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OCT 11 2016  
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

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.

**REPLY TO APPELLANTS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO REMOVE FROM APPELLANTS' 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 SAME FROM THEIR INTIAL BRIEF AND TO EXTEND THE TIME FOR FILING RESPONDENTS' INTIAL BRIEF AND DESINGATION OF MATTER**

A. There Has Been No Violation of Court of Appeals Order Nor Any Exceptional Delay Caused by Respondents, and Certainly No Sanction Is Appropriate

In the present case, the Respondents obtained two extensions of time to respond to a 49 page initial brief that was served in late June, 2016. First, two extensions to file an initial brief is quite typical. It was aytipcal that during that time Respondents' counsel's (Domin's) wife began to progressively lose use of her right leg due to spinal

cord impingement. After multiple tests, doctors visits, and second opinions, an hours-long spinal decompression surgery was performed in early August, followed by a period of convalescence. Respondents' counsel's wife's surgery was the stated and actual reason offered for the second extension to the Court.

Respondents' counsel began to outline and write a response in September and realized Appellants were using materials not properly before the lower court or the Board of Architectural Review (BAR). Respondent considered addressing this issue in the brief, and drafted the majority of the brief before deciding that it was not wise to continue writing a brief that would likely have to be substantially re-drafted.

The good cause for a further extension beyond the two provided is that Appellants have not followed the South Carolina Appellate Court Rules or general principles of appellate practice in the designation of matter. Rather than calling their issue to the Court upon filing, the Appellants simply included the materials and used the materials in support of their position in their brief. And now Appellants fault Respondents for not bringing their violation of the rules to the Court sooner.

As to Appellants' claim of unreasonable delay, Appellants should not be heard to complain of a delay which is caused by their own designation of material for the record that is not proper.

Further, it is noteworthy Appellants took two extensions of time to file their own brief. Appellants then submitted a non-conforming brief which exceeded the 50 page limit. The page limit extension was denied May 26, 2016. Appellants were given another 30 days to provide a compliant brief. Therefore, the Appellants' original brief which was due on or about January 22, 2016 was in fact served on June 24, 2016.

B. Materials Which Are Improperly Proposed for the Record on Appeal

1. Personal Notes of a BAR member

To be clear, Appellants concede the personal notes of one BAR member were not part of the record to the lower court. Appellants simply included them in the proposed appellate record and then made arguments based on their interpretation of the notes.

Appellants justify this deviation from the Rules by claiming that these materials should have been in the record. The personal notes and musings of an individual Board member are not part of the record of a board or commission. Further, the notes were not even the musings about a "meeting" of the BAR. The notes were taken either during or at some point after an occasion when less than a quorum of BAR members were afforded an opportunity to review the project. Numerous other jurisdictions throughout the country hold that informal meetings of groups of less than a quorum do not violate FOIA or open meetings requirements. See, e.g., City of Gary v. McCrady, 851 N.E.2d 359 (Ind. Ct. App. 2006) ("The legislature has specifically defined 'meeting' under the Open Door Law as requiring a majority of the governing body; thus, without a majority present, no meeting occurs for purposes of the Open Door Law."); Hispanic Educ. Comm. v. Houston Indep. Sch. Dist., 866 F. Supp. 606 (S.D. Tex. 1995) (school district board of trustees, meeting in numbers less than quorum, did not violate Open Meetings Act; "limiting board members' ability to discuss school district issues with one another outside formal meetings would seriously impede the board's ability to function," reasoning that "with fewer than a quorum present, nothing can be formally decided; without a formal decision, no act is taken. Without action, there is no illegality."); Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983) ("it is important that the rule

not be so restrictive as to lose the public benefit of personal discussion between public officials”); Britt v. County of Niagara, 82 AD.2d 65 (N.Y. Sup. Ct. 1981) (the statutory requirement of a quorum is paramount; where no quorum was present at the meetings, there was no violation of the law).

To be clear, the Appellants can and will still make the argument that there was a meeting of less than a quorum of the BAR and that said occasion constituted a “meeting” for the purposes of FOIA, and that this somehow invalidated the decision of the Board. The Respondent will vigorously meet that argument and will likely cite the same cases above. However, it is entirely inappropriate for Appellants to simply introduce into the record materials that were not part of the record below and to spend over a page of their brief discussing Appellants’ interpretation of those notes.

## 2. Pleadings, Memoranda, and Other Materials

Again, Appellants concede that they propose to include in the Record on Appeal materials not submitted to the Circuit Court and memos concerning summary judgment were not even in existence. They attempt to justify this as a form of “judicial notice.” It is certainly not improper for a party to make passing reference to the pendency of another related action. It is not improper to provide a reference to a caption or civil action number for the appellate court’s reference. But it is not appropriate to include in the Record on Appeal briefs and pleadings and other materials from a related case. And in this case there is a specific harm beyond printing hundreds of copies of unnecessary papers. Appellants improperly want to buttress and bootstrap an argument that was either not made or not made very well at the BAR hearing itself.

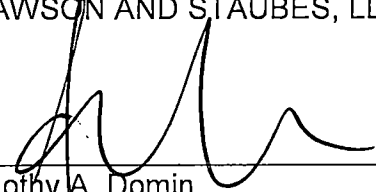
On appeal, Appellants argue that the Board of Architectural Review should have refused to hear the application before it for a variety of reasons—including alleged fault and improper procedure in the process of the how the Town reached a contract with the Developer. This argument was either barely made or not made at all at the BAR hearings.

Of course, Appellants are still free to make the argument that boards of architectural review should hear questions about the validity of contracts. Respondents believe that position is incorrect and will respond that boards of architectural review principally exist to consider aesthetic issues. They should not and cannot be decision-makers as to all manner and kind of legal issues that might be raised in connection with a project. While the parties are free to argue such positions in their briefs, the Appellants improperly want to include materials related to their arguments on the validity of the contract in the Record on Appeal. And this would be permissible if the materials were presented to the BAR. But they were not. Nor were they submitted to the lower court.

Appellants further claim they can easily delete such references. Let them do so. Respondents' counsel is more concerned with the effect on the Record on Appeal than the argument that a BAR should examine legal issues relative to the validity of an applicant's contract.

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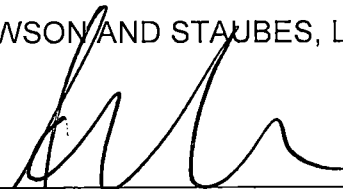
**CERTIFICATE OF SERVICE**

I hereby certify that on October 6, 2016, I have caused to be mailed, regular first class mail, postage prepared, an original and six copies of a Reply to Appellant's Memorandum in Opposition to 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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March 31, 2016

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OCT 11 2016  
SC Court of Appeals

File No.: 20150083.000

VIA US MAIL

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

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.: 2015-002199

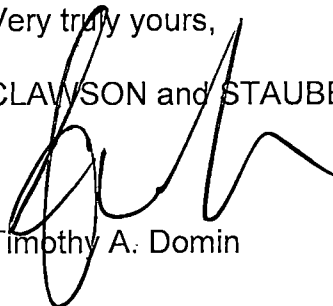
Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Reply to Appellant's Memorandum in Opposition to 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 Proof of Service regarding the above-referenced case. Please file the originals and return a stamped, filed copy of the documents in the self-addressed, stamped envelope provided for your convenience.

Thank you for your assistance in this matter.

Very truly yours,

CLAWSON and STAUBES, LLC

*fel* 

Timothy A. Domin

TAD/vhs  
Enclosures

October 6, 2016

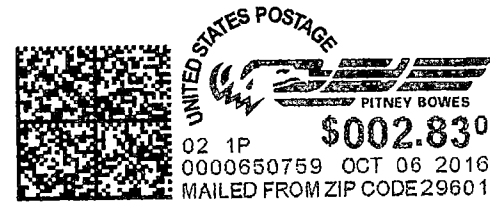
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cc: W. Andrew Gowder, Esq.  
G. Waring Parker, Esq.  
Michael T. Rose, Esq.  
(All via US Mail & w/enclosures)

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**SC Court of Appeals** The Honorable Jenny Abbott Kitchings  
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