IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge
Case No. 2015-CP-18-00991

Appellate Case No. 2015-002199

Faye P. Croft, Personally and as Trustee of the James A. Croft Trust; James A. Croft Trust; William A. Harbeson; Heyward G. Hutson; James Stephen Greene, Jr.; South Carolina Public Interest Foundation; Summerville Preservation Society; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated, Appellants,

v.

Town of Summerville and Town of Summerville Board of Architectural Review, Respondents.

INITIAL BRIEF OF APPELLANTS

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II. Did the Circuit Court err either by not finding the decisions of the BAR appealed to the Circuit Court to be incorrect, or correct without accepting "additional evidence," or by not remanding those decisions to the BAR for a "rehearing" as required by S.C. Code Ann. § 6-29-930(A)?

III. Did the Court err by affirming BAR decisions when the BAR had failed to adopt, develop and comply with procedures and criteria required by law to have been adopted, developed and followed when the BAR made the decisions being appealed?

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VI. Did the Court err by affirming BAR decisions when the BAR wrongfully issued a certificate of appropriateness based on numerous applications that were unqualified, and wrongfully failed to accept and consider public objections that the BAR applications were unqualified?

STATEMENT OF THE CASE

On May 5, 2015 the Appellants filed a Petition, 2015-CP-18-877, with the Circuit Court as authorized by S.C. Code Ann. § 6-29-900 *et seq.* and Summerville, S.C. Code of Ordinances ("Town Ordinance"), Sec. 32-181(c)(7) and Sec 32-182(f), to appeal decisions made by the Town of Summerville Board of Architectural Review ("BAR") on April 6, 2015. On May 22, 2015, the Appellants filed with the Circuit Court a second Petition,

2015-CP-18-991, to appeal decisions made by the BAR on May 11, 2015. These appeals have been consolidated into this one action. **(Consent Order for Consolidation of Cases, September 4, 2014)**. The respondents filed responses to this appeal, defending the BAR's actions, on August 11, 2015.

The decision of the BAR on April 6, 2015 was to grant "final approval of [the Hotel] project with [five] conditions." **(Minutes BAR Meeting 4/6/15, at 2-3)**. The decisions of the BAR on May 11, 2015 were to grant "final approval [of the Hotel project] based on the conditional final requirements being satisfactorily answered" **(Minutes BAR Meeting 5/11/15, at 2)** and to issue the BAR's Certificate of Appropriateness dated May 11, 2015 which states in part the following:

> **"Work Approved:** Final approval given for the mixed use development consisting of hotel, restaurant, with roof top bar, condos, conference center and parking garage. Final approval includes demolition (as approved on January 12, 2015 by the BAR pending final approval of the submitted project) of structures at 208 S. Cedar Street, 213 W. 2nd South Street, 200, 206 and 210 W. Richardson Avenue." **(Certificate of Appropriateness May 11, 2015** (emphasis added)).

At BAR meetings on June 1, July 6 and August 3, 2015, the BAR responded to these appeals by creating a purported new "decision" and new "findings and conclusions." **(Minutes BAR Meetings 6/1/15, 7/6/15, 8/3/15)**. This purported new decision and accompanying findings and conclusions were adopted by the BAR on August 3, 2015, in a new seventeen page document entitled "Decision of the Town of Summerville Board of Architectural Review, Including Findings of Fact and Conclusions of Law" ("BAR Findings" or "Findings and Conclusions") **(Minutes BAR Meeting 8/3/15)**. On August 5, 2015 the BAR submitted to the Circuit Court as the purported record of the appeal both the documents and recordings that existed on May 11, 2015, the last date of the BAR

decisions being appealed, and the seventeen pages of BAR Findings adopted by the BAR at its August 3, 2015 meeting.

On August 14, 2015, a hearing was held before the Circuit Court regarding the Appellants' appeals of the BAR's April 6 and May 11, 2015 decisions. At the August 14, 2015 hearing the Circuit Court Judge requested *sua sponte* that the BAR supplement the record of May 11, 2015, with "minutes," but not with the recordings or the agenda, "of the BAR meetings of June, July and August of 2015, wherein the BAR Order was discussed and ultimately approved." (Order Circuit Court 9/24/15, at 4; **accord**, **Transcript Circuit Court Hearing 8/14/15, at 31-33**). The BAR provided the Court these June 1, July 6 and August 3, 2015 minutes which it considered, along with the Bar Findings adopted by the BAR on August 3, 2015, as part of the record when the Circuit Court rendered its decision.

On September 24, 2015, the Circuit Court issued an Order, filed on October 23, 2015, affirming the decisions of the BAR on April 6, May 11 and August 3, 2015. (**Order Circuit Court 9/24/15, at 1, 7**). On October 22, 2015 Appellants filed and served a Notice of Appeal of the Circuit Court's decision as authorized by SC Code Ann. § 6-29-940.

FACTS

On November 10, 2013, the Town of Summerville ("Town") published a Request for Proposal for the design and construction of a hotel, restaurant, bar, garage, convention center and condominiums in Summerville, South Carolina ("Hotel project") in the Historic District of the Town. On December 18, 2013 the Town awarded the Hotel project to Applegate & Co. ("Developer"). (**Minutes, Special Summerville Town Council Meeting 12/18/13**).

On May 28, 2014 the Town created the Town of Summerville Redevelopment Corporation ("RDC"), pursuant to the Community Development Law, S.C. Code Ann. § 31-10-10 *et. seq.*

On July 9, 2014, the Town, the RDC and the Developer signed a Public-Private Partnership Agreement Between [*sic*] Town of Summerville, Town of Summerville Redevelopment Corporation and Applegate & Co. ("PPP Agreement") regarding the building of the Hotel project. (**Order Circuit Court 9/24/15, at 1-2**).

On December 19, 2014 the Appellants in this action, and others, filed a lawsuit, currently captioned Faye P. Croft, et al., vs. Town of Summerville, et al., Civil Action No.: 2015-CP-10- 00713 ("Croft Lawsuit"), alleging, *inter alia*, numerous violations of law by the Town, the BAR and the RDC, including misuse of public funds and violations of law by the BAR that are alleged in this appeal. (Id.; **Respondents' Memorandum In Opposition to Petitions for Appeal, August 11, 2015, at 1-2**). The allegations stated in the Croft Lawsuit relevant to this appeal include that the Hotel project is unlawful and therefore the BAR should not review applications for the Hotel project because:

> (1) The PPP Agreement on which the Hotel project is based is unlawful and *ultra vires*;
>
> (2) The developer applicant for BAR approval failed to comply with the contractual requirement in the PPP Agreement that "[p]rior to submission for review and approval to [the BAR] for permitting or [sic] certificate of appropriateness, DEVELOPER will submit a final design . . . to the RDC for review and approval" (emphasis added);
>
> (3) The Hotel project is based on an unlawful RFP and RFP award by the Town;
>
> (4) The Hotel project was not created by the RDC as a "redevelopment project" pursuant to a "redevelopment plan," in

violation of S.C. Code Ann. § 31-10-20(15),(16) and S.C. Code Ann. § 31-10-100(b),(c); and

(5) The Hotel project was not submitted by the RDC for prior approval to the Town, in violation of S.C. Code Ann. § 31-10-100(e),(f). (E.g., Croft Lawsuit, §§ 2, 160, 164, 197, 199, 207, 208, 226B6, 226B7, 226B10-16, 226C, 226E, 226F, 264).

Board of Architectural Review Actions

1. September 8, 2014 BAR Meeting

At an unknown date the Developer and the Town, but not the RDC,[1] filed an Application ("Application") seeking BAR approval at a BAR meeting to be held on September 8, 2014, of "The Dorchester mixed-use development to include conference center, +/- 187 space parking deck, +/- 61 room hotel, +/- 36 condominiums, and demolition of existing structures" at "200, 206, & 210 West Richardson Ave. and 208 South Cedar St." (**Application, undated, for 9/8/14 BAR Meeting**). This Application does not request "conceptual" or "preliminary" approval and is undated. (**Id.**). No record exists showing when this Application was filed, with whom it was filed and what, if anything, was attached to the Application for the BAR to consider. (**Id.**). There is no evidence the BAR's Secretary received complete applications from all required parties at least fourteen days before, or that the Town's planning department received complete applications at least ten days before, the next regularly scheduled BAR meeting, as required by Town Ordinances, Sec. 32-176(i), 32-181(c)(6). The Developer and the Town "certif[ied] that all information required is included and the application is complete" even

[1] The RDC should have been an applicant for a certificate of appropriateness since the RDC was an "owner" of the Hotel project, as a co-signer of the PPPA authorizing the Hotel project as a "redevelopment project" as defined by S.C. Ann. § 31-10-20(16). See Town Ordinance, Sec. 32-181(c)(1); pp. 14, 30-32, 43, 61 infra. At no time did the RDC file an application for consideration by the BAR regarding the Hotel project.

though, according to the BAR record, nothing was attached to this one-page Application. (**Id.**). Therefore, this Application violated Town Ordinance, Sec. 32-176(i)'s requirement that "[c]omplete applications must be received by the town's planning department at least ten days prior to the regularly scheduled meeting and shall include items listed on the current checklist." (**Id.**). That Application should not have been submitted or accepted without it "includ[ing] items listed on the current checklist." **(Id.).** Members of the public were not permitted to inspect or copy this Application prior to the September 8, 2014 meeting.[2]

There is no evidence on the BAR record that any action was taken on this Application at the BAR's September 8, 2014 meeting. Therefore the Court should find the BAR failed to take action on this Application at the BAR's "next regularly scheduled meeting following receipt of the application," in violation of Town Ordinance, Sec. 32-181(c)(6).[3] What exactly the BAR did at its September 8, 2014 meeting regarding this Application is unknown to Appellants because the minutes, recording and transcript of the recording of this September 8, 2014 BAR meeting were not submitted by the BAR as part of the BAR record to be considered by the Circuit Court, as required by S.C. Code Ann. § 6-29-920(A).[4] However, minutes for this September 8, 2014 BAR meeting exist, as shown by the fact they were approved at the October 6, 2014 meeting of the BAR that was submitted to the Circuit Court by the BAR. **(Minutes BAR Meeting 10/6/14)**. That a recording and a transcript of the recording of the September 8, 2014 BAR meeting exist is evidenced by the fact that the BAR filed with the Court recordings and a transcript of

[2] See pp. 55-56 infra.
[3] See pp. 32-33 infra.
[4] "[T[he [BAR] must file with the clerk a duly certified copy of the proceedings held before the [BAR] including a transcript of the evidence heard before the [BAR], if any . . . ." Id.

recordings of all other meetings for which the BAR filed minutes of BAR meetings that considered the Hotel project.

2. October 6, 2014 BAR Meeting

At an unknown date the Gayle F. E. Cates Revocable Trust filed an Application seeking approval, at a BAR meeting to be held on October 6, 2014, of the following:

> The demolition of the existing structures located on the parcel of property located at 206 and 208 West Richardson Ave. in conjunction with the multi-use development known as The Dorchester planned by Applegate & CO. Demolition is conditioned on final approval of the development by the BAR and closing on the contract to purchase the property. **(Application Gayle F. E. Cates Revocable Trust, undated, for 10/6/14 BAR Meeting)("Application Gayle F. E. Cates Revocable Trust")**(emphasis added).

Similarly, at an unknown date the Faith Partnership filed an Application seeking approval at a BAR meeting to be held on October 6, 2014 of the following:

> "The demolition of the existing structure located on the parcel of property located at the corner of South Cedar Street and West Richardson Ave. in conjunction with the multi-use development known as The Dorchester planned by Applegate & CO. Demolition is conditioned on final approval of the development by the BAR and closing on the contract to purchase the property."
> **(Application Faith Partnership, undated, for 10/6/14 BAR Meeting) ("Application Faith Partnership")**(emphasis added).

Similarly, at an unknown date Anne Gaither filed an Application seeking approval, at a BAR meeting to be held on October 6, 2014, of the following:

> "The demolition of the existing structure located on the parcel of property located at 213 W. 2nd Street South in conjunction with the multi-use development known as The Dorchester planned by Applegate & CO. Demolition is conditioned on final approval of the development by the BAR and closing on the contract to purchase the property." **(Application Anne Gaithers, undated, for 10/6/14 BAR Meeting) ("Application Anne Gaithers")**(emphasis added).

