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.

REVISED INITIAL BRIEF OF APPELLANTS

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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 were consolidated into this one action. **(Consent Order 9/4/14)**. The respondents filed responses to this appeal on August 11, 2015.

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 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 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 9/24/15, at 4**; **accord**, **Transcript 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 October 23, 2015, affirming the decisions of the BAR on April 6, May 11 and August 3, 2015. (**Order 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, S.C. ("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 Meeting 12/18/13**). On May 28, 2014, the Town created the Town of Summerville Redevelopment Corporation ("RDC"), pursuant to 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 9/24/15, at 1-2**).

The Developer, the Town and other property owners, but not the RDC,[1] filed seven separate Applications ("Application" or "Applications") seeking BAR approval of the Hotel project, including the demolition of buildings. (**Applications BAR, undated, 9/8/14, 10/6/14, 1/5/15, 1/12/15, 4/6/15).**

All of these Applications are undated and no record exists showing when the Applications were filed, with whom they were filed and what, if anything, was attached to the Application for the BAR to consider. (**Id.**) None of these Applications request, and no law defines or mentions, "conceptual" or "preliminary" approval. The public was not permitted to inspect or copy these Applications prior to the BAR meetings at which they were considered.[2] There is no evidence that any Application was complete, submitted by all required parties or received by the BAR Secretary at least fourteen days before, or by the Town's planning department at least ten days before, the next regularly scheduled BAR meeting, as required by Town Ordinances, Sec. 32-176(i), 32-181(c)(6).[3]

Prior to the BAR meetings at which these Applications were considered, notice was not provided, as required by Town Ordinance, Sec 32-182(b), that the public was entitled to speak against proposed demolition. At the meetings the BAR Chairman repeatedly stated that the public had no right to speak at the meetings, even though it did, and did not

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[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 Agreement 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. 24-26, 44-46 infra. However, at no time did the RDC file an application for consideration by the BAR.

[2] See pp. 23-24, 44-45 infra.

[3] The Developer and the Town "certif[ied] that all information required is included and the application is complete" even though, according to the BAR record, nothing was attached to the one-page Applications and, therefore, the Applications were incomplete in violation of Town Ordinance, Sec. 32-176(i).

let the public speak at some meetings about information the public wanted the BAR consider and to be on the BAR record as a basis for appeal. **(See Minutes BAR 1/12/15, at 2; Transcript BAR 1/12/15, at 10-11).** When the public was allowed to speak, it did so subject to unpublished, ad hoc rules made up and announced at the meetings by the BAR Chairman limiting public comment and objections on the record about the BAR Applications. **(See, e.g., Transcript BAR 10/6/14, at 2, 49-50; 11/3/14, at 10-13, 75 lines 1-16, 78;1/5/15, at 2; 5/11/15, at 32, 34-36; BAR Findings §§ 5, 13).**

September 8, 2014 Meeting. There is no evidence on the BAR record that any action was taken on the Application regarding the Hotel project filed for the BAR's September 8, 2014 meeting.[4] 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).[5]

October 6, 2014 Meeting. At unknown dates an Application for the demolition of existing structures in the Town was filed to be considered at a BAR meeting on October 6, 2014, regarding the Hotel project by each of the following: (1) Gayle F. E. Gates Revocable Trust; (2) Faith Partnership; and (3) Anne Gaither. **(Application Gayle F. E. Cates Revocable Trust, undated, for 10/6/14 BAR Meeting); Application Faith Partnership, undated, for 10/6/14 BAR Meeting); Application Anne Gaithers, undated, for 10/6/14 BAR Meeting).**

[4]The minutes, recording and transcript of the recording of the 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).

[5] "[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. See pp. 25-27 infra.

The Agenda for this October 6, 2014 BAR meeting does not identify any of these three Applications or the Application for the September 8, 2014 meeting, to be considered at the October 6, 2014 BAR meeting; does not reference that demolition will be considered; does not reference "conceptual" or "preliminary" approval of any Application; and does not state what or whose Application(s) will be considered at the October 6, 2014 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 10/6/14**).

Despite these omissions in the Agenda for the October 6, 2014 BAR meeting, and the failure of any Application to ask for "conceptual" approval, at the meeting the BAR Chairman stated that:

> "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. (**Transcript BAR 10/6/14 at 2-3)** (emphasis added).

