

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

RECEIVED

SEP 26 2016

SC Court of Appeals

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.

**Respondents' Motion to Require Appellants to Remove from their Designation of Matter Materials which Are Not Related to this Appeal and which Post-Date this Appeal and to Order Appellants to Remove All References to the Same from their Initial Brief and to Extend Time for Filing Respondents' Initial Brief and Designation of Matter Pending Ruling on this Motion**

This case is an appeal of a decision of the Summerville Board of Architectural Review (hereinafter Board or BAR). The decision relates to project called "The Dorchester" which includes a hotel, conference center, parking garage, and private condominiums. The Town itself and the Town's Redevelopment Corporation (Summerville Redevelopment Corporation) are a party to what is called a "Public Private Partnership Agreement" to build the hotel. In addition to this Appeal of the BAR Decision Appellants have also filed a lawsuit attempting to declare the contract void and

ultra vires, Faye P. Croft, et. al v. Town of Summerville, et al, Civil Action No. 2015-CP-10-00713. That action is still pending in Circuit Court.

The Appellants have filed a brief and designation of matter containing materials which are not in the record and which were not available to the Circuit Court. In particular, the Appellants attempt to interject into the record and their initial brief the notes obtained from a single board member, John Kwist, who voted against the project. These notes contain Kwist's subjective interpretation of certain discussions, including some comments he has since renounced. These are not discussions of the Board or even notes of a meeting of a quorum of the Board. These materials were not presented to the BAR or Circuit Court in connection with this appeal. This is an attempt to use the raw notes prepared at an unknown time of one board member who was against the project to undermine the decision of the Board in the eyes of the Court of Appeals. The argument relating to these notes is largely contained starting the bottom of page 37 of Appellants' Initial Brief and extending to 39. Not only were these notes not submitted to the Circuit Court, there was no argument regarding the notes to the Circuit Court.

In addition, Appellant's designation of matter contains reference to other materials which do not relate to this appeal. In particular, Appellants attempt to designate for the Record on Appeal the Amended Complaint and Plaintiff's Motion for Summary Judgment and Memorandum of Law, October 19, 2015 and Plaintiff's Motion for Partial Summary Judgement and Memorandum of Law, November 30, 2015 in Faye P. Croft, et. al v. Town of Summerville, et al, Civil Action No. 2015-CP-10-00713 (All contained at Item 5 of Appellants' Designation of Matter). These materials are not from the instant case. They are an effort to bootstrap the issues in the other case relating to the validity of the developer's contract with the Town and Redevelopment Authority into

the appeal of a Board of Architectural Review Decision. As can be seen by the dates, the memorandum did not even exist when the Circuit Court signed its order September 24, 2015. These matters should not be included in the record on appeal and all references to the same in the briefs should be deleted.

It is axiomatic that the record on appeal can only contain those materials which were presented to the lower tribunal. Rule 210(c), SCACR. This is also true where the Circuit Court sits in an appellate capacity over the decision of the Board of Architectural Review. The only matters that should be included are those matters submitted to the Board. The findings of fact by a board of architectural review shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. See S.C. Code Ann. § 6-29-930 ("the findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law."); Austin v. Board of Zoning Appeals, Town of Hilton Head Island, 606 S.E.2d 209 (S.C. Ct. App. 2004); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 552 S.E.2d 42, 44 (S.C. Ct. App. 2001). Further, the court's review is "strictly limited to the facts and arguments raised to the board. Indeed, the circuit court is expressly forbidden from considering any new facts." Austin, 606 S.E.2d at 214.

For the reasons stated, this Court should order the Appellant to take out all materials from its designation of matter and Respondent's brief which were not materials of the Board or submitted as part of the record of the Board. This would include the entirety of Item number 5 of Appellants Designation of Matter and also any of John Kwist's notes.

Further, Respondents request that the time for filing their Initial Brief and Designation of Matter be held in abeyance pending this decision as Respondents do not know whether to respond or ignore those sections of Appellants' Initial Brief.

CLAWSON AND STAUBES, LLC



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Attorneys for Respondents

September 22, 2016

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v.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2016, I have mailed, regular first class mail, postage prepared, one copy of Respondents' Motion to Require Appellants to Remove from their Designation of Matter Materials which Are Not Related to this Appeal and which Post-Date this Appeal and to Order Appellants to Remove All References to the Same from their Initial Brief and to Extend Time for Filing Respondents' Initial Brief and Designation of Matter Pending Ruling on this Motion to:

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September 22, 2016

VIA US MAIL

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211-1629

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File No.: 20150083.000

SEP 26 2016

SC Court of Appeals

Re: Faye P. Croft, Personally and as Trustee of the James A. Croft Trust v. Town of Summerville and Town of Summerville Board of Architectural Review  
Case No.: 2015-CP-18-991  
Claim No.: SF150012

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondents' Motion to Require Appellants to Remove from their Designation of Matter Materials which Are Not Related to this Appeal and which Post-Date this Appeal and to Order Appellants to Remove All References to the Same from their Initial Brief and to Extend Time for Filing Respondents' Initial Brief and Designation of Matter Pending Ruling on this Motion, along with the Certificate of Service. Please file the original documents and return a stamped, filed copy in the self-addressed, stamped envelope provide for your convenience. Also enclosed is our check in the amount of Twenty-Five (\$25.00) Dollars representing the administrative fee for this request.

Very truly yours,

CLAWSON and STAUBES, LLC



Timothy A. Domin

TAD/paa  
Enclosures

cc: W. Andrew Gowder, Esq.  
Michael T. Rose, Esq.  
G. Waring Parker, Esq.  
(All via US Mail & w/enclosures)

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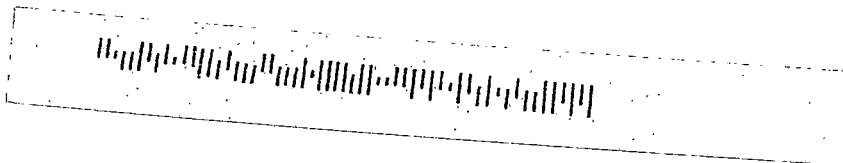
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The Honorable Jenny Abbott  
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