Only these three Applications were to be considered at the BAR's October 6, 2014 meeting. None of these Applications request "conceptual" or "preliminary" approval and all of the Applications are undated. (**Application Gayle F. E. Cates Revocable Trust; Application Faith Partnership; Application Anne Gaithers**). No record exists showing when each of these Applications was filed, with whom each was filed and what, if anything, was attached to each Application for the BAR to consider. Members of the public were not permitted to inspect or copy any of these Applications prior to the October 6, 2014 meeting.[5]

The Agenda for this October 6, 2014 BAR meeting does not list any of these three Applications to be considered at this October 6, 2014 BAR meeting; does not reference demolition of property at 213 W. 2nd Street South, 208 West Richardson Ave. or at the corner of South Cedar Street or West Richardson Avenue; does not reference the Application filed for the September 8, 2014 BAR meeting; and does not state what or whose Application(s) will be considered at the October 6, 2014 BAR meeting. Rather, the Agenda states in pertinent part only the following:

> "**208 S. Cedar Street, 200, 206 and 210 W. Richardson Avenue** – Mixed Use Development consisting of 65 room hotel, restaurant with roof top bar, 34-36 unit condos, conference center and 157 space parking garage. (B-3)" (**Agenda BAR Meeting 10/6/14**).

The Agenda for this October 6, 2014 BAR meeting does not include any reference to "conceptual" or "preliminary" approval of any of these three BAR Applications or of the BAR Application submitted for the BAR's September 8, 2014 meeting. (**Agenda BAR Meeting 10/6/14**).

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[5] See pp. 55-56 infra.

Despite the failure of any of these Applications for the BAR's September 8 or October 6, 2014, BAR meetings to appear on the Agenda for the October 6, 2014 BAR meeting and the absence of any law or rule of any kind mentioning "conceptual" or "preliminary" approvals by the BAR, the BAR Chairman made the following *ad hoc* verbal statements at the BAR's October 6, 2014 meeting:

> "As with any other project, the applicant has the opportunity to present a conceptual or master plan for our review prior to committing funds for a full set of design plans and specifications. This means that we might agree with the concept while disagreeing with some of the details. It also means that each phase of the project must be submitted at a later date for approval; that they will be more developed at that point; and the individual portions of the project and any disagreements will have been worked out before the applicant comes back to the Board.
>
> Demolition is also considered as a separate action by the Board, and while conceptual approval may be contingent on some demolition, it doesn't mean that demolition concerns are overlooked." **(Transcript BAR Meeting 10.6.14 at 2-3)** (emphasis added).

Moreover, during this October 6, 2014 meeting the Developer told the BAR that "we're here on a conceptual basis" and that its Application being considered at that meeting "is not a final product." **(Transcript BAR Meeting 10/6/14, at 30)**.

In addition, the BAR Findings retroactively adopted by the BAR on August 3, 2015 state that the purpose of the BAR's October 6, 2014 meeting was to:

> [C]onsider the applications of Goff D'Antonio Architects and Applegate & Co. for conceptual approval to demolish structures located on the above-referenced real properties and to build a mixed use development . . . ." **(BAR Findings § 1)**(emphasis added).

There were no real properties referenced above this statement in the BAR Findings; the BAR Findings do not state what or whose Application or Applications were considered at the October 6, 2014 BAR meeting and what, if anything, was

attached to any Application or Applications considered; and no BAR Application before the BAR at its October 6, 2014 meeting had requested "conceptual" approval.

At the beginning of the October 6, 2014 meeting the BAR Chairman stated verbally ad hoc rules limiting public comment about the BAR Applications being considered by the BAR, as follows:

> If your sole purpose for being here is to argue either for or against this hotel, you have my permission to get up and leave now because you will not be allowed to speak. And as soon as I or one of the other board members realizes that is what you're doing, we will ask you to sit down. That discussion needs to be taken up with the Town Council or someone else, not the Board of Architectural Review. . . . If someone before you has made your point, please limit your comments to stating that you agree with them. Rehashing the same points over and over will not enhance your position and, in fact, might damage it. ... Again, I must stress that if you are here to argue either for or against building the hotel, you are at the wrong meeting and will not be allowed to speak. **(Transcript BAR Meeting 10/6/14, at 2)**.

Also the BAR Chairman verbally announced additional rules limiting public input to the BAR. **(Transcript BAR Meeting 10/6/14 at 49-50; BAR Findings § 5)**. At the end of this October 6, 2014 meeting the BAR Chairman announced that no decision would be made at that meeting and "requested that the architect take comments under consideration and come back for conceptual approval with a re-design." **(Minutes BAR Meeting 10/6/14, at 3)**(emphasis added).

3. November 3, 2014 BAR Meeting

The Agenda for this November 3, 2014 BAR meeting does not mention any of the three above-referenced BAR Applications filed with the BAR to be considered at the October 6, 2014 BAR meeting; does not mention the BAR Application filed for the September 8, 2014 BAR meeting; does not state what or whose BAR Application will be

considered at the November 3, 2014 BAR meeting; does not identify what, if anything, was attached to any Application as a submission to be considered by the BAR; and does not reference considering property at 213 W. 2nd Street South, 208 West Richardson Ave. or at the corner of South Cedar Street or West Richardson Ave. as stated in the three above-referenced BAR Applications for consideration at the October 6, 2015 BAR meeting. Rather, the Agenda states in pertinent part only the following, which is different than what is stated on all the above-referenced BAR Applications:

> **208 S. Cedar Street, 200, 206 and 210 W. Richardson Avenue – Conceptual** Mixed Use Development consisting of 65 room hotel, restaurant with roof top bar, 34-36 unit condos, conference center and 157 space parking garage. (B-3). **(Agenda BAR Meeting 11/3/14).**

This Agenda published by the BAR for its November 3, 2014 BAR meeting is identical to the Agenda published by the BAR for its October 6, 2014 meeting, except the word "Conceptual" was added, for unknown reasons, in the Agenda for the BAR's November 3, 2104 meeting. This Agenda does not reference demolition of structures. **(Agenda BAR Meeting 11/3/16).**

At the November 3, 2014 BAR meeting the Developer asked the BAR to give "conceptual and preliminary approval for the project" **(Transcript BAR Meeting 11/3/14, at 24)**, which is different than the type of approval noticed in the BAR Agenda for the November 3, 2014 BAR meeting and in all of the BAR Applications regarding the Hotel project that had been submitted to the BAR before the November 3, 2014 BAR meeting.

Prior to public comments being allowed at this meeting the BAR Chairman stated verbally that no one would be permitted to "either argue for or against" the Hotel project and that public comments would be limited "purely [to] the aesthetics, design, architecture,

height, mass, and scale, and in harmony with the historic district of the Town of Summerville." **(Transcript BAR Meeting 11/3/14, at 11)**. In addition, the BAR President verbally announced additional, *ad hoc* rules limiting public input to the BAR. **(Transcript BAR Meeting 11/3/14, at 10-13; BAR Findings § 13)**.

At the hearing the President of the Summerville Preservation Society objected that the BAR should not consider the Hotel project because the Developer applicant had not submitted a final design of the Hotel project to the RDC for prior review and approval as required by Paragraph 8a of the PPP Agreement.[6] The BAR's unwillingness to consider this objection is shown by the following:

> CHAIRMAN DIXON: Heyward, that's not part of our purview. Please stop on that right now.
> HEYWARD HUTSON: Yes. I want to read the paragraph [8a of the PPPA]
> CHAIRMAN DIXON: No.
> HEYWARD HUTSON: ... that applies to this board.
> MS. DREYER: The agreement is not between us.
> HEYWARD HUTSON: No? MS. DREYER: No.
> HEYWARD HUTSON: Let me read the paragraph that applies to this meeting tonight, because...
> CHAIRMAN DIXON: Your three minutes are up, also, sir.
>
> **(Transcript BAR Meeting 11/3/14, p. 75, lines 1-16)**.

Near the end of the November 3, 2014 BAR meeting the BAR President announced verbally yet another *ad hoc*, unilateral rule he said would be followed by the BAR:

> Let me just explain something. If the Board votes out and out to disapprove a project, I don't have the ordinance here to tell you the time, but it's something like six months before the applicant can come back again. So the Board's policy has been if there are disagreements or some ideas that we feel that the applicant needs to

[6] Paragraph 8a of the PPP Agreement states that "[p]rior to submission for review and approval to any required public agency for permitting or certificate of appropriateness, developer will submit a final design for both the private and public improvements to the RDC for review and approval." Id.

look at, that we will defer ruling on it and let them take a look at it. If they come back and say, "No. That's what we want,"then we'll vote. But at this point we feel that we're still in the -- you might say the negotiating stage." **(Transcript BAR Meeting 11/3/14, at 78)** (emphasis added).

At the end of the November 3, 2014 BAR meeting the BAR announced that no decision would be made at that meeting and asked the Developer to return to the BAR with revised drawings after considering comments made at the BAR meeting. **(Transcript BAR Meeting 11/3/14, at 77-78).**

4. January 5, 2015 BAR Meeting

At an unknown date the Developer and the Town, but not the RDC,[7] filed with the Board of Architectural Review a BAR Application seeking BAR approval, at a BAR meeting to be held on January 5, 2015, of the following:

> The Dorchester – mixed use development to include conference center, +/- 166 space parking deck, +/- 61 room hotel, +/- 27 condominiums, and demolition of existing structures [at] 200, 206, & 210 West Richardson Ave., 213 W 2nd S St & 208 South Cedar St." **(Application, undated, for 1/5/15 BAR Meeting)**(emphasis added).

This BAR Application is undated, no record exists showing when this BAR Application was filed, with whom it was filed and what, if anything, was attached to the Application for the BAR to consider. **(Application, undated, for 1/5/15 BAR Meeting).** Moreover, the BAR Application does not show that the Developer or the Town owns or represents owners of existing structures sought in the January 5, 2015 BAR Application to be demolished. In fact, the three above-noted Applications filed with the BAR for the BAR meeting on October 6, 2014 show that the following properties are not owned by the Town

[7] The RDC was required to be, but was not, an applicant for construction of the Hotel project. See fn 1 supra.

or the Developer: 206 and 208 West Richardson Ave.; 213 W. 2nd Street; and the intersection of S. Cedar Street and W. Richardson Ave. Because the Town and the Developer did not own these structures sought to be demolished and no authorization had been submitted to the BAR showing the Town or the Developer represented the owners, the Town and the Developer were not qualified to submit this Application for demolition of these structures. (Town Ordinance, Sec. 32-181(c)(1)); see pp. 30-32, 43, 61, infra. Members of the public were not permitted to inspect or copy this Application prior to the January 5, 2014 meeting.[8]

This BAR Application does not request "conceptual" or "preliminary" approval. Nevertheless, at the January 5, 2015 BAR meeting the Developer requested that the BAR give "conceptual and the preliminary approval" (**Transcript BAR Meeting 1/5/15, at 7**), and "[t]he Board gave conceptual/preliminary approval of the [Hotel] project." (**Minutes BAR Meeting 1/5/15, at 2; Bar Findings § 26; Transcript BAR Meeting 1/5/15, at 47-48**). Moreover, handwritten by the BAR Chairman at the bottom of the BAR Application for the BAR meeting on January 5, 2015, is the following: "Approved as Noted – conceptual & preliminary only." (**Application, undated, for 1/5/15 BAR Meeting**).

In addition, at this meeting the BAR approved moving a cottage at the rear of 206 W. Richardson Ave. and "approved the demolition of the structure located at 200 W. Richardson Avenue." (**BAR Findings, §§ 22, 23, 24**).

Prior to public comments being allowed at this meeting the BAR Chairman again stated, *ad hoc* and without a vote of the board, rules regarding comments by the public. (**Transcript BAR Meeting 1/5/15, at 2**).

[8] See pp. 55-56, infra.

5. January 12, 2015 BAR Meeting

At an unknown date the Developer and the Town, but not the RDC,[9] filed with the Board of Architectural Review an Application seeking BAR approval, at a BAR meeting to be held on January 12, 2015, of the following:

> The Dorchester – mixed use development – Applicant requests **final approval for demolition of structures** located on parcels below and as shown on the attached plan. . . . 200, 206, 208 & 210 W. Richardson Ave. 213 W. 2nd Street South & 208 S. Cedar St." **(Application, undated, for 1/12/15 BAR Meeting)**(emphasis added).

This BAR Application is undated and no record exists showing when this BAR Application was filed with the BAR, with whom it was filed or what, if anything, was attached to the Application as a submission to be considered by the BAR. Members of the public were not permitted to inspect or copy this Application prior to the January 12, 2014 meeting.[10]

The Agenda for this meeting states that at the meeting the BAR will consider:

> 208 S. Cedar Street, 213 W. 2nd South Street, 200, 206 and 210 W. Richardson Avenue – Final approval for demo of existing buildings for a Mixed Use Development consisting of 65 room hotel, restaurant with roof top bar, 27 unit condos, conference center and 157 page parking garage. (B-3). **(Agenda BAR Meeting 1/12/15)**(emphasis added).

Inconsistently, this Agenda omits consideration of 208 W. Richardson Ave., which is part of the BAR Application for this January 12, 2015 BAR meeting.

