity") [and other cases]. Thus, based upon the foregoing, members of city council would be entitled to absolute legislative immunity for actions taken as part of their legislative duties.

Thus, it is clear that members of legislative bodies, including members of City Council, are absolutely immune from damage claims for action taken in their legislative capacity.

FOIA

Your next question concerns the applicability of the Freedom of Information Act ("FOIA"). Your question involves a situation where "council amends the agenda to move one

subpart from the Executive Session to the beginning of the meeting leaving the remaining subparts and action item." You ask "When is the appropriate time to take the noticed action?" In other words, as you state, "if the time is voted on at a later time in the meeting, and not right after it was discussed, possibly following a separate Executive Session, is the decision by Council valid?" According to your letter, consideration of the lawsuit settlement was moved on the agenda to early in the meeting from near the end. The matter was reached and a motion to go into executive session failed. Discussion of the matter "followed in open session . . ." and no votes thereupon were taken in a subsequent executive session to discuss the settlement, or immediately following. Other items on the agenda were then taken up. Near the end of the meeting, following a very short executive session, the settlement was then voted upon without notice. As you state, "Motions were made on the various executive session items including a motion to approve the mediation settlement agreement and conceptual plan in the Middle Street Partners v. Town of Mt. Pleasant case as discussed in the first executive session and to authorize the mayor to sign any documents required to perfect settlement on those terms and require Town's legal counsel to proceed accordingly."

As noted, your question raises concerns under FOIA, codified at § 30-4-10 et seq. FOIA is a remedial statute and must be liberally construed. As we advised in Op. S.C. Att'y Gen., 2016 WL 963697 (February 11, 2016), FOIA was enacted with the following legislative purpose in mind:

> [t]he 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. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.
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> S.C. Code Ann. § 30-4-15 (2007 & Supp. 2015). In other words, and as the South Carolina Supreme Court has summarized, "the essential purpose of the FOIA is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).
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> Being a statute remedial in nature, our courts recognize the FOIA "should be liberally construed to carry out its purpose." Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Thus, it has also been recognized that any exception to the Act's applicability must be narrowly construed. Evening Post Publ'g Co. v. City of North Charleston, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005).

"'The essential purpose of FOIA is to protect the public from secret government activity.'" Brock v. Town of Mt. Pleasant, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (quoting Lambries v. Saluda County Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014)).

In Op. S.C. Att'y Gen., 2009 WL 1968596 (June 9, 2009), we addressed FOIA's limitations upon a public body's change in agenda. The question we discussed and analyzed in 2009 was the efficacy of a 1989 Opinion regarding amendment of an agenda at the beginning of a meeting. In our 2009 Opinion, we noted that in Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006), our Supreme Court stated that "[t]he purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." FOIA, we emphasized, "'is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.'" (quoting New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007)). In addition, we quoted as follows § 30-4-80, which governs the notice required to be given of meetings by public bodies:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda if any, for regularly scheduled meetings must be posted on a bulletin board at the office meeting place of the public body at least twenty-four hours prior to such meetings. 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 practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

(emphasis added).

Our 2009 Opinion, referencing § 30-4-80(a), and emphasizing that "'the placement of business on the agenda cannot be used to circumvent the Freedom of Information Act or any other provisions of law governing notice to other board members or to the general public,'" stated as follows:

> [w]e agree with your assessment that FOIA does not specifically require public bodies to have an agenda and the use of the phrase "if any" in section 30-4-80(a) further supports this understanding. Thus, we understand your position that when an agenda is not required, if an agenda exists, the public body should be allowed to amend it. However, as we mentioned above, our courts take the position that the provisions in FOIA should be liberally construed in favor of disclosure in order to provide the greatest protection to the public. Certainly, the public would receive the greatest protection by requiring that the agenda in its final form be posted at least twenty-four hours in advance of a meeting. Thus, members of the public would be well informed of matters to be discussed at the meeting. In addition, if public bodies are allowed to amend their agendas up until the time of a meeting, the twenty-four-hour posting requirement contained in section 30-4-80(a) could become meaningless, as the public body could post a blank agenda and fill in items for discussion at the last minute affording no notice to the public and defeating the purpose of section 30-4-80(a). Furthermore, interpreting section 30-4-80(a) to permit last minute changes

