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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

RECEIVED

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

OCT 10 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.

Appellants' Opposition to 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

Appellants object to Respondents' motion because, as explained below, Respondents (1) have failed to comply with this Court's Order dated August 30, 2016; (2) have concealed and failed to include in the Circuit Court's BAR record a document as required by law; (3) incorrectly claim that publicly existing judicial pleadings referenced in the Circuit Court appeal should not be included in Appellants' Designation of Matter; and (4) simultaneously, unlawfully

and inconsistently have added to the BAR record a material document (Facts and Conclusions, Item #8 Appellants' Designation of Matter; see Appellants Amended Initial Brief, at 2-3,18-27,39-43) that did not exist at the time of the BAR decisions that are the subject of Appellants' appeal.

A. Violations of Court of Appeals Order

Appellants' Designation of Matter, Initial Brief and Motion to Expand the Page Limitation were filed on March 22, 2016. Appellants' Amended Initial Brief was filed, as order by the Court, on June 24, 2016.

In response, the Respondents requested by motions and were granted by this Court two successive thirty (30) day extensions by which to file their initial brief and designation of matter. The Order, dated August 30, 2016, granting this last extension states in its entirety:

“The time for serving and filing the respondents' initial brief and designation of matter is hereby extended until September 23, 2016. **No further extensions will be granted absent extraordinary circumstances.**” (Emphasis added.)

The Respondents have not filed their initial brief or designation of matter, in violation of this September 23, 2016 Order's deadline for doing so. Instead, the Respondents waited until September 22, 2016, the last day before the September 23 deadline, to file the above-referenced Motion as a substitute for complying with the Court's August 30, 2016 Order by filing their initial brief and designation of matter. Time limits under the court's rules are generally not stayed by the filing of a motion or petition. Rule 240(b), SCACR.

No “extraordinary circumstances” exist or even are alleged by the Respondents to exist as an excuse not to have filed their initial brief and designation of matter within the Court's September 23, 2016 deadline. Rather, the Respondents move that the Court delete merely two

(Items #5 and #12) of the sixty-eight items (68) listed in Appellants' Designation of Matter, as an apparent justification for completely having failed to file the Respondents' initial brief and designation of matter, and, at the last possible day before the September 23 deadline, have asked the Court for permission to again extend the deadline again hoping that the Court will agree.

Respondents submit that the Appellants have not complied with the Court's August 30, 2016 Order, thereby unnecessarily delaying these proceedings, and should not be rewarded by being given another extension of time to make those filings. Respondents obviously could have filed its initial brief and designation of matter based on the amended initial brief and designation of matter submitted by the Appellants on June 24, 2016, and could have argued in Respondents' filings against consideration of anything submitted by the Appellants to which the Respondents objected. In the alternative, the Respondents could, and should, have filed a motion to delete the two items in Appellants' Designation of Matter weeks before the Court's September 23, 2016 deadline, instead of further delaying this appeal by waiting to do so at the last possible moment before the September 23, 2016 deadline.

B. DESIGNATION OF MATTER

None of the materials listed in the Appellants' Designation of Matter should be deleted, and the Respondents motion to do so should be denied.

1. Concealment of Notes of John Kwist, BAR Member, dated 12/12/14 – (Item #12 Appellants' Designation of Matter)

Respondents first ask the Court to strike item #12 from the Appellants' designation of matter, which consists of detailed notes contemporaneously handwritten by a BAR member

about illegal secret meetings of the BAR held on 12/12/14 (a date written on the document) at which the BAR conducted business, and about other illegal conduct by members of the BAR that Appellants contend should invalidate the BAR decisions being appealed. The Respondents illegally secreted and withheld these notes by failing to provide them as part of the BAR record as required by SC Code § 6-29-920, and now, in a kind of circular logic, ask the Court of Appeals to refuse to consider this illegally secreted evidence now by summarily excluding it from the BAR record based on the fact that the Respondents had succeeded in secreting it from the BAR record before the Circuit Court.

The Respondents complained at the Circuit Court hearing on August 14, 2015, that the Respondents had held BAR meetings at which BAR business intentionally and secretly had been conducted without the quorum and public notice required by law. Transcript of Circuit Court Hearing, August 14, 2015, at 10-14. Similarly, Appellants stated as grounds for appeal to the Court of Appeals its objections to those illegal meetings and why those illegal meetings were harmful and should render the BAR decisions invalid. Amended Initial Brief, at 36-41.