At the January 12, 2015 BAR meeting no member of the public was allowed to speak and the BAR voted to "approve demolition of the structures on the construction site

[9] See fn 1 supra.
[10] See pp. 55-56, infra.

with approval being contingent on the entire project receiving final approval." (**Minutes BAR Meeting 1/12/15, at 2; accord, Transcript BAR Meeting 1/12/15, at 10-11**). However, on the BAR Application for the BAR meeting on January 12, 2015 after the printed words "Approved as Noted" are the handwritten words "Conceptual & Preliminary Approval only" even though, (1) as quoted above, the BAR did not vote to give "conceptual" or "preliminary" approval at this meeting; and (2) the above-referenced Application for this meeting does not ask for "conceptual" or "preliminary" approval but asks only for "final" approval, and does not clarify for which specific properties on that BAR Application that "Conceptual & Preliminary Approval" was granted. (**Application, undated, for 1/12/15 BAR Meeting**)(emphasis added).

6. April 6, 2015 BAR Meeting

At an unknown date the Developer and the Town, but not the RDC,[11] filed with the Board of Architectural Review a BAR Application seeking BAR approval, at a BAR meeting to be held on April 6, 2015, of the following:

> Seeking Final BAR approval for The Dorchester, a mixed-use development consisting of a three story, 66 room hotel with first floor restaurant & retail, and rooftop bar; three story, 27 unit residential building; 10,500 SF one story convention center; 166 car parking garage. (**Application, undated, for 4/6/15 BAR Meeting**)(emphasis added).

This BAR Application is undated and no record exists showing when this BAR Application was filed, with whom it was filed and what, if anything, was attached to the Application for the BAR to consider. (**Id.**) Members of the public were not permitted to inspect or copy the Application prior to the April 6, 2015 meeting.[12] At the April 6, 2015

[11] See fn 1 supra.
[12] See pp. 55-56 infra.

BAR meeting a motion "for conditional final approval passed with a majority vote of 4 to 1." **(Minutes BAR Meeting 4/6/15, at 2** (emphasis added)).

Because this BAR approval purported to be "final," although "conditional," and the time period for an appeal of a BAR decision was limited to thirty days, S.C. Code Ann. Section 6-29-900(A), on May 5, 2015, Appellants filed with the Circuit Court a Petition challenging this April 6, 2015 decision by the BAR.

7. May 11, 2015 BAR Meeting

The Agenda of the BAR's May 11, 2016 meeting consisted of the following:

> Request for full final approval for demolition of all structures including aesthetic approval for a Mixed Use Development plan including demolition of all structures . . . for the following properties . . . ." **(Agenda BAR Meeting 5/11/15)** (emphasis added).

At that meeting members of the public were allowed to speak within rules limiting the content and manner of public discussion stated verbally by the BAR Chairman. **(Transcript BAR Meeting 5/11/15, at 32, 34-36).** In addition, the BAR passed a "motion to give final approval based on the conditional final requirements being satisfactorily answered." **(Minutes 5/11/15, at 2** (emphasis added)); **(Transcript BAR Meeting 5/11/15, at 45).** Based on that approval, the BAR issued to the Developer and the Town a Certificate of Appropriateness dated May 11, 2015 regarding the Hotel project. **(Certificate of Appropriateness, May 11, 2015).** On May 22, 2015 Appellants filed with the Circuit Court a Petition challenging this May 11, 2015 "full final," although "conditional," decision by the BAR.

8. June 1, 2015 BAR Meeting

Although the Appellants had filed the appeals of both the April and May BAR actions, the BAR continued to revise and supplement those actions long after the appeals. The pertinent Agenda of the BAR's June 1, 2015 meeting consisted of the following:

> **Appeal of BAR Decision of April 6, 2015** for 208 S. Cedar; 213 W. 2nd South Street; and, 200, 206, 210 W. Richardson Avenue - . . . Notification by Board's Legal Counsel of Receipt of Appeal; Responsibilities of Board. (Executive Session to receive legal advice concerning receipt of Appeal and Responsibilities of Board in responding to Appeal). **(Agenda BAR Meeting 6/1/15, at 1)**(emphasis in original).

No public questions or comments were allowed at this meeting. The BAR provided no recording or transcript of a recording of this meeting to the Circuit Court or to the Appellants.

In executive session at this meeting BAR members "discuss[ed] legal advice concerning an appeal to their decision of April 6th" **(Minutes BAR Minutes 6/1/15, at 1)**. Afterwards, during the meeting, the BAR passed a motion "to direct the Town Attorney to prepare findings of fact and conclusions for review and approval by this Board at its next scheduled meeting" and stating that "staff is directed to prepare transcripts for filing with the Circuit Court [regarding] cases 2015-CP-18-877 and 2015-CP-18-991 . . . filed with the Circuit Court." **(Id.)**

9. July 6, 2015 BAR Meeting

The pertinent Agenda of the BAR's July 6, 2015 meeting consisted of the following:

> **Executive Session to receive legal counsel related to pending litigation regarding the appeals of the BAR decisions of April 6, 2015 and May 4, 2015.**
>
> **Review and Consideration of the proposed Order of the appeals of BAR decisions of April 6, 2015 and May 4, 2015** for . . . final

approval for a mixed use development . . . **(Minutes BAR Meeting 7/6/16 at 1)**(emphasis in original).

No public questions or comments were allowed at this meeting. The BAR provided no recording or transcript of a recording of this meeting to the Circuit Court or to the Appellants.

At this meeting the BAR passed a motion, after receiving legal advice in Executive Session about the two BAR appeals, "to review the findings of fact and conclusions of law for [the Hotel project] and reconvene to adopt, deny or amend that document." **(Minutes BAR Meeting 7/6/16, at 1-2)**.

10. August 3, 2015 BAR Meeting

The pertinent Agenda of the BAR's August 3, 2015 meeting consisted of the following:

> **Executive Session to receive legal counsel related to pending litigation regarding the appeals of the BAR decisions of April 6, 2015 and May 4, 2015.**
>
> **Review and Consideration of the proposed Order of the appeals of BAR decisions of April 6, 2015 and May 4, 2015** . . . final approval for a mixed use development . . . . **(Minutes BAR Meeting 8/3/15, at 1)**(emphasis in original).

No public questions or comments were allowed at this meeting. The BAR provided no recording or transcript of a recording of this meeting to the Circuit Court or to the Appellants.

At this meeting the BAR passed a motion, after receiving legal advice in Executive Session about the two BAR appeals, to:

> "[A]pprove the order **as prepared and presented in response to the appeal of the final decisions of April 6 and May 4, 2015 of**

> **the BAR** for a mixed used development consisting of a boutique hotel, restaurant with roof top bar, condominiums, conference center and parking garage including demolition for the project site now know as 208 S. Cedar Street; 213 W. 2nd South Street; 200, 206 and 210 W. Richardson Avenue." (**Minutes BAR Meeting 8/3/15, at 3**)(emphasis added).

This "order" of the BAR was signed and submitted 3-4 months after the notices of appeals had been filed and served and only days before the hearing on those appeals was scheduled before the Circuit Court. This matter came before the Circuit Court on August 14, 2015, for a hearing on Appellants' Petitions for appeal of the decisions of the BAR of April 6, 2015 and May 11, 2015. On September 24, 2012 the Honorable Edgar W. Dickson issued the Order Affirming Decisions of Town of Summerville Board of Architectural Review that is the subject of this appeal. On October 22, 2015 the Appellants filed a Notice of Appeal to the Court of Appeals, pursuant to S.C. Code Ann. § 6-29-940.

STANDARD OF REVIEW

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the evidence. Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005), citing Gurganious v. City of Beaufort, 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995). Furthermore, the appellate court's standard of review of a board of architectural review's decision is the same as that of the trial court. Blind Tiger, LLC, 621 S.E. 2d at 362, citing Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach, 294 S.C. 475, 479-80, 366 S.E.2d 15, 18 (Ct. App. 1988) (holding the appellate court will not reverse the circuit court's affirmance of

the board unless the board's findings of fact have no evidentiary support or the board commits an error of law).

ARGUMENT

I. The Circuit Court erred by soliciting, receiving, admitting, considering and relying on evidence added to the BAR record by the BAR when the BAR lacked jurisdiction to do so, having been created by the BAR after the Appellants appealed the April 6, 2015 and May 11, 2015 BAR decisions to the Circuit Court.

A person with a "substantial interest" in a decision of a board of architectural review may appeal within thirty days after the affected party receives actual notice of the decision of the board. S.C. Code Ann. § 6-29-900(A); see, Blind Tiger, 621 S.E.2d at 363. In this case, the appellants were required to appeal within thirty days of the announced decisions at the BAR's April and May meetings, or risk being barred from appeal. Within thirty days from the BAR's receipt of notice of the appeals the BAR was required to file with the Clerk of the Circuit Court a duly certified copy of the proceedings held before the BAR, including a transcript of the evidence heard before the BAR, if any, and the decision of the board including its findings of fact and conclusions. S.C. Code Ann. § 6-29-920(A). This, the BAR failed to do. If the BAR had done this, it would have been unable to place in the record of the BAR's proceedings the materials, including most significantly its findings and conclusions, that did not exist at the time of the BAR decisions being appealed and that the BAR manufactured months after their decisions were rendered and the notices of appeal had been filed. By allowing these subsequent materials, created long after the decisions and more than 30 days after the notices of appeal, the Circuit Court erred.

Section 6-29-930(A) requires that when a Circuit Court considers a BAR appeal, "[t]he findings of fact by the [BAR] are final and conclusive on the hearing of the appeal [and] the court may not take additional evidence." (Id.)(emphasis added.) The BAR's findings of fact considered by the Circuit Court should have been only those findings, if any, that existed **on April 6, 2015 and May 11, 2015**, the respective dates the BAR made the decisions that were appealed. However, instead of considering only the findings existing on those dates, the Circuit Court "[took] additional evidence," in violation of Section 6-29-930(A), by allowing the BAR to supplement the BAR record that existed on April 6, 2015 and May 11, 2015, with a 17 page document the BAR misleadingly titled **"Decision of the Summerville Board of Architectural Review, Including Findings of Fact and Conclusions of Law" ("Impermissible BAR Evidence")**, with a false certification of the BAR record and BAR meeting minutes generated on June 1, July 6 and August 3, 2015. The BAR mischaracterized this 17 page document, adopted by the BAR on August 3, 2015, as a "decision" and on August 5, 2015 filed it with the Circuit Court claiming it was part of the BAR record for the Appellants' then pending appeals to the BAR's April 6 and May 11, 2015 decisions. However, the Appellants did not appeal a "decision" made by the BAR on August 3, 3015 but appealed decisions made by the BAR only on April 6 and May 11, 2015. Because Appellants appealed BAR decisions on April 6 and May 11, 2015, not a BAR decision on August 3, 2015, this 17 page document was "additional evidence" that should not have been added to the record of the BAR decisions on April 6 and May 11, 2015 that were being appealed. See S.C. Code Ann. § 6-29-930(A)("the court may not take additional evidence").

On August 4, 2015, the Town's Director of Planning and Economic Development falsely "certif[ied] that the documents [submitted by the BAR for filing with the] Dorchester County Clerk of Court constitute a complete copy of the proceedings held before the Board with respect to the project at issue in the above-entitled appeal, including a transcript of the evidence heard before the Board and the decision of the Board including its findings of fact and conclusions." **(Certification of Record, August 4, 2015)**(emphasis added). Thus, the Town misrepresented to the Circuit Court that the Impermissible BAR Evidence was part of the record of the April 6 and May 11, 2015 BAR decisions being appealed, without disclosing that in fact they were not.

The Court's allowing the BAR to certify that Impermissible Bar Evidence as part of the BAR record being appealed and the Court's acceptance of that Impermissible Bar Evidence as part of the BAR record being appealed, were errors because:

(1) After the BAR decisions made on April 6 and May 11, 2015 were appealed to the Circuit Court on May 5 and May 22, 2015, the BAR lacked jurisdiction to take any additional action regarding those decisions except to furnish the Circuit Court a copy of the "proceedings held [on April 6 and May 11, 2015] before the" BAR as required by S.C. Code Ann. § 6-29-920(A); and

(2) That Impermissible BAR Evidence did not exist on the dates the April 6, 2015 and May 11, 2015 decisions being appealed were made and, therefore, logically could not be part of the record of those appeals or be consistent with the mandate in S.C. Code Ann. § 6-29-930(A) that the "court may not take additional evidence."[13]

In addition, the Respondents gratuitously sent the Court two Affidavits, dated July 8 and July 9, 2015, to add to the BAR record that were completely irrelevant to the merits

[13] At oral argument on August 14, 2015, counsel for Appellants asked the Circuit Court to "disregard the findings of fact and conclusions of law . . . filed on August the 5th, 2015 [because] [t]hey're not part of the record . . . are not the contemporaneous findings or determinations of the board, but they are an after-the-fact attempt to clean up the record." **(Transcript Circuit Court Hearing 8/14/15, at 5)**.

of appeal for the purpose, as stated by the Respondents, of trying to persuade the Judge not to make a decision adverse the Developer (who was not even a party to the BAR appeal or the related lawsuit) and, if the Court did so, at least to require a bond. (**Affidavit of Defendants Applegate & Co., The Dorchester, LLC and Arthur H. Applegate, dated July 8, 2015; Affidavit of William C. Collins, July 9, 2015**). As stated by counsel for the Respondents in an e-mail to the Circuit Court Judge:

> Additionally . . . we also are submitting for the Court's record the attached Affidavits of Mayor Collins and Arthur Applegate, which address some of the anticipated damages from delay of this project. . . . [W]e would request a bond from Appellants should a stay be considered . . . ." (**E-mail dated August 17, 2015 from Laura Greaver, to Jenny Pittman, Law Clerk, Judge Edgar W. Dickson**).