> to agendas gives public bodies the ability to post agendas with only noncontroversial items and later amend those agendas to include more controversial items without notice to the public. Accordingly, we believe this reading would deny the public some of the protection FOIA seeks to afford.
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> While we do not believe a public body is completely without leave to make minor adjustments to its agenda within the twenty-four hours prior to a meeting, we believe the best reading of section 30-4-80(a) is to require an agenda in its most final form to be posted at least twenty-four hours prior to the meeting. Moreover, we believe posting a final agenda within the twenty-four hour period best serves the spirit of FOIA.

Following our 2009 Opinion, our Supreme Court decided the case of Lambries v. Saluda County Council, supra. Lambries held that County Council's amendment of its agenda during a regularly scheduled meeting did not violate FOIA. In Lambries, a motion was made during a regularly scheduled meeting of Saluda County Council. According to the Supreme Court,

> [o]n December 8, 2008, at a regularly scheduled meeting of the Saluda County Council, a motion was made and seconded to amend the posted agenda to take up a resolution. Both the motion and resolution were voted upon and passed unanimously during the meeting, which was open to the public. The nonbinding resolution pertained to water and sewer services, although that subject was not originally listed on the County Council's agenda.

409 S.C. at 5, 760 S.E.2d at 787.

The Lambries Court observed that FOIA did not require a regularly scheduled meeting to have any agenda at all. According to the Court, "[a]n agenda, if there is one, must be posted at least twenty-four hours before the meeting." 409 S.C. at 14, 760 S.E.2d at 791. (emphasis in original). Given this language, the Court thus explained:

> [i]n sum, nowhere in FOIA is there a statement that an agenda is required for regularly scheduled meetings. Since what the General Assembly says in the text of the statute itself is the best evidence of legislative intent, Hodges, 341 S.C. at 85, 533 S.E.2d at 581, we believe the legislative intent evidenced in the use of the phrase "if any" is that the issuance of an agenda for regularly scheduled meetings lies within the discretion of County Council. Cf. 62 C.J.S. Municipal Corporations § 148 (2011) ("The functions of a municipal corporation may be either imperative or discretionary. Whether any particular power or duty is mandatory, permissive, or discretionary is purely a question of legislative intent." (footnote omitted)).
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> If the General Assembly wanted to require an agenda for regularly scheduled meetings, it could have done so with the simple use of the word "shall," which generally signals a command. Cf. City of Midwest City v. House of Realty, Inc., 198 P.3d 886, 891 n. 6 (Okla.2008) ("All public bodies shall give notice in writing by December 15 of each calendar year of the schedule showing the date, time and place of the regularly scheduled meetings of such public bodies for the following calendar year. . . . In addition . . ., all public bodies shall, at least twenty-four (24) hours prior

> to such meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting . . .; provided, however, the posting of an agenda shall not preclude a public body from considering at its regularly scheduled meeting any new business." (quoting Okla. Stat. tit. 25, § 311 (2001)); cf. Grapski v. City of Alachua, 31 So.3a 193, 199 (Fla.Dist.Ct.App.2010) (holding while Florida courts have recognized that notice of public meetings is mandatory, the preparation of an agenda that reflects every issue that may come up at a properly noticed meeting is not, and notice need not be given of every potential deviation from a previously announced agenda; the public has the right to attend open meetings, but no authority to interfere with the decision-making process.))
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> Nor is there any restriction contained in FOIA on the amendment of an agenda. We agree with the dissent that it appears the majority of the Court of Appeals engrafted this prohibition onto FOIA based on its subjective view of the "spirit" and "purpose" of FOIA. Although we understand the concerns articulated by the majority, the purpose of the notice provision in section 30-4-80 is to prevent government business from taking place in secret, as noted in our case law, e.g., Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998), and in the General Assembly's statement of purpose in section 30-4-15. The public was not prevented from finding out the actions of County Council where the proposed amendment to the agenda and the resolution were both raised and voted upon in public and were recorded in the minutes of the meeting of County Council. Since County Council posted the regularly scheduled meeting at the beginning of the year and posted a discretionary agenda at least twenty-four hours prior to the meeting, it complied with the requirements of FOIA's notice requirement in section 30-4-80. Cf. Dorsien v. Port of Skagit County, 32 Wash.App. 785, 650 P.2d 220, 223 (1982) ("The primary requirement for regularly scheduled meetings is that they be 'open to the public.' Notice of the agenda is required only for special meetings. RCW 42.30.080.").