BAR member John Kwist mentioned the existence of one of these illegal secret meetings at a BAR meeting on January 5, 2015, Transcript BAR 1/15/15, at 35, quoted in Amended Initial Brief, at 37. The BAR produced as part of the BAR record submitted to the Circuit Court Findings and Conclusions disputing the Appellants' claims that the BAR illegally had conducted business without a quorum and in violation of the Freedom of Information Act. Findings and Conclusions, §§ 50, 51, 53, 56, 59 (Appellants' Designation of Matter #8).

The BAR was required by SC Code § 6-29-870(D) to "keep records of its examinations . . . which immediately must be filed in the office of the board and must be a public record." *Id.* (Emphasis added.) Sec 32-176(e) requires 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). SC Code § 6-29-920(A) requires that the BAR “must file with the clerk a duly certified copy of the proceedings held before the” BAR. (Emphasis added.)

The Kwist notes strongly evidence that the BAR conducted BAR business by examining developer plans, discussing disqualifying conflicts of interest of two BAR members and taking other official actions without the quorum required by law, without keeping records as required by law and without public knowledge and participation as required by law. Further, the BAR failed to provide those notes as part of the copy of the proceedings held before the BAR, as required by S.C. Code § 6-29-920(A). The BAR must not be rewarded for its unlawful misconduct by allowing it to obtain the dismissal now of highly relevant evidence that the BAR failed to submit as part of the public BAR record to the Circuit Court as required by law.

2. Judicial Notice of Public Pleadings, Civil Action No: 2015-CP-10-00713 (Item #5 Designation of Matter)

Respondents secondly ask the Court to strike item #5 from the Appellants’ designation of matter, which consists of the following: “Amended Complaint [dated February 23, 2015] and Plaintiffs’ Motion for Partial Summary Judgment and Memorandum of Law, October 19, 2015, and Plaintiffs’ Motion for Partial Summary Judgment and Memorandum of Law, November 30, 2015 in Faye P. Croft, et al., vs. Town of Summerville, et al., Civil Action No: 2015-CP-10-00713.”

The existence and significance of this lawsuit, Civil Action No: 2015-CP-10-00713, including six reasons Appellants argue the BAR lacked jurisdiction to consider the subject matter of the decisions appealed by Appellants to the Circuit Court, are stated in Paragraphs 2 and 3A on pages 1-3 of both Appellants’ Petition (Item #6 Designation of Matter) filed with the BAR on

May 5, 2015, and Appellants' Petition (Item #7 Designation of Matter) filed with the BAR on May 22, 2015. Thus, the Appellants brought up this lawsuit in its two Petitions to the Circuit Court appealing the BAR decisions, and thereby made that lawsuit part of the BAR record considered by the Circuit Court Judge and that should be considered now by the Court of Appeals.

In response to Appellants' Petitions to the Circuit Court, the Respondents filed with the Circuit Court Respondents' Memorandum in Opposition to Petitions for Appeal ("Memorandum"), dated August 11, 2015, which is Item #16 of Appellants' Designation of Matter. On pages 1-2 in that Memorandum Respondents cite and discuss the identical lawsuit, Civil Action No: 2015-CP-10-00713, which Respondents now want stricken from Appellants' Designation of Matter. Thus, the Respondents brought up this lawsuit in the Memorandum in Opposition to Petitions for Appeal they filed with the Circuit Court and Respondents thereby made that lawsuit part of the BAR record considered by the Circuit Court Judge and that should be considered now by the Court of Appeals.

Indeed, this portion of this Memorandum by the Respondents referring to this lawsuit, Civil Action No: 2015-CP-10-00713, is specifically cited on pages 6-7 of Appellants' Amended Initial Brief, as follows:

On December 19, 2014 the Appellants, and others, filed a lawsuit, captioned Faye P. Croft, et al., vs. Town of Summerville, et al., Civil Action No.: 2015-CP-10- 00713 ("Croft Lawsuit"), alleging, *inter alia*, 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**). (Emphasis added.)

Thus, the Respondents are objecting now to Appellants including in the record the Amended Complaint of lawsuit Civil Action No: 2015-CP-10-00713 that existed on February 23, 2016, when the Respondents filed with the Circuit Court a Memorandum In Opposition to Petitions for Appeal specifically referencing that lawsuit on August 11, 2015.