This is another example of Respondents loading up the BAR record with material not before the BAR when in April and May the BAR made the decisions being appealed and the Court's acceptance of "additional evidence" in clear violation of S.C. Code Ann. 6-29-930(A).

The Court's taking of this "additional evidence" was extremely prejudicial to the Appellants. The Respondents generated this "additional evidence" after the Appellants had filed both their Petitions for appeals, and literally crafted their purported "findings and conclusions" adopted on August 3, 2015 to rebut, often in conclusory fashion and without supporting evidence, the grounds for appeal stated by the Appellants in their Petitions on May 6 and May 22, 2015. (**Transcript Circuit Court Hearing 8/14/15, at 5-7**). As just one of many examples, in response to claims by Appellants in their Petitions on April 6 and May 11, 2015 that the BAR had violated the Freedom of Information Act, the "additional evidence" the BAR adopted on August 3, 2015 and filed with the Court on

August 5, 2015 included conclusory and unsupported findings by the BAR that the BAR had not violated the Freedom of Information Act. (See e.g., **Petition 4/6/15, at 6; Petition 5/11/15, at 6; BAR Findings § 59**).

If this precedent of accepting "additional evidence" after final BAR decisions already have been made and after Petitions to appeal those decisions already have been filed with a Circuit Court is allowed to stand, in the future this BAR and other boards of architectural review in South Carolina will be able to nullify and render moot judicial appeals of BAR decisions by allowing BARs to create and add to BAR records "additional evidence" "to clean up the record" and to supply "rolling facts and conclusions" rebutting the grounds stated in the Petitions for appeal. The BAR clearly lost jurisdiction over each BAR decision appealed the moment the Appellants filed a Petition with the Circuit Court appealing that decision, and therefore lacked the authority to take any action thereafter to supplement with "additional evidence" the record being appealed.

II. The Circuit Court erred either by not finding the decisions of the BAR appealed to the Circuit Court to be incorrect, or correct without accepting "additional evidence," or by not remanding those decisions to the BAR for a "rehearing" as required by S.C. Code Ann. § 6-29-930(A).

When the BAR made its decisions on April 6 and May 11, 2015 that Appellants appealed on May 6 and May 22, 2015, respectively, the BAR had made no findings and stated no conclusions whatsoever except to state, without analysis or justification, that applications to construct and to demolish certain structures were approved. (**See Minutes BAR Meeting 4/6/16, at 2; Minutes BAR Meeting 5/11/16, at 2**; pages 17-18 supra). Further, the BAR record that existed on April 6, 2015 and May 11, 2015 failed to contain evidence that all the grounds for appeal stated in the two Petitions dated May 6, 2015 and

May 22, 2015 were not valid. In error, the BAR relied, in its written and oral arguments to the Circuit Court opposing Appellants' appeals, on the above-referenced Impermissible BAR Evidence incorrectly allowed by the Court as "additional evidence" on the BAR record in violation of Section 6-29-930(A). **(Respondents' Memorandum In Opposition to Petitions for Appeal, August 11, 2015, at 2, 8, Exhibit 2; see Transcript Circuit Court Hearing 8/14/15, at 26, 30-33).**

As a matter of law if the Judge believed "the certified record [was] insufficient for review, the matter must [have been] remanded to the [BAR] for rehearing." S.C. Code Ann. § 6-29-930(A)(emphasis added). The very fact that the Judge did allow this Impermissible Bar Evidence as "additional evidence" on the "certified record" of the BAR despite the Appellants' objections evidences that the Judge did believe the "certified record" without the Impermissible Bar Evidence he allowed was "insufficient for review." If the Judge believed the correct BAR record not containing this "additional evidence" was "insufficient for review," the Court was required to remand the matter to the BAR for a "rehearing" but failed to do so. **(Transcript Circuit Court Hearing 8/14/15, at 12-13).**

III. The Court erred by approving BAR decisions when the BAR had failed to adopt, develop and comply with procedures and criteria required by law to have been adopted, developed and followed when the BAR made the decisions being appealed.

When the BAR made its decisions being appealed, the BAR had failed to adopt, develop or follow criteria, rules and guidelines specifically required by law.

A. The BAR did not adopt, develop or use "rules of procedure" as required by S.C. Code Ann. § 6 29 870(D); "reasonable rules concerning time and place of access" as required by S.C. Code Ann. § 30-4-30(a); "prescribed procedures and guidelines" referenced in Sec. 32-175(f); "rules of order" required to be "adopt[ed]" by the BAR by Sec. 32-176(e); "guidelines" required to be "develop[ed]" by the

BAR by Sec. 32-176(h)(4); and "established guidelines" referenced in Sec. 32-176(h)(6).

State statutes and Town ordinances impose the following requirements on the BAR:

> (1) S.C. Code Ann. § 6-29-870(D) expressly requires that: "The [BAR] shall adopt rules of procedure in accordance with the provisions of any ordinance adopted pursuant to this chapter" (id.)(emphasis added);
>
> (2) S.C. Code Ann. § 30-4-30(a) requires that "[a]ny person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access" (id.)(emphasis added);
>
> (3) Sec. 32-175(f) states that the BAR "shall have the power to approve . . . applications in accordance with prescribed procedures and guidelines" (id.)(emphasis added);
>
> (4) Section 32-176(e) requires that the "[BAR] shall adopt rules of order . . ." (id.)(emphasis added);
>
> (5) Sec. 32-176(h)(4) states that the "[BAR] . . . shall develop guidelines for the administration of the [this] section" (id.) (emphasis added); and
>
> (6) Sec. 32-176(h)(6) states that "[i]t is the duty of the [BAR] to follow the established guidelines governing . . . new construction . . ." (id.)(emphasis added).

In violation of these mandates the BAR has adopted no rules, procedures or guidelines. **(Transcript Circuit Court Hearing 8/14/15, at 10)**. Nothing on the BAR record or on any other public record shows that it did. At most, the BAR Chairman verbally, unilaterally and inconsistently pronounced ad hoc during BAR meetings limited requirements governing when and how the public could speak at those meetings, and the sequential order in which the BAR would consider matters on its agenda. (See, e.g., **Transcript Part II BAR Meeting 5/11/16, at 34**; pages 10, 12, 15, 17-18 supra). The BAR neither adopted nor published any procedure, rule or guideline in writing so the public

could know clearly, predictably and timely what conduct was required by applicants, the BAR and the public. Without clear rules and guidelines adopted or developed in writing by the BAR regarding submitting, considering, approving and rejecting approval of applications to the BAR, the public is forced to endure uncertainty because the BAR is able to follow procedures made up ad hoc, unilaterally, at whim and possibly arbitrarily and abusively by the BAR Chairman, and the BAR can act arbitrarily and capriciously with virtual impunity. Petitioners were left guessing through this entire BAR process on how this decision was proceeding because there were no rules written down anywhere. **(Transcript Circuit Court Hearing 8/14/15, at 7-10, 41, 44-45).**

Even if the Town per se passed ordinances stating some procedures of the BAR, the BAR did not comply with the specific mandates that "[t]he [BAR] shall adopt rules of procedure in accordance with the provisions of any ordinance adopted pursuant to this chapter," S.C. Code Ann. § 6-29-870(D) (emphasis added); that the "[BAR] shall adopt rules of order . . . ," Section 32-176(e) (emphasis added); and that the "[BAR] . . . shall develop guidelines for the administration of [this] section," Town Ordinance, Sec. 32-176(h)(4) (emphasis added). The BAR has adopted and developed no rule or guideline. At argument, the BAR's counsel argued that the BAR followed Roberts Rules of Order and that that complied with Section 32-176(e). (See **Transcript Circuit Court Hearing 8/14/15, at 8, 44-45**). That claim is not accurate. There is no evidence on the BAR record or on any public record that the BAR followed Roberts Rules of Order; that the BAR "adopted" Roberts Rules of Order as expressly required by Town Ordinance, Sec. 32-176(e); and, if it did, which version of Roberts Rules of Order was adopted and used by the BAR and when. Similarly, the BAR has not "develop[ed] guidelines" regarding color

or any other matter as required by Town Ordinance, Sec. 32-176(h)(4), and nothing on the BAR record or on any other public record shows that it did. Despite the BAR's failure to have developed these required guidelines, the BAR issued a certificate of appropriateness for the Hotel project. **(Transcript BAR Meeting 4/6/15; Transcript BAR Meeting 5/11/15 at 2, 6-9, 12, 17-18, 23-24, 28 and 30; BAR Findings §§ 35, 39).**

Any rules of procedure that were adopted by the Town or the BAR regarding how or when the BAR should proceed when considering applications to construct or demolish buildings were insufficient as a matter of law. For example, no rule of procedure adopted by the Town or BAR clarifies who must submit an application for BAR approval of demolition or construction; the time and place of public access to inspect and copy an application to the BAR as required by S.C. Code Ann. § 30-4-30(a); the meaning of the terms "conceptual" and "preliminary" approval; or when, how and on what terms the BAR should consider or grant "conceptual" and "preliminary" approvals versus "final" approval. Town Ordinance, Sec. 32-181(c)(1) states "[t]he application for the certificate of appropriateness must be submitted by the owner or agent of the property in question." Id. (emphasis added). The BAR's failure to define "owner or agent of the property in question" (emphasis added) to clarify who must submit an application for new construction results, at a minimum, in uncertainty in whether the RDC was required to submit an application for construction regarding the Hotel project because the RDC, as a signer of the PPPA which authorized the Hotel project, was a legal "owner" of the Hotel project. The RDC was a necessary applicant and the approval of the Hotel project by the BAR is void because the RDC did not submit an application and no applicant stated that applicant was an agent of the RDC.

The BAR repeatedly uses the terms "conceptual" and "preliminary" but never defines their meaning. (**See, e.g., BAR Findings §§ 2, 8, 14, 17 and 26**). The terms "conceptual" and "preliminary" approvals are simply confusing terms the BAR invented ad hoc and without prior notice to the public as incremental steps in the BAR approval consideration process without the BAR or Town having adopted any rule creating those interim steps and defining the meaning and intended use of those terms. Indeed, BAR members and the Developer were confused over whether the BAR was considering conceptual or both conceptual and preliminary approval. (**See Transcript BAR Meeting 1/5/15, at 47-48**). The BAR's use of these interim steps in this manner allowed the BAR to operate arbitrarily, unaccountably, non-transparently, inconsistently and manipulatively, and has caused much public confusion. (See e.g., **Transcript BAR Meeting 11/3/14, at 74-76**).

B. The BAR's Secretary did not receive complete applications from all required parties at least fourteen days before, and the Town's planning department did not receive complete applications at least ten days before, the next regularly scheduled BAR meeting, and those applications did not include items listed on "the current checklist," in violation of Sec. 32-176(i), 32-181(c)(6).

None of the BAR applications submitted regarding the Hotel project is dated and nothing on the BAR record indicates specifically to whom or the date on which each of those Applications was submitted or specifically what, if anything, was attached to each Application. Consequently, there is no evidence on the BAR record that any of these Applications was submitted to the BAR's Secretary and to the Town's Planning Department and, if they were, that they were submitted to each of them within fourteen days and ten days as required by Town Ordinances, Sec. 32-176(i) and 32-181(c)(6), respectively. In addition, there is no evidence on the BAR record that each application was

complete and included all items on the "current checklist." (See **Transcript Circuit Court Hearing 8/14/15, at 10**). Indeed, neither the BAR record nor any other public record in any way indicates what is the meaning of the term "current checklist;" what items are on that "current checklist;" or whether in fact "the current checklist" as used in Town Ordinance, Sec. 32-176(i) even exists. (See **Transcript Circuit Court Hearing 8/14/15, at 10**).