(emphasis added). Lambries further emphasized the importance under FOIA of the public's awareness of any change in the agenda. In the Court's mind, the "purpose of the notice provision in section 30-4-80 is to prevent government business from taking place in secret." Id. As noted above, Lambries stressed that, in the situation before the Court, "[t]he public was not prevented from finding out the actions of County Council where the proposed amendment to the agenda and the resolution were both raised and voted upon in public and were recorded in the minutes of County Council." Id.

Following the Supreme Court's decision in Lambries, the General Assembly amended § 30-4-80 by Act No. 70 of 2015. The purpose of this Act, as expressed in its Title, was to "provide [that] public bodies shall post agendas for all regularly scheduled meetings" and to "provide for the manner in which these agendas subsequently may be amended." Section 30-4-80(A) now reads as follows:

> § 30-4-80. Notice of meetings of public bodies.
> (A) All public bodies, except as provided in subsections (B) and (C) of this section, must give written public notice of their regular meetings at the beginning of each

> calendar year. The notice must include the dates, times, and places of such meetings. An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies. 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. Nothing herein relieves a public body of any notice requirement with regard to any statutorily required public hearing.

(emphasis added).

Subsequently, the Supreme Court decided Brock v. Town of Mt. Pleasant, supra. There, the Supreme Court distinguished Lambries on the basis that the meeting in question in Brock was a "special meeting" rather than one regularly scheduled. The Court noted that "[i]n relying on this Court's ruling in Lambries that FOIA imposed no restrictions on amending discretionary agendas, the Court of Appeals failed to distinguish between regular meetings and special meetings." 415 S.C. at 630, 785 S.E.2d at 201. Thus, "the Court of Appeals' holding that Town Council could take any action on any item that was properly discussed during executive session is in conflict with Lambries, wherein we noted that in special meetings, 'nothing can be done beyond the objects specified for the call.'" 415 S.C. at 631, 785 S.E.2d at 201-02 (quoting Lambries, 409 S.C. at 15, 760 S.E.2d at 792). Brock observed also that "[a]lthough this case is governed by a previous version of the statute, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas during meetings." 415 S.C. at 629, n. 4, 785 S.E.2d at 201, n. 4 (emphasis added). Thus, Lambries has been at least partially overruled by statute. See Atkins v. Wilson, 417 S.C. 3, 788 S.E.2d 228 (Ct. App. 2016). The "specific procedure for amending agendas during meetings," as now set forth in § 30-4-80(A), is that there must be a "two thirds vote of the members present and voting" and "a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda."

In your situation, following the failed vote to go into Executive Session to discuss the settlement in question, the Minutes quote one member of Council as stating that "it is beneficial having a number of residents in attendance this evening, so they understand exactly where Council is." Minutes at 36. Legal counsel advised that "what came out of mediation" is "why this is brought to Council this evening." Id. at 37. Counsel also noted that "any votes [regarding the Settlement proposal] whether it be to approve or deny or take no action is put on the public record." Id. at 38. At that point, one council member stated that "he wants to understand how to come out of executive session and vote on something that has not yet been vetted with the public." Id. Council was then advised if it "comes back and votes in the negative . . . the case goes on." Id. at 39. Further, Council was advised that "there has been one vote and the motion failed; therefore, confirming that there will not be executive session in this issue." Id. at 39-40. From this colloquy, at this point, an objective observer could conclude that Council did not wish to take up the settlement issue.