That is wrong-headed. When, as here, both the Appellants and the Respondents filed documents with the Circuit Court discussing the lawsuit Civil Action No: 2015-CP-10-00713 regarding a BAR appeal, the Amended Complaint in that lawsuit existing at the time of the Circuit Court Order being appealed should be considered part of the BAR record on appeal to the Court of Appeals. Moreover, the Circuit Court Judge and the Court of Appeals should take judicial notice of each document that was part of the lawsuit, Civil Action No: 2015-CP-10-00713, at the time of the Circuit Court Order being appealed, and thereafter.

The Amended Complaint that the Respondents move to strike is dated February 23, 2015. It existed when the Circuit Court received the above referenced documents from the parties discussing the lawsuit that is the subject of the Amended Complaint and that existed at the time the Circuit Court issued its Order being appealed now by the Appellants. As a result, the Amended Complaint was and is part of the BAR record and should be allowed as part of Appellants' Designation of Matter.

The two Motions for Partial Summary Judgment in the above-referenced lawsuit did not exist on the date of the Circuit Court Order being appealed, but were filed subsequently with the Court. Those two motions are mentioned in the Amended Initial Brief only once, by citing them in footnote 13 on page 25 thereof, and can be deleted, if required, without changing anything else in the Amended Initial Brief. The two motions are mentioned in the Appellants' Designation of

Matter only once, and simply can be deleted, if required. Thus, if the Court determines that these two Motions for Partial Summary Judgment should be deleted, there is no need to rewrite any other part of the Amended Initial Brief or of the Designation of Matter. Instead, those two references to those two Motions simply can be deleted. The remaining part of footnote 13 in the Amended Initial Brief can remain with the citations deleted or, preferably, with the words "Amended Complaint" substituted for the two Summary Judgment Motions cited. By making these two simple changes continued delay of this appeal by rewriting and refileing Appellants' initial brief and restarting the timetables to respond can be avoided.

CONCLUSION

The Respondents rely in this appeal on a key document entitled Facts and Conclusions which Appellants vigorously object should not be part of the BAR record because it was created after the BAR made its decisions which the Appellants are appealing and after the Appellants had filed with the Circuit Court its pleadings appealing those BAR decisions. (See Facts and Conclusions, Item #8 Appellants' Designation of Matter; Appellants Amended Initial Brief, at 2-3,18-27,39-43).

Inconsistently, the Respondents object to the Appellants' inclusion on the BAR record of documents that were created before the BAR decisions being appealed and that either were referenced to the Circuit Court by the Appellants and/or Respondents before the Circuit Court Order now being appealed, or were concealed and wrongfully withheld from the BAR record by the Respondents.

For the reasons stated above, the Court should exclude from the BAR record none of the documents Respondents have moved to exclude, and should not allow Respondents to continue

to delay these proceedings by failing to file its initial brief and designation of matter as previously ordered by the Court of Appeals.

At a minimum, the Court of Appeals should wait to consider the facts regarding all these documents before making a final determination in the future about whether any of them should be excluded, instead of summarily excluding any of them at this stage of this appeal.

Respectfully submitted,

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October 3, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Case No. 2015-CP-18-991

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v.

Town of Summerville and
Town of Summerville Board of Architectural ReviewRespondents.

PROOF OF SERVICE

I, Frances Butler, of Pratt-Thomas Walker, P.A., hereby certify that I have served a true and accurate copy of the APPELLANTS' OPPOSITION TO RESPONDENTS' MOTION TO REQUIRE APPELLANTS TO REMOVE FROM THEIR DESIGNATION OF MATTER MATERIALS WHICH ARE NOT RELATED TO APPEAL AND WHICH POST-DATE THIS APPEAL AND TO ORDER APPELLANTS TO REMOVE ALL REFERENCES TO THE SAME FROM THEIR INTIAL BRIEF AND TO EXTEND TIME FOR FILING RESPONDENTS' INITIAL BRIEF AND DESIGNATION OF MATTER PENDING RULING ON THIS MOITION by U.S. Mail on October 3, 2016 to counsel of record as shown below:

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
P.O. Box 11629
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RE: BAR Appeal
Case No: 2015-002199
Our File: 7754.001

Dear Sir or Madam,

Enclosed please find the original and six copies of the Appellants' Opposition to 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 and also find the Proof of Service. Also enclosed is our firm's check in the amount of \$25.00. Thank you for your assistance and please let me know if you have any questions.

Sincerely,

PRATT-THOMAS WALKER, P.A.



Frances Butler


Assistant to W. Andrew Gowder Jr.

/hfb

Enclosures as stated.

cc: Timothy Domin, Esq.
G. Waring Parker, Esq.



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