In addition, nothing in the record indicates whether all required persons or entities, including the RDC,[14] signed the applications. Indeed, four Applications, on September 8, 2014; January 5, 2015; January 12, 2015; and April 6, 2015, submitted by the Developer and the Town failed to include as an applicant the RDC, in violation of Town Ordinance, Sec. 32-181(c)(1), which states "[t]he application for the certificate of appropriateness must be submitted by the owner or agent of the property in question." (Id.)(emphasis added). Because the RDC, as a signer of the PPPA which authorized the Hotel project, was a legal "owner . . . of the property in question," i.e., of the Hotel project, the RDC was a necessary applicant for all applications regarding the Hotel project. Further, and very significantly, because as a matter of law the entire Hotel project was required to be the product of a Request for Proposal issued by the RDC for a "redevelopment project" that was part of a "redevelopment plan" created by the RDC,[15] the RDC was the true "owner" of the Hotel project. (S.C. Code Ann. §§ 31-10-10(b),(c); 31-10-20(15),(16) and 31-10-100; see S.C. Code Ann. § 31-10-10 *et. seq.*). Because the four applications submitted by the Developer

[14] See fn. 1 supra.

[15] The Respondents did not comply with statutory requirements for involving the RDC in the Hotel project whose approval by the BAR is the subject of this appeal. This is explained in detail by two motions argued before Judge Edgar W. Dixon on January 19, 2016 and awaiting his decision. See **Plaintiffs' Motion for Partial Summary Judgment and Memorandum of Law, dated October 19, 2015; Plaintiffs' Motion for Partial Summary Judgment and Memorandum of Law, dated November 30, 2015.**

and the Town failed to include as an applicant the RDC, the owner, in violation of Town Ordinance, Sec. 32-181(c)(1), the BAR's approval of the Hotel project is void.

Based on this inability and failure by the Bar to demonstrate compliance with these requirements in Town Ordinances, Sec. 32-181(c)(1), 32-181(c)(6) and Sec. 32-176(i), and the BAR's failures to comply with those requirements, the Circuit Court either should have reversed the BAR decisions that were being appealed or, at a minimum, remanded the matter to the BAR for a "rehearing" in accordance with Section 6-29-930(A). **(See Transcript Circuit Court Hearing 8/14/15, at 12-13).**

C. The BAR failed to take action upon each application at the BAR's "next regularly scheduled meeting following receipt of the application," in violation of Sec. 32-181(c)(6).

In several instances the BAR record fails to show that the BAR took action upon applications regarding the Hotel project at the BAR's next regularly scheduled meeting following receipt of the applications, as required by Town Ordinance, Sec. 32-181(c)(6). Because none of the BAR applications are marked with individual identifiers such as numbers or dates submitted and because of the confusing, imprecise and inconsistent ways in which applications were identified to the public in agendas, minutes and meetings, it is confusing and uncertain precisely what or whose application the BAR considered or acted upon at BAR meetings and whether or not specific applications ever were considered or acted on.

For example, there is no evidence in the BAR record that any of the individual Applications for demolition submitted by (1) Gayle F. E. Cates Revocable Trust, (2) the Faith Partnership and (3) Anne Gaither to be considered at the BAR's meeting on October 6, 2014 were ever considered or acted upon by the BAR. Similarly, there is no evidence

on the BAR record that the Application submitted by the Town and the Developer for consideration at the BAR's September 8, 2014 meeting were ever considered or acted upon by the BAR.

D. The BAR deferred action on Hotel project applications without making findings that the application was incomplete or that unanswerable questions arose during the BAR's review of each application.

Town Ordinance, Sec. 32-181(c)(6)c states in pertinent part:

> If the application is found to be incomplete or unanswerable questions arise during the [BAR's] review of the application, the [BAR] may defer action on the application until the next scheduled meeting. (Id.)(emphasis added).

No evidence exists anywhere that the BAR found at any BAR meeting that any of the applications reviewed by the BAR were incomplete or that any unanswerable questions arose during the BAR's review of any of the applications. Therefore, no decision on whether to approve or disapprove any BAR application should have been deferred until the next scheduled meeting. Moreover, no deferment of BAR action on any application should have been until a special meeting of the BAR but, instead, should have been "until the next scheduled meeting". (See Town Ordinance, Sec. 32-181(c)(6)c).

Despite these requirements, the BAR expressly deferred action on the Hotel project applications considered at BAR meetings on at least two occasions, not because of the incompleteness of an application or the emergence of unanswerable questions, but for alternative reasons not consistent with Town Ordinance, Sec. 32-181(c)(6)c. The BAR deferred making a decision about the Hotel project at its meetings on October 6, 2014 and November 3, 2014. What the BAR did regarding its Hotel project application at its September 8, 2014 meeting is unknown because that information is not on the BAR record. For example, at the end of this October 6, 2014 meeting the BAR Chairman announced

that no decision would be made at that meeting and, instead, the Developer should "take a think on it and take a look at it." **(Transcript BAR Hearing 10/6/14, at 84-85).** In addition, at the BAR meeting on November 3, 2014 the BAR Chairman stated why he was deferring action on BAR applications as follows:

> If the [BAR] votes out and out to disapprove a project... it's something like six months before the applicant can come back again. So, the [BAR's] policy has been if there are disagreements or some ideas that we feel that the applicant needs to look at, that we will defer ruling on it and let them take a look at it., If they come back and say, "No. That's what we want," then we'll vote. But at this point we feel that we're still in the - - you might say the negotiating stage. **(Transcript BAR Meeting 11/3/14, at 78** (emphasis added)).

E. The BAR failed to issue the certificate of appropriateness granted the Town and Developer on May 11, 2015 within "180 days of the time of the filing of the application with the designated town official" as required by Sec. 32-182(c).

According to the BAR record, seven applications regarding the Hotel project were filed with the BAR on unknown dates and with unknown individuals for consideration at BAR meetings to be held on September 8, 2014; October 6, 2014; January 5, 2015; January 12, 2015; and April 6, 2015. (See pages 15-17 supra). The BAR's approvals being appealed occurred on April 6, 2015 and May 11, 2015. (See pages 16-18 supra). Because more than 180 days had elapsed between dates of the filing of the four Applications to be heard on September 8, 2014 or October 6, 2014, and the BAR decisions to approve applications on April 6 and May 11, 2015, the BAR could not have granted a certificate of appropriateness for those four Applications.

Moreover, the Town and the Developer could not have circumvented this 180 day time limit by filing multiple successive applications with serial start dates, without violating the letter and the spirit of Town Ordinance, Sec. 32-182(c). That particularly is true because of the BAR's stated policy of not allowing an application to be reinstated until

at least 180 days after an application has been rejected, and because the failure to approve an application within 180 days has the effect of that application expiring and thereby being rejected according to Town Ordinance, Sec. 32-182(c). **(See Transcript BAR Meeting 11/3/14, at 78**; page 34 supra). Because the BAR record does not identify which specific applications were considered at the BAR meetings on April 6, 2015 and May 11, 2015, and what happened to the four applications to be heard on September 8, 2014 or October 6, 2014, it is impossible to know from the BAR record whether a certificate of appropriateness was granted for one or more applications whose 180 deadline had expired. Therefore, the Certificate of Appropriateness issued by the BAR on May 11, 2015 is invalid and, at a minimum, due to the insufficiency of the BAR record, this matter should be remanded to the BAR for a rehearing as provided by S.C. Code Ann. § 6-29-930(A).

F. The BAR erred by not issuing a separate certificate of appropriateness for demolition and for new construction, and on each property, for which an application was filed regarding the Hotel project.

Town Ordinance, Sec. 32-173 states a "[c]ertificate of appropriateness means [a] document issued by the [BAR] . . . certifying that the proposed actions by an applicant are found to be acceptable in terms of design criteria relating to the individual property or the historic district." (Id.)(emphasis added). Town Ordinance, Sec. 32-181(a),(b) states in part:

> "A certificate of appropriateness is required from the [BAR] . . . for any construction . . . and any demolition of a building or structure. [. . .] The certificate of appropriateness shall be a standardized format . . . stating that the . . . demolition **or** changes including . . . proposed construction . . . for which the application has been made are approved by the [BAR]." (Id.)(emphasis added).

The "review criteria" required for BAR approval of "demolition" (see Town Ordinance, Sec. 32-182(b)) are totally different than the BAR criterial for approval of "construction."

(see Town Ordinance, Sec. 32-182(d)). A BAR application for and approval of "demolition" of a structure requires a "separate action by the [BAR]" than a BAR application for and approval of "construction" of a new structure. At the BAR hearing on October 6, 2014 BAR the Chairman explained that "[d]emolition is also considered as a separate action by the [BAR] . . . ." **(Transcript BAR Meeting 10/6/14, at 3)**(emphasis added). That is why separate applications to demolish existing buildings and applications to construct new buildings were submitted by different owners of property for consideration by the BAR and were subsequently received, advertised, considered, voted on and justified with purported findings and conclusions published by the BAR, separately. Applications for demolition of existing structures for the Hotel project were submitted for the BAR meetings dated October 6, 2014; January 5, 2014; and January 12, 2015. See pages 7-10, 13-16 supra. Applications for new construction for the Hotel project were submitted for the BAR meetings dated September 8, 2014; January 5, 2015; January 12, 2015; and April 6, 2015. See pages 5-7, 13-17 supra.

Despite this consistent history of processing separately applications for the demolition of buildings and the construction of new buildings, the BAR issued only one Certificate of Appropriateness approving both demolition and construction for the Hotel project instead of separate certificates of appropriateness – one for demolition and one for construction - and separate certificates of appropriateness for each property on which approval to demolish or construct was sought.

This consolidation of approvals for both demolition and construction into one Certificate of Appropriateness has the likely purpose of trying to avoid expiration of the Certificate of Appropriateness that might be caused by the requirement of Town Ordinance,

Sec. 32-181(b) that "[t]he activities [i.e., demolition and construction] covered by the certificate must be started within six months of the date [sic] issuance, otherwise the certificate expires and the applicant must reapply." (Id.)(emphasis added). Even if demolition of a building approved by the certificate of appropriateness occurred within six months of its date of issuance, no construction for the Hotel project has occurred and, therefore, the Certificate of Appropriateness issued on May 11, 2015, has expired. Moreover, if two separate certificates of appropriateness were required, one for demolition and one for construction, the failure of construction of the Hotel project to have started within six months of issuance of the certificate of appropriateness has caused that certificate of appropriateness to expire even if some demolition has occurred. The BAR should have promulgated rules to clarify these issues, as required by statute and ordinance.[16]

IV. Facts on the BAR record fail to adequately support the decisions of the BAR and the BAR failed to show how facts that are on the record comply with the criteria for BAR approval.

A. There is not sufficient information and documentation in the BAR record to affirm the decisions of the BAR being appealed.

The criteria upon which approval or rejection of a BAR application for construction and demolition must be based include the following:

1. Sec. 32-172(a)("to protect, preserve and enhance the distinctive architectural and cultural heritage of the town; to promote educational, cultural, economic and general welfare of the people of the town; to foster civic pride; to encourage the harmonious, orderly and efficient growth and development of the municipality; . . . to ensure that new buildings . . . will be harmonious with the existing structures and sites);(c)("to encourage a harmonious . . . outward appearance of structures . . . to preserve property values and continue to attract

[16] See 27-31 supra.

business and residents); (d)("encouraging a general harmony [regarding] style, form, proportion, texture and material . . . to contribute to the distinctive character of the town)(emphasis added)

2. Sec. 32-175(f)("promote the purposes and objectives of this article");

3. Sec 32-176(h)("make [six] determinations");

4. Sec 32-176(h)(6)("to follow the established guidelines governing . . . new construction . . . ."); and

5. Sec. 32-182(d)("use Secretary of the Interior's Standards for Rehabilitation as guidelines in making its decisions").

At the BAR meetings on April 6 and May 11, 2015 at which the BAR made its decisions being appealed, the BAR literally stated no findings, no conclusions of law and no facts to demonstrate compliance with any of the above-stated criteria or to explain the BAR's rationale for its decisions to approve the applications being appealed. (**Transcript Circuit Court Hearing 8/14/15, at 14-15**)("[T]here's no evidence in the record supporting any finding that the project as presented and the demolition permits as requested satisfy the requirements of [Town Ordinance, Sec. 32-182(d)(1) through (10), 40). Indeed, the BAR did not even identify what criteria it used when deciding to approve the applications for the Hotel project. Therefore, those decisions are invalid and should be overturned as a matter of law. (See **Transcript Circuit Court Hearing 8/14/15, at 18**) ("if there are no facts upon which to justify their decision, then that is a ground for appeal and is an error of law"); Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005), citing Gurganious v. City of Beaufort, 317 S.C. 481, 486, 454 S.E.2d 912, 915 (Ct. App. 1995).

Even if the Findings and Conclusions adopted by the BAR on August 3, 2015 were to be considered, despite the BAR's lack of jurisdiction to make them after the appeals

were noticed and served, the statements in those Findings and Conclusions are completely unsupported and conclusory and fail to identify any facts that support, justify or reasonably lead to the conclusion that the applications approved complied with the criteria required for approval. (See **Transcript Circuit Court Hearing** 8/14/15, at 14-15, 17 ("The findings must be tied to the evidence and not just conclusory statements without reference to the evidence . . . all of the findings on their compliance with the statute are conclusory. They're not specific. They don't say how it is that the project meets any of these criteria")).

For example, although the Findings and Conclusions identify criteria (BAR **Findings §§ 54-57**) the BAR may have considered when approving the applications, these Findings and Conclusions say nothing more about BAR compliance with those criteria other than the bald, unexplained, unsupported and conclusory statement that "[t]he BAR complied with all relevant obligations and requirements set forth within the Town of Summerville Code of Ordinances." (Id. §§ 54-58). And, not surprisingly, these findings directly respond to the grounds stated in the notices of appeal filed months before. (**Id**. § 58). Similarly, the Findings and Conclusions claim, without explanation, justification or supporting facts, that "[t]he BAR complied with all relevant obligations of the South Carolina Freedom of Information Act" (**BAR Findings § 59**); "[c]omplete and timely applications were received by the Town's planning department" (**id**. § 60); [a]ppropriate and timely notice of each . . . meeting was given in accordance with Section 32-176(d) . . . and section 30-4-80" (**id**. § 61); "[t]he appropriate 'review criteria' as set forth in Section 32-182 . . . including the Secretary of the Interior's Standards for Rehabilitation, were properly utilized" (**id**. § 62); "[a]ll of the actions of the BAR . . . were in accordance with . . . the 'purpose and intent' of . . . Section

32-172" (**id**. § 63); and "with the duties and powers conferred upon it under both South Carolina law and Sections 32-175 and 32-176" (**id**. § 64); "[t]he BAR reviewed and ultimately approved subject plans and applications in accordance with prescribed procedures and guidelines . . . within Section 32-175" (**id**. § 65); "[t]he Project is in compliance with all relevant provisions of the Town of Summerville Historic Preservation Ordinance" (**id**. § 68); and "[t]he BAR's decisions and determinations regarding demolition of existing structures and salvage of materials where appropriate and practical are in compliance with all relevant provisions of the Town of Summerville Historic Preservation Ordinance" (**id**. § 69).

The Findings and Conclusions do claim the BAR decisions complied with specific criteria where they state that "[i]n accordance with Section 32-176(h) . . . the BAR made determinations in accordance with established guidelines with respect to [four criteria]" (**id**. § 67) and "[t]he mixed use development project . . . is appropriate in terms of aesthetics, design, architecture, height, mass, scale, proportion, arrangement, texture and material, and is compatible with the general character of its immediate neighborhood within the historical district of the Town of Summerville" (**id**. § 70). However, these claims also are invalid because no facts are identified anywhere that evidence or explain how these BAR findings and conclusions specifically comply with these criteria.[17]

In addition, some of the statements in the Findings and Conclusions provide no relevant evidence of compliance with the required criteria for BAR approval of the applications. For example, Paragraph 11 of the Findings and Conclusions states that:

> "[[T]he Developer] significantly improved the site plans and specifications from the initial submission, making it more pleasing

[17] See pp. 27-31 supra.

> in terms of aesthetics, design, architectures, height, mass, scale and harmony within the historic district." **(BAR Findings § 11)**(emphasis added).

These claims that the Developer "improved" plans and specifications from his initial submission and made them "more pleasing" are conclusory, completely unsupported by identified facts and do not constitute evidence of compliance with the relevant criteria. Indeed, Appellants contend those "improvements" fall far short of complying with those criteria. The BAR record is clear that the public objected[18] to BAR approval of the Hotel project due to its excessive mass, size, noise, traffic, tree cutting, destruction of the Historic District's ambiance, etc. (e.g., **Transcript BAR Meeting 11/5/14, at 79-80**; **Transcript Bar Meeting Part II 5/11/16, at 35-38, 42-43, 47**); opposed the demolition or removal of structures (e.g., **Letter dated January 12, 2015, from Heyward Hutson, President, Summerville Preservation Society, to BAR**); and objected to the failure of the Developer to have provided a scale model[19] of the Hotel project for the BAR and public to review. Nothing in the BAR record demonstrates how these specific objections have been overcome (**Transcript Circuit Court Hearing 8/14/15, at 21**) and whether and how the applications approved complied with the required criteria. This is evidenced by the

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[18] See **Transcript Circuit Court Hearing 8/14/15, at 21-22**("record . . . shows that the BAR members, the public . . . strenuously objected to early designs of the hotel project as being out of character with the historic district, unsightly, not consistent with the designs Applegate showed the Town to obtain Town approval of the project, etc. . . . But there's no evidence in the record that any of those objections were overcome or dealt with by the BAR in public. . . . There [is] no evidence in the record . . . that supports approval of this project by the criteria . . . in the town ordinance. There is no evidence that the BAR found that the project is . . . compatible with the general character of their immediate neighborhoods and preserves the existing street scene, nor could there be such a finding. ").

[19] For example, the President of the Summerville Preservation Society told the BAR: "But you didn't follow-up and insist on that scale model. So there's a very real possibility that we're going to get a monstrosity in this community, and not realize what a monstrosity we have until after it's . . . built. [...] Why don't you insist upon a scale model? Because it would prevent you from making an even – humongous mistake. . . . I think you should insist on that." **Transcript BAR Hearing Part II 5/11/16, at 39-40**. Similarly, BAR member John Kwist bitterly objected when neither a scale model nor a sample wall in lieu of a model was provided. See **Transcript BAR Meeting 4/6/15, at 65-70; Transcript BAR Meeting 5/11/16, at 35**.

following statements by BAR member John Kwist explaining why he was voting on April 6, 2015 to disapprove the Hotel project:

> There are really so many things that still have to be addressed, and I . . . don't think it's particularly fair to ask us to make a vote with so many unknowns. . . . I want to see that scale model. There are so many unanswered questions. We don't know what this is. . . . And you can't see anything outside these elevations. And to kind of preserve the integrity of the neighborhood, we have to know how this is going to blend with the rest of the neighborhood. This is like putting the blinders on. And we've got some great pictures here that show beautiful renderings, but it doesn't say how it relates to the surroundings buildings. . . . I'd just like a model that shows . . . this project in context with the surrounding neighborhood. **(Transcript BAR Meeting 4/6/15, at 65-69).**

a. Important information and documentation in the record is incorrect.

For example, contrary to claims[20] stated in the Findings and Conclusions, there is no fact or evidence in the BAR record indicating that the BAR's Secretary received complete applications from any or all[21] the owners of the Hotel project at least fourteen days before the BAR meeting, as required by Town Ordinance, Sec. 32-181(c)(1),(4),(6), or that notices and advertisements regarding BAR meetings about demolition stated that members of the public could speak at those meetings, as required by Town Ordinance, Sec 32-182(b). On the contrary, the BAR complied with neither of these requirements.[22]

B. The BAR refused to consider important information from the public showing that the applications failed to comply with the criteria the BAR was required to follow.

The BAR repeatedly refused to consider design issues the public tried to get the BAR to resolve to cause the Hotel project to comply with the criteria required for approving the Hotel project applications. For example, at the BAR's May 5, 2015 meeting the BAR

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[20] See **BAR Findings §§ 60, 61**; page 40 supra.

[21] The applications are undated and there is no record of when or by whom they were received. In addition, the applications failed to list the RDC as one of the owners of the Hotel project. See fn 1 supra.

[22] See pp. 5-6, 14-17, 31-33 supra and 53-56 infra.

flatly refused to consider objections by property owners near the proposed Hotel that the restaurant where bands would be playing music nightly on the roof of the Hotel was not being made "soundproof" or rejected to avoid excessive noise in the surrounding residential neighborhood in the Town's historic district, including at a nearby church. (See, e.g., **Transcript Part II BAR Meeting 5/11/15, at 35-38; Letter, undated, by Faye Croft to BAR**). This refusal, along with public anger and frustration over the BAR's dismissal of the public's concerns and the confusion and arbitrariness caused by the BAR's use of unwritten, ad hoc procedures, are shown by the transcript of the BAR's May 11, 2015 meeting, (**Transcript Part II BAR Meeting 5/11/15, at 35-38, 41**), which states in part as follows:

> MALE SPEAKER: . . . I live right by the hotel, where it's going up at. And I asked last time was it soundproof on the restaurant and band that they were going to have there. . . . I live there, right across from it.
>
> . . . .
>
> MALE SPEAKER: I asked last time whether you were going to have it soundproof or whether they can make it soundproof, and nobody at any of these times has answered this question or even brought it up. Why? Why haven't you brought it up?"
>
> CHAIRMAN DIXON: It's not part of the review of the plan, sir.
>
> MALE SPEAKER: This is part of the view plan. . . .
>
> . . . .
>
> MALE SPEAKER: You don't care about what I have or what I feel?
>
> . . . .
>
> MALE SPEAKER: You have control over the building. You have control over the park that's going in there.
>
> CHAIRMAN DIXON: I do not have control over what might or might not happen in the future in the building. It's -- that's not part of what the BAR – our control is.
>
> MALE SPEAKER: ... [Y]ou ought to be reviewing something to make it soundproof.

. . . .

MALE SPEAKER: . . . That's not a window that's going to separate you from sound. . . .

MALE SPEAKER: Well, then why don't you have a window?

MALE SPEAKER: . . . These types of things are things that are nuisances that you need to take up with Town Council, not with the [BAR] -

MALE SPEAKER: . . . And you can make the parks where it will be soundproof.

FEMALE SPEAKER: Sir, I think he has a right to be heard, and the BAR should consider these matters.

CHAIRMAN DIXON: . . . We're here tonight for five items. That's all. The preliminary approval was already given last month. We're here to look at the – what it's going to be built of, and not the other things. We had three meetings that I recall where all those could be brought up.

MALE SPEAKER: I think y'all ought to resign.

FEMALE SPEAKER: Yes, I'm afraid I agree." (**Id.**)(emphasis added).

Similarly, a female speaker at this meeting subsequently said:

> Yes. I have a little bit of a problem with Mr. Chairman. . . . I apologize if I'm a little irate, but I am at this minute because you need to give people a little more open forum. You just closed minds on everything, and we need a little bit of discussion. This is a community. We're not just you. We're a community. And I think you need to be a little more open and congenial, please. And I would like (unintelligible) very much to see something addressed about the sound problem, because I am concerned about my churches in my community. I've said it before and I'm saying it again. And if you don't have the authority sounds (sic), please bring it up with the rest of the town. Please do your job that way. Help us out. Give us a little break – please. Please, sir. . . . (Applause) (**Transcript Part II BAR Meeting 5/11/15, at 41**) (emphasis added).

Similarly, the following written comments were submitted to the BAR by the owner of the home "right behind the hotel complex running alongside of the proposed 4 story condos with a rooftop bar on top:"

> HOW WOULD YOU LIKE HAVING THE BAR ROOM NOISE THAT CLOSE TO YOUR SLEEPING AREA? This would require that the windows would never be raised to allow fresh air. And that the blinds would have to be closed at all times." **(Letter, undated, from Faye Croft to BAR)**.

Thus, as shown above, the BAR refused to consider whether the design and materials of the restaurant on top of the roof of the Hotel could be made soundproof to avoid or mitigate noise in the adjoining residential portion of the Town's historic district. This was the BAR's refusal to comply with its duties to, e.g., to "promote the . . . general welfare of the people of the town;" (Town Ordinance, Sec. 32-172(a)(emphasis added)); "foster civic pride;" (id.)(emphasis added); "encourage the harmonious, orderly and efficient growth and development of the municipality;" (id.)(emphasis added); "ensure that new buildings . . . will be harmonious with the existing structures and sites;" (id.)(emphasis added); "protect the quality of life for local residents;" (Town Ordinance, Sec. 32-172(b))(emphasis added); "preserve property values and continue to attract business and residents;" (Town Ordinance, Sec. 32-172(c)(emphasis added)); and "encourag[e] a general harmony [regarding] style, form, proportion, texture and material . . . to contribute to the distinctive character of the town" (Town Ordinance, Sec. 32-172(d)(emphasis added)). Moreover, these statements show the BAR Chairman claimed it was too late for the BAR to consider these public concerns because the BAR already had given the Hotel project "preliminary" approval. However, as stated above, public concerns about excessive noise had been voiced at previous BAR meetings before "preliminary" approval had been granted, and the meaning, significance and authority to use "preliminary" approval as part of the BAR procedures did not exist in any rule adopted by the BAR and therefore should not have been used by the BAR.

The reason the BAR may have been deaf to these concerns is that the decision to approve had already been worked out in secret "workshop" BAR meetings held in the outside the public eye.

V. The BAR transacted BAR business at secret meetings held deliberately without a quorum, proper prior public notice, public attendance and participation; and without keeping and publishing immediately minutes and records to the public, all in violation of the South Carolina Freedom of Information Act and other laws.