Following these events, a discussion ensued as to whether the agenda item was "to receive legal advice" or was "Council obligated to vote on this. . . ." Legal counsel advised that "there is no absolute requirement to take action." Id. at 41. Further, counsel advised that "there is no requirement to go into executive session." Id. It was stated that absent any action from Council, 'the next steps would be for Council to go to trial." Id.

Legal counsel also advised that, while there has been much discussion regarding the lawsuit or its resolution, "there has never been a Council action on this at this point." Id. at 44. Further, counsel stated in response to a question with respect to "who would be signing any proposed settlement as discussed," that "there would have to be a Council decision." Id. at 45.

The Mayor explained that although the earlier motion to go into Executive Session had failed, such failure "does not mean that another motion could not be made. . . ." The Mayor thereafter asked counsel for clarification on that point. Counsel advised members that "if there are circumstances that changed, another motion could be made to go into Executive Session." Id. at 48. Following that explanation,

> Mayor Page stated another motion had been made to go into Executive Session, and asked if there were questions before the vote was taken.
>
> There being no questions, Mayor Page called for the vote. Mr. Brimmer, Mr. Carrier, Mr. Smith and Mayor Page voted yes. Mr. Owens, Mr. Bustos and Mr. Haynie voted no. Mr. Gawrych and Mr. Santos abstained. The motion to go into Executive Session passed with a 4-3 vote.
>
> The meeting was adjourned into Executive Session at 9:18 p.m.
>
> Mayor Page reconvened the meeting at 10:09 p.m. stating no action and no votes were taken. She stated there is an item later on the agenda and another Executive session, and the last item on the agenda is Post Executive Session, Council may take action.

Id. at 48. It is not entirely clear if the Mayor was advising that action on the settlement in question could be taken later in the meeting. Regardless, Council then proceeded to take up other items on the agenda.

The crucial vote regarding approval of the settlement began with Council adjourning into Executive Session at 11:36 p.m. The following recounting of events is described in the Minutes:

> C. Executive Session
>
> Mayor Page said there is a need to go into Executive Session to receive Legal Advice pertaining to a lawsuit entitled Home Depot versus the Town of Mount Pleasant. There are also some personnel issues, including an appointment to the Planning Commission, appointment to the Commercial Design Review Board and discussion related to a personnel matter.
>
> Mayor Page asked if there is a motion and Mr. Carrier so moved. Mr. Smith seconded the motion. All present voted in favor.
>
> Mayor Page adjourned the meeting to Executive Session at 11:36 p.m. stating Council may take action upon reconvening. [Mr. Gawrych departed at 11:36 p.m.]
>
> Mayor Page reconvened the meeting at 11:46 p.m. stating Mr. Gawrych had left the meeting. Mayor Page said there was legal and contractual advice taken· on several issues, and there are some appointments to two boards.
>
> 1. Legal and Contractual
>
> a. Legal advice and consideration of proposed mediation ·settlement agreement in Middle Street Partners v. Town of Mount Pleasant
>
> Mr. Smith moved to approve the mediation settlement agreement and conceptual plan as discussed in Executive Session and authorize the Mayor to sign any documents required to perfect settlement on those terms and require Town's Legal Counsel to proceed accordingly. Mr. Carrier seconded the motion.
>
> Mr. Santos recused himself from the vote. Mayor Page stated there is a motion and a second to approve the Middle Street settlement and called for the vote.
>
> Mr. Brimmer, Mr. Carrier, Mr. Smith and Mayor Page all voted in favor.·
>
> Mr. Bustos, Mr. Haynie and Mr. Owens voted no. Mr. Santos · recused himself and Mr. Gawrych was not present for the vote. The motion carries by a vote of 4-3.