Moreover, at 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 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).

However, 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 has requested "conceptual" approval. Despite this failure to request or notice "conceptual approval," at the end of the 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 10/6/14, at 3)**(emphasis added).

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 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 (**Agenda BAR 11/3/16**), even though demolition was considered at the meeting.

At the November 3, 2014 BAR meeting the Developer asked the BAR to give "conceptual and preliminary approval for the project" (**Transcript BAR 11/3/14, at 24**), which was not requested or noticed in the BAR Agenda for the November 3, 2014 BAR meeting and in all of the BAR Applications and Agendas regarding the Hotel project that had been submitted to the BAR before the November 3, 2014 BAR meeting.

At the hearing the President of the Summerville Preservation Society tried to object that the BAR should not consider the Hotel project because the Developer 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 Chairman objected to the making of this objection. (**See Transcript BAR 11/3/14, at 75, lines 1-16).**

[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. (emphasis added).

January 5, 2015 BAR Meeting. 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 or the Developer but by private parties: 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. 23-25 infra.)

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 1/5/15, at 7**), and "[t]he Board gave conceptual/preliminary approval of the [Hotel] project." (**Minutes BAR 1/5/15, at 2; Bar Findings § 26; Transcript BAR 1/5/15, at 47-48**).[7] 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**).

January 12, 2015 BAR Meeting. The Agenda for this meeting states that at the meeting the BAR will consider:

[7] 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**)(emphasis added).

> 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 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. 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) the BAR did not vote to give "conceptual" or "preliminary" approval at this meeting; and (2) the 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**).

April 6, 2015 BAR Meeting. At the April 6, 2015 BAR meeting a motion "for conditional final approval passed with a majority vote of 4 to 1." (**Minutes BAR 4/6/15, at 2** (emphasis added)).

May 5, 2015 BAR Meeting. The BAR passed a "motion to give final approval based on the conditional final requirements being satisfactorily answered." (**Minutes 5/11/15, at 2**); (**Transcript BAR 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).**

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 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 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.**)

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 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 7/6/16, at 1-2**).

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 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 to: "approve 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 [the Hotel project], including demolition for the project." (**Minutes BAR 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.

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.

Within thirty days from the BAR's receipt of notice of the appeals on May 5, 2015 and May 22, 2015, 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[8] 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. (S.C. Code Ann. § 6-29-930(A)).

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,

[8] 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.

> 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."[9]

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 of appeal and for the stated purpose of trying to persuade the Judge not to make a decision adverse the Developer (who was not even a party to the BAR appeal) and, if the Court did so, at least to require a bond. (**Affidavit of Defendants Applegate & Co., The Dorchester, LLC and Arthur H. Applegate, July 8, 2015; Affidavit of William C. Collins, July 9, 2015; E-mail August 17, 2015 from Laura Greaver, to Jenny Pittman, Law Clerk, Judge Edgar W. Dickson**).

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 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

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[9] 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 8/14/15, at 5**).

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 BARs 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 except to state, without analysis or justification, that applications to construct and to demolish certain structures were approved. (**Minutes BAR 4/6/16, at 2; Minutes BAR 5/11/16, at 2**; page 13 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, Exh. 2; see Transcript Circuit Court 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 case to the BAR for a "rehearing" but failed to do so. **(Transcript Circuit Court 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.

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).

Statutes and 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 8/14/15, at 10**). Nothing on the BAR record or 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 5/11/16, at 34**; pages 9, 11, 14, 16-17 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 written rules anywhere. (**Transcript Circuit Court 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 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 4/6/15; Transcript BAR 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 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 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 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 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," as required by Town Ordinance Sec.32-176(i) (See **Transcript Circuit Court 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 8/14/15, at 10**).

In addition, nothing in the record indicates whether all required persons or entities, including the RDC,[10] signed the applications. Indeed, four Applications, on September 8,

[10] See fn. 1 supra.

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)[11]. 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,[12] 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 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 S.C. Code Ann. § 6-29-930(A). (See **Transcript Circuit Court 8/14/15, at 12-13**).

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[11] See page 7 supra.

[12] 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. See Letter dated 1/7/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR; Letter dated 1/5/15 from Peter Gorman, East Historic District Civic Association, to Phillip Dixon, Chairman, BAR. Moreover, the BAR refused to consider evidence from the Appellants that the BAR lacked authority to consider the Hotel project because of these statutory violations regarding the RDC. See p. 11 supra and pp. 44-45 infra.