A. The BAR transacted BAR business at secret BAR meetings in violation of statutes and ordinances requiring that BAR business be transacted only by a quorum at publicly noticed meetings accessible to the public and for which the BAR kept minutes and records immediately made available to the public.

At the January 5, 2015 BAR meeting BAR member John Kwist ("Kwist") publicly made the following statements about the Hotel to the Developer:

> . . . You addressed the height, and I appreciate that. I don't think you've addressed the mass. And as I indicated to you in that **workshop**, the elevation along Richardson Avenue, best I could tell, is about 320 feet of continuous building. **(Transcript of BAR Hearing 1/15/15, at 35)**(emphasis added).

Totally unknown to the public when BAR member Kwist made this public reference to a "workshop" was that on December 12, 2014 BAR members secretly had met with the Developer in at least two "workshop[s]" "for the Hotel Project" in a Town conference room arranged by official communications to six of the seven[23] BAR members from the Secretary of the BAR. **(E-mail dated December 5, 2014, from BAR Secretary Lucy Dreyer to Six BAR Members)**. Three members of the BAR attended the first

[23] The seventh member of the BAR, Jeff Bowers, attended neither of these "workshops" because he had recused himself from participating in all BAR discussions about the Hotel project due to his conflict of interest. See e.g., **Recusal Statement, dated 10/28/14, by Jeff Bowers**.

"workshop" and three other members attended the second "workshop," instead of all members of the BAR attending together one "workshop," for the expressed purpose of "avoid[ing] any possibility of a quorum", (**id.**), to try to justify meeting secretly without public notice, participation or records (**id.**; **BAR Findings § 50**). Also attending each of the meetings were the Developer, Arthur Applegate, and the Town Planner, Madelyn Robinson. (**Hotel Workshop Notes, dated Dec. 12, 2014, by BAR Member John Kwist, at 1**). The business conducted at these two "workshops" consisted of BAR members and the Town Planner reviewing, discussing and negotiating with the Developer design changes regarding the Hotel project, prior to the public BAR meeting on January 5, 2015, at which the Developer's and the Town's applications regarding the Hotel project would be discussed, considered and possibly approved, delayed or rejected. (**Hotel Workshop Notes, dated Dec. 12, 2014, by BAR Member John Kwist**).

Contemporaneous notes taken by BAR member Kwist at the secret "workshop" meeting he attended describe what occurred at that meeting in part as follows:

> I. [BAR Member] David [Price] indicated that . . . he himself thought that by bringing more tourists to Summerville, his bed and breakfast business would thrive because of it. Applegate indicated that those opposed to this project are in the minority few and unfortunately got all the `press.'"
>
> II. Applegate presented the revised drawings:
>
> . . . .
>
> III. Beth [Huggins] asked if there was room on site for a "TENTEVENT." She is in the event planning business, and would like to see that if possible."
>
> "IV. "[John Kwist] acknowledged improvement, but still feels that the mass is a problem. Asked if the Hotel and Condos can be separated with a drive/alley for use by the condo owner. Applegate said maybe, but not to get my hopes up. David said he did not necessarily agree with me. Applegate changed his tune quickly. He said he would not consider it. I feel betrayed by the

> Chairman. . . . David and Beth clearly seem to be too eager to endorse the revised plan. I will e-mail the other members and explain my recommendations. Maybe they will listen and support me at the next BAR meeting on 1/5/15." **(Hotel Workshop Notes, dated Dec. 12, 2014, by BAR Member John Kwist, at 1-3)**(emphasis added).

These contemporaneous notes show that at this "workshop" the design topics discussed regarding the Hotel project included the following: HVAC; noise pollution; traffic; entrance & egress; height, mass & scale; aesthetics; whether an urban project; size & scale; preserving the neighborhood and quality of life; noise ordinance; entrance and egress; whether tower is appropriate; demo; setbacks; height; and conference center. In addition, these notes evidence that two members of the BAR (David Price, Beth Huggins) had direct or indirect interests in property that would be affected by a decision of the BAR and therefore, in accordance with Town Ordinance, Sec 32-174(h), were "disqualified from participating in the discussion, decision of proceedings or the [BAR] in connection" with the Hotel project. **(Hotel Workshop Notes, dated Dec. 12, 2014, by BAR Member John Kwist).**

Documents[24] generated by BAR member John Kwist and the BAR Secretary show that at these meetings BAR members were "transacti[ng] business" of the BAR but were doing so deliberately without the quorum expressly required by Sec 32-176(e)[25] as a prerequisite to the BAR's 'transacti[ng] business." **(Transcript Circuit Court Hearing 8/14/16, at 12-13)**. In addition, the failures of the BAR to allow members of the public to attend and to give public notice of the time and place of these meetings violated Town

[24] The notes and other documents generated by the BAR about these "workshop" meetings were never made available to the public or the Circuit Court by the BAR but were provided to the plaintiffs as discovery responses in the Croft Lawsuit. See page 4 supra.

[25] Sec 32-176(e) states that "[a] quorum, consisting of a majority of the total membership of the board, shall be required for the transaction of business" Id. (emphasis added).

Ordinance, Sec 32-176(d), which states in part that "[a]ll meetings of the [BAR] shall be open to the public and reasonable notice of the time and place shall be given to the public." (**Id.**)(Emphasis added). In addition, the failure of the BAR to keep records and minutes of the business it transacted at these meetings violated Section 6-29-870(D)'s requirement that "[t]he [BAR] shall keep minutes of its proceedings . . . and shall keep records of its examinations and other official actions, all of which immediately must be filed in the office of the [BAR] and must be a public record." (**Id.**)(emphasis added). Moreover, the failure of the BAR to provide these documents regarding these secret meetings to the Circuit Court as part of the BAR record violated the requirements of Section 6-29-920(A) that the BAR "must file with the clerk a duly certified copy of the proceedings held before the [BAR]." (**Id.**)

In addition to the above, on July 21, 2014 the BAR Secretary arranged three secret meetings, on July 21, 23 and 29, 2014 each attended by "two [different] BAR] members at a time . . . (no possibility of it looking like a quorum)" (emphasis added) where they discussed the Hotel project with the Mayor of Summerville. (**E-mail dated July 21, 2014, from BAR Secretary Lucy Dreyer to Six BAR Members**). Those meetings violated the same provisions cited above regarding the secret meetings held on December 12, 2014.

B. The BAR deliberately orchestrated the attendance at the secret BAR meetings to avoid a quorum, in violation of the South Carolina Freedom of Information Act.

The secret meetings described above violated provisions of the South Carolina Freedom of Information Act ("FOIA"), including S.C. Code Ann. § 30-4-60, requiring that "[m]eetings of public bodies shall be open" and that "[e]very meeting of all public bodies shall be open to the public . . . ." (Id.)(emphasis added); S.C. Code Ann. § 30-4-80(a),

requiring public notice of all regular meetings and agendas of "[a]ll public bodies" (emphasis added); S.C. Code Ann. § 30-4-90(a), requiring that "[a]ll public bodies shall keep written minutes of all of their public meetings" (id.)(emphasis added); and S.C. Code Ann. § 30-4-90 (b), requiring that "[t]he minutes shall be public records and shall be available within a reasonable time after the meeting . . . ." (Id.)(emphasis added).

S.C. Code Ann. § 30-4-20, defines a "[p]ublic body" as including "any public or governmental body or political subdivision of the State, including . . . municipalities . . . including committees, subcommittees, advisory committees, and the like of any such body by whatever name known . . . ." (Id.)(emphasis added). At a minimum the above-described meetings attended by less than a quorum of BAR members to transact BAR business constitute de facto committees that are subject to all these requirements of the Freedom of Information Act applicable to public bodies. This conclusion is supported by Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001), which held that the secret, non-public meeting of even an advisory committee to a public body was prohibited by the Freedom of Information Act. As in Quality Towing, because the BAR's secret workshops were not open to the public, the public was unable to learn what design changes the Developer was proposing and negotiating with BAR members and therefore was unable to comment on those design changes to BAR members. As in Quality Towing, the BAR has advanced no valid reason to hold the secret, non-public meetings and discussions by a group of BAR members with the Developer regarding whether the BAR would award the Developer a certificate of appropriateness to which many members of the public objected. As in Quality Towing, the issue being discussed in secret by BAR members involved the expenditure of public funds. (Croft Lawsuit, supra at 4). As in

Quality Towing, "FOIA was enacted to prevent the government from acting in secret, South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 447 S.E.2d 843 (1994)" and "[t]his kind of secret determination is exactly what FOIA was designed to prevent." 345 S.C. at 163.

In particular, the BAR's manipulatively orchestrating successive secret meetings of BAR members with the Developer and the Town's Planner and Mayor without a quorum to discuss, plan and negotiate the Hotel project violated S.C. Code Ann. § 30-4-70(c) , which states in part:

> . . . [C]ircumvention of chapter . . . .
>
> (c) No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction or advisory power. (Id.)(emphasis added).

The BAR members and Town officials who committed these FOIA violations are subject to the penalties stated in Section 30-4-110 that "[a]ny person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor . . . ."

C. The BAR failed to notify the public that it would have an opportunity to comment at BAR meetings considering the demolition of structures; misrepresented at BAR meetings that any comments allowed to be made to the BAR were not required; and unreasonably interfered with the public's rights to comment by imposing unreasonable restrictions and threatening the public.

Town Ordinance, Sec 32-182(b) states in part:

> *Demolition*. . . . Upon receipt of an application to demolish a structure, the secretary to the [BAR] shall published a display advertisement in a newspaper . . . in the town at least 14 days before the meeting informing the public that such application has been received, detailing the date, time and place of the meeting at which

> it will be considered and stating the public will have an opportunity to comment at such meeting. (Id.)(emphasis added).

The BAR record shows that the BAR held meetings at which the BAR considered the demolition of structures on October 6, 2014; November 3, 2014; January 5, 2015; January 12, 2015; April 6, 2015; May 11, 2015; June 1, 2015; July 6, 2015; and August 3, 2015. The BAR record shows that an advertisement was placed in a newspaper only regarding the BAR meetings on October 6, 2014; January 5, 2015; and May 11, 2015 **(Ad dated 9/19/14 in Post & Courier for 10/6/14 BAR Meeting; Ad dated 12/19/14 in Summerville Journal Scene for 1/5/15 BAR Meeting; Ad dated 4/2/15 in Summerville Journal Scene for 5/11/15 BAR Meeting)**. No advertisement was placed regarding the BAR's consideration of demolition at BAR meetings on November 3, 2014; January 12, 2015; April 6, 2015; June 1, 2015; July 6, 2015; and August 3, 2015. Very importantly, **none** of the advertisements that were placed stated that "the public [would] have an opportunity to comment" at the meetings, as required by Town Ordinance, Sec 32-182 (b) quoted above. In addition, **none** of the letters of notification sent to adjacent property owners as required by Town Ordinance, Sec. 32-176(d) advised that the public could comment at the upcoming BAR meetings where the BAR would consider demolition. **(Letters from BAR Secretary Lucy Dreyer, Planning Department, dated 9/9/14; 10/27/14; 12/29/14; 3/30/15; and 4/23/15)**.

On the contrary, the BAR Chairman specifically misrepresented to the public in those BAR meetings about demolition that the BAR did not have to listen to comments by the public but was allowing public comments only as a matter of gratuitous grace. For example, at the meeting on November 3, 2014 BAR the BAR Chairman stated:

> Although we're not required to solicit comments from anyone other than the applicant and the board members, we have chosen based on the great interest expressed . . . both for and against this project to allow others to express comments that might help influence our decision making. (**Transcript BAR Meeting 11/3/14, at 12**) (emphasis added).[26]

In addition, the BAR Chairman made statements threatening and intimidating attendees at BAR meetings and imposing unreasonable restrictions on the content and time allowed regarding public comments about the Hotel project.[27]

In addition, at the BAR meeting on November 3, 2015, the BAR Chairman warned:

> If your soul [sic] purpose for being here is to argue either for or against this hotel, you have my permission to leave now, because I will not allow you to speak concerning that. And as soon as I or one of the other board members realizes that's what you're doing, we'll ask you to sit down. . . .
>
> . . . [D]o not engage in any side conversations with our other guests. If someone before you has made your point, please limit your comments to stating that you agree with them. Rehashing the same points over and over will not enhance your position and, in fact, might damage it.
>
> When you're not speaking, please remain silent so that the board and the applicant can hear what the speaker has to say. If you do not comply with this, you will be asked to leave. Again, I must stress that if you are here to argue either for or against building the hotel, you are at the wrong meeting and will not be allowed to speak." (**Transcript of BAR Meeting 11/3/14, at 11-13**).

Substantially identical warnings were issued to the public by the BAR Chairman at other BAR meetings (**BAR Findings §§ 5, 13, 38 and 46**) including, for

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[26] The BAR expressed the same notion that public comments were being allowed by the BAR gratuitously in paragraphs 5, 13, 38 and 46 of the BAR's Findings and Conclusions. (**BAR Findings §§ 5, 13, 38, 46**). That claim ignores that allowing public comments about applications for demolition was required by Town Ordinance, Sec. 32-176(d).

[27] See pp. 10-15, 17-19, 42-46, 51-52 supra and 55-57 infra.

example, at the BAR's October 6, 2014 meeting, (**see Transcript BAR Meeting 10/6/14, at 2-4, 49**) where the BAR President said the following:

> . . . I will remind you about the three minutes. We are keeping track of it. . . . If you've gotten your three minutes, at that point I really expect you to finish your statement, what you plan -- I hope you've thought what you're going to say first, so you just don't ramble on. (**Id**. at 49).

D. The BAR deliberately withheld applications, notifications, minutes and project designs from the public for the purpose and with the effect of negating or limiting public comment and understanding about proposed demolition and construction.

As stated above, the BAR failed to publish required notifications advising that the public could speak at nine separate BAR meetings about demolishing structures. See p. 53 supra. In addition, the BAR deliberately obstructed public input and opposition to the Hotel project. For example, on January 2, 2015 members of the public asked the BAR Secretary to be allowed to inspect an application by the Developer and the Town that would be considered by the BAR at its January 5, 2015 meeting. **(Letter dated 1/7/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR).** The BAR Secretary replied that the application could be viewed by the public only in response to a written Freedom of Information Act request which would not be answered for up to fifteen days after the date of the request. (**Id**.) Objections that that procedure requiring a fifteen day delay would not allow the public to inspect the application before it was considered at the BAR's January 5, 2015 meeting were unheeded and no viewing of the application was allowed before the January 5, 2015 meeting. (**Id**.; **Transcript Circuit Court Hearing 8/14/16, at 10, 12-13**) [28].

[28] Similarly, delays in public access to BAR meeting minutes prevented the public from knowing what actions the BAR had taken, what the BAR would do next and what the public needed to do to express their

This intentional delaying of the public's ability to inspect the Developer's application to the BAR before the BAR meeting considering that application violates S.C. Code Ann. § 30-4-30(a), which states that "[a]ny person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access." (Id.)(emphasis added). There is nothing "reasonable" about, for example, requiring the public to view an application for demolition of a structure only after the BAR's meeting to decide whether to grant that application for demolition, when Town Ordinance, Sec 32-182(b) expressly allows the public to comment to the BAR about that application. Without being able to review an application before a BAR meeting about that application, the public cannot make reasonable comments about that application and, therefore, cannot put on a BAR record a basis for appealing to the Circuit Court an adverse decision of the BAR.

E. Contrary to BAR claims, the BAR refused to allow the public to speak at its meetings and denied and unreasonably restricted public participation, observation, hearing and comments at BAR proceedings.

The January 5, 2015 BAR meeting, rather than being held in the Town Council chambers where BAR meetings usually are held, was held in a very small room which could not accommodate the crowds that appeared to witness the hearing and to speak to the BAR about the Hotel project. Many of the people who attended were elderly. They had no place to sit, they had no place to stand in the hall, they had to sit on the floor, and many of them had to leave. At that meeting no public comment was allowed, though the applicant was allowed to speak for a long period of time; and there was no amplification

opinions and protect their rights, including on appeal. See **Transcript Circuit Court Hearing 8/14/16, at 14.**

or sound system that would allow even people that got in the room to hear what was going on. (See **Letter dated 1/7/15, from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR; Transcript Circuit Court Hearing 8/14/15, at 13).**

Similarly, the following objections on the BAR record describe how the BAR obstructed public participation in the January 5, 2015 BAR meeting:

> The B.A.R. actions at your January 5, 2015 meeting to approve the . . . Dorchester hotel complex without allowing public comment was disrespectful, unkind and demonstrated a disregard for your duty to the citizens of Summerville.
>
> . . . .
>
> Before the meeting was called to order, it was obvious that there were far too few seats to accommodate the number of people crowded into the second-floor hearing room of the Town Hall. Courtesy dictates that the meeting should have been moved to the third-floor Council chambers, especially since many of the attendees were seniors. Not only did you refuse to move the meeting, you changed the order of the hearing items, forcing approximately 30 people to stand for 90 minutes to await member discussion of the Applegate proposal.
>
> When you opened the meeting, you asked members of the public present to limit their remarks to three minutes and not to repeat previous testimony. Members of the public present had prepared remarks and every expectation that they would be given the opportunity to offer them. Yet, after your committee heard from [the Developer] for 45 minutes and discussed the matter among yourselves, you called for the vote and then declared the meeting closed, **effectively denying the public any chance to participate in a decision regarding how their tax money will be spent by the Town. (Letter dated 1//7/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR, at 1; Transcript Circuit Court Hearing 8/14/16, at 13** (emphasis added)).

Similarly, another Town citizen complained at the May 11, 2015 BAR meeting as follows:

> We could not hear the discussion up there. . . . We couldn't see the materials that were being discussed. [. . .] I was sitting in the third row . . . and I could not hear what [BAR member] Rachel [Burton] was saying, because she was mumbling. . . . [T]hat's part of the problem of your proceedings [. . .] [W]e couldn't hear the discussion and we couldn't see the mock-ups. So that's the problem. (**Transcript Part II BAR Meeting 5/11/15, at 38-40** (emphasis added)).

VI. The BAR wrongfully issued a certificate of appropriateness based on numerous applications that were unqualified, and wrongfully failed to accept and consider public objections to the applications that they were unqualified.

A. The BAR should not have considered the Developer's and the Town's applications because the applicants who submitted those applications had failed to comply with their contractual requirement that prior to their submission for review and approval for a certificate of appropriateness, the Developer must have submitted a final design to the Redevelopment Commission for review and approval.

Paragraph 8a of the PPPA signed by the Developer, the Town and the RDC authorizing the building of the Hotel project states:

> **SITE AND ARCHITECTURAL DESIGN.** The project site and architectural design will be based on the conceptual provided in Exhibit F, and as agreed upon by the PARTIES. **Prior to submission** for review and approval to any required public agency for permitting or certificate of appropriateness, **DEVELOPER will submit** a final design for both the PRIVATE and PUBLIC IMPROVEMENTS to the RDC for review and approval. (**PPP Agreement, supra at 4**)(emphasis added)).

At the BAR's November 3, 2014 meeting the President of the Summerville Preservation Society objected to the BAR's considering applications by the Developer and the Town for the Hotel project and, over the objections of the BAR President, read to the BAR Paragraph 8a quoted above to support that objection.[29] (**Transcript BAR Meeting**

[29] This objection was communicated to the BAR also by the East Historic District Civic Association. See **Letter dated 1/7/15, from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR, at 2.**

11/3/14, at 74-77). In response, the BAR President declared "that's not part of our purview" because that PPPA "agreement is not between us" (**Transcript BAR Meeting 11/3/14, at 75**); suggested that compliance with Paragraph 8a was not required at this November 3, 2014 BAR meeting because the BAR was not considering "final" plans but was considering only "conceptual" plans at the meeting (**id**. at 76); and allowed the BAR to consider those applications even though the Developer had not yet submitted a final design of the Hotel project to the RDC for review and approval as specifically was required by Paragraph 8a of the PPPA (**id**. at 74-77).

The BAR's consideration of this application from the Developer at this meeting, and of this and other applications from the Developer at other meetings, was improper[30] because, in violation of Paragraph 8a of the PPPA, the Developer had not "submit[ted] a final design . . . to the RDC for review and approval" "[p]rior to submission for review and approval to any required public agency for [a] certificate of appropriateness." (**PPP Agreement, supra at 1, § 8a**) There is no evidence in the BAR record that the RDC approved of any design of the Hotel project prior to the Developer having submitted to the BAR an application for a certificate of appropriateness. The BAR's reliance on its distinction between "conceptual" and "final" plans to justify considering the application despite non-compliance with the PPPA is confusing and misplaced because those terms are not defined anywhere in the BAR's procedures and the plain language of Paragraph 8a of the PPPA requires that a "final" design be reviewed and approved by the RDC "[p]rior to

[30] Other objections were made that the BAR not consider applications by the Developer for the Hotel project because of the Developer's failure to have complied with Paragraph 8A of the PPPA. **See Letter dated 1/5/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR, at 1; Letter dated 1/7/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR, at 1-2.**

submission for review and approval to any public agency . . . ." (Emphasis added.) Compliance with this Paragraph 8a required that the final version of the plans that existed at the time of any submission of the application to the BAR have been reviewed and approved by the RDC before that submission, and that each new version of the plans be approved by the RDC before submission of that new version of the plans to the BAR for review and approval.

B. The BAR erred by considering BAR applications regarding the Hotel project because the contract authorizing the Hotel project to which the Developer and Town applicants were parties was illegal, *ultra vires* and subject to pending litigation regarding the legality of the contract and project.

Members of the public made the BAR aware[31] of the existence of the Croft lawsuit[32] challenging the legality of the PPPA that authorized the Hotel project for which the Developer and the Town, two of the parties to the PPPA, submitted applications to the BAR for a certificate of appropriateness. The BAR not only did not consider whether the allegations in the Amended Complaint warranted the BAR's refusing to consider those applications, but specifically refused to do so, claiming that the BAR could consider only the design of the project but not the effect of the lawsuit on the applications to the BAR regarding the project.[33] Thus, according to the BAR's logic, the BAR automatically must consider any application for demolition or construction no matter how illegal, financially not viable, fraudulent or otherwise ludicrously unfeasible the project is. The BAR's failure

[31] See e.g., **Letter dated 1/5/15, from Peter Gorman, East Historic District Civic Association to Phillip Dixon, Chairman, BAR; Letter dated 1/7/15, from Peter Gorman, East Historic District Civic Association to Phillip Dixon, Chairman, BAR; Letter dated 1/12/15 from Heyward G. Hutson, President, Summerville Preservation Society, to BAR.**

[32] See p. 4 supra.

[33] See pp. 11-12, 42-46, 53-54, 57-58 supra.

to define what makes an application "qualified" and consideration of an application that was not qualified were reversible error.

C. The BAR decisions are invalid because they fail to include as an applicant each "owner" of the Hotel project, in violation of Sec. 32-181(c)(1).

See pages 14, 30-32, 43, supra.

D. The BAR erred by refusing to allow evidence supporting public objections that applications being considered by the BAR were not qualified.

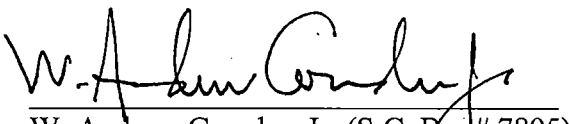
Because evidence in addition to the BAR record cannot be considered by a Court when appealing a decision by the BAR, the BAR's exclusion of evidence on the BAR record of objections to the qualifications of an application or an applicant effectively would avoid the ability of a Court to consider the merits of the objections being excluded. Therefore, the BAR must allow at its meetings public comments disputing the qualifications of an application or an applicant. The BAR's refusal to allow on the BAR record objections regarding an application and applicant, and to consider and determine whether the Hotel project that is the subject of the applications was not qualified due to being illegal, financially unsound, fraudulent or otherwise unfeasible, are reversible errors.

CONCLUSION

Therefore, for all of these reasons, this Court should reverse the Circuit Court's Order affirming the BAR's decisions and remand this case to the BAR to issue such decisions as are before it in compliance with the requirements of law stated above.[34]

[34] The South Carolina Supreme Court has found a remand to consider prospective injunctive relief as an appropriate remedy for FOIA violations. See Donohue v. City of N. Augusta, 412 S.C. 526, 533, 773 S.E.2d 140, 143 (2015).

Respectfully Submitted,
PRATT-THOMAS WALKER, PA



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March 22, 2016
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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge
Case No. 2015-CP-18-00991

Appellate Case No. 2015-002199

Faye P. Croft, Personally and as Trustee of the James A. Croft Trust; James A. Croft Trust; William A. Harbeson; Heyward G. Hutson; James Stephen Greene, Jr.; South Carolina Public Interest Foundation; Summerville Preservation Society; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated, Appellants,

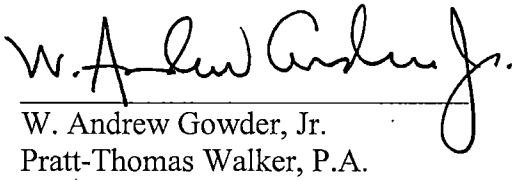
v.

Town of Summerville and Town of Summerville Board of Architectural Review, Respondents.

CERTIFICATE OF COUNSEL

I certify that the Appellants' Designation of Matter to be included in the Record on Appeal and Initial Brief contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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PROOF OF SERVICE

I certify that on the date indicated below, I served Appellants' Initial Brief and Designation of Matter, by depositing a copy of it in the United States Mail, postage paid, on March 22, 2016, addressed to all attorneys of record as follows:

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