Id. at 77-79.

In summary, as we understand the situation, Council moved up consideration of the settlement on the agenda, approving it unanimously, consistent with amended § 30-4-80. Council then called for a vote to go into Executive Session to consider the matter, but the vote to retire to Executive Session failed. Subsequently, when Council successfully voted to go into Executive Session, it took no action upon return from Executive Session. Following ambiguous statements regarding possible consideration of the settlement at the end of the meeting, Council then went on to other matters. Subsequently, Council voted upon and approved the settlement at the very end of the meeting.

Conclusion

As to your first question – under what circumstances may members of the Town Council "be held personally financially liable in municipal related litigation," – it is our opinion that Council Members would be entitled to absolute immunity from individual monetary liability in the performance of their legislative duties and responsibilities. Both our Supreme Court, as well as our Court of Appeals, have recognized the doctrine of absolute immunity for legislative acts. And, as the United States Supreme Court recognized in Bogan v. Scott-Harris, 523 U.S. 44, 53-54 (1998), "[a]ny argument that the rationale for absolute immunity does not extend to local legislators" would be rejected; as the Court stated there, "[l]ocal legislators are entitled to absolute immunity . . . for their legislative activities." Thus, so long as the particular activity is "legislative" in nature and scope, members of City Council are absolutely immune from personal financial liability.

As to your second question, we emphasize that we cannot determine factual questions in an opinion of this Office. As we have consistently recognized over the years, "pursuant to longstanding office policy, [the Attorney General] does not investigate and determine factual questions, but instead issues only legal opinions." Op. S.C. Att'y Gen., 2014 WL 1398595 (January 2, 2014).

Nevertheless, based upon the amendment of § 30-4-80(A), now requiring a two-thirds approval by the public body of amendments to the agenda during the course of a meeting, it is our opinion that a court could well determine that Council may not have conformed to such a requirement. We recognize that § 30-4-80(A) does not use the word "amend" or "amendment," but instead employs the language "added to the agenda." However, the Title of Act 70 of 2015 uses the word "amended' as part of the legislative purpose. Moreover, the Supreme Court, in Brock references the Act as setting forth "a specific procedure for amending agendas during meetings." Thus, construing FOIA liberally, we believe the purpose of the 2015 Act was to require a two-thirds vote in order to "amend" an agenda during the meeting.

As we understand the sequence of events, both from your letter and the Minutes which you provided this Office, the following events occurred: Council voted unanimously to move the Executive Session and consideration of the settlement matter to first on the agenda; Council's vote to go into Executive Session to consider the settlement failed; following some discussion of the matter in public, Council again voted to go into Executive Session to consider the matter and this vote succeeded; Council emerged from Executive Session and took no action; later, at the very end of the meeting, Council took action to approve the settlement following Executive Session. It does not appear that either a two-thirds vote to take up the settlement again at the end of the meeting was taken, nor was there a determination by Council that this was an emergency situation or an exigent circumstance, thereby allowing a by-pass of the two-thirds requirement of § 30-4-80 for amendment of the agenda.

Based upon these facts, a court certainly could conclude that Council's decision to move consideration back to the end of the meeting constituted another "amendment" of the agenda, thus requiring a two-thirds vote, consistent with § 30-4-80 of FOIA, as amended. Essentially, returning consideration of the settlement to a location near the end of the meeting, after having voted to move such consideration up to the front, is as much an "amendment" of the agenda one way as it is the other. In short, having first unanimously amended the agenda to require earlier consideration of the settlement, the moving of such consideration back again to the end of the meeting, could be held to require two-thirds approval under FOIA. Construing FOIA broadly, as we must, it is our opinion that the statute required a two-thirds approval to return consideration of the settlement to its former location on the agenda. This was not done in accordance with § 30-4-80(A). A court could conclude that Council played "musical chairs" with the public.

Sincerely,

Robert D. Cook
Solicitor General