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.[13]

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 part that "[i]f 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

[13] 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 Gaithers 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 was ever considered or acted upon by the BAR.

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 – October 6 and November 3, 2014 -- 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. (See **Transcript BAR 10/6/14, at 84-85; 11/3/14, at 78).** Moreover, what the BAR did regarding its Hotel project application at its September 8, 2014 meeting is unknown because that is not on the BAR record.

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.[14] The BAR's approvals being appealed occurred on April 6, 2015 and May 11, 2015. (See pages 15-17 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.

[14] See page 7 supra.

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 11/3/14, at 78**). 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-day deadline had expired. Therefore, the Certificate of Appropriateness issued by the BAR on May 11, 2015 is invalid and, at a minimum, 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 "[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 BAR "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. (**Transcript BAR 10/6/14, at 3** ("[d]emolition is also considered as a separate action by the [BAR]" (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 only for demolition of existing structures for the Hotel project were submitted for the BAR meetings dated October 6, 2014 and January 12, 2015.[15] An application for construction only was filed on April 6, 2015.[16] Applications for new construction and demolition for the Hotel project were submitted for the BAR meetings dated September 8, 2014 and January 5, 2015.[17]

Despite this consistent history of processing separately applications for the demolition of buildings and the construction of new buildings, the BAR issued only one

[15] **Applications BAR, undated, 10/6/14, 1/12/15**; see pp. 8-10, 12-13.
[16] **Application BAR, undated, 4/6/15.**
[17] **Applications BAR, undated, 9/8/14, 1/5/15**; see pp. 8, 11-12.

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/or 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 rules to clarify these issues, as required by statute and ordinance.[18]

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.

[18] See pp. 20-23 supra.

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 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 8/14/15, at 14-15**). There is 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 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, 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** 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).[19]

[19] 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

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.[20]

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 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[21] to BAR approval of the Hotel

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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)

[20] See pp. 20-23 supra.

[21] See **Transcript Circuit Court 8/14/15, at 21-22**("record . . . shows that the BAR members, the public . .

project due to its excessive mass, size, noise, traffic, tree cutting, destruction of the Historic District's ambiance, etc. (e.g., **Transcript BAR 11/5/14, at 79-80**; **Transcript Bar 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[22] 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 8/14/15, at 21**) and whether and how the applications approved complied with the required criteria. (See **Transcript BAR 4/6/15, at 65-69).**

Important information and documentation in the record is incorrect. For example, contrary to claims[23] 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[24] 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

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. 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. ").

[22] 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 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 4/6/15, at 65-70; Transcript BAR 5/11/16, at 35.**

[23] See **BAR Findings §§ 60, 61.**

[24] 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.

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.[25]

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 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 the application for the Hotel project was not being 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 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 clearly by the transcript of the BAR's May 11, 2015 meeting. (**Transcript Part II BAR 5/11/15, at 35-38, 41**).

Similar written objections to noise due to the proposed design of the Hotel project 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" (**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

[25] See pp. 23-25 supra and 43-44 infra.

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)). 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, as described below.

V. The BAR transacted BAR business at secret meetings held deliberately without a quorum, proper prior public notice and 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 of 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 BAR 1/15/15, at 35**)(emphasis added).

Totally unknown to the public when BAR member Kwist made that 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[26] BAR members from the Secretary of the BAR. (**E-mail dated December 5, 2014, from BAR Secretary Lucy Dreyer to Six BAR Members; Petition and Notice of Appeal of Decision of Town of Summerville Board of Architectural Review, dated May 5, 2015, Civil Action No. 2015-CP-18-877 ("Petition Bar May 5, 2015"), at 4,7,8,41,42; Petition and Notice of Appeal of Decision of Town of Summerville Board of Architectural Review, dated May 22, 2015, Civil Action No. 2015-CP-18-991 ("Petition BAR May 22, 2015"), at 4,7,8**). Three members of the BAR attended the first "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.**; see **BAR Findings § 50**). Also attending each of the meetings were the Developer, Arthur Applegate, and the Town Planner, Madelyn Robinson.(**E-mail dated December 5, 2014, from BAR Secretary Lucy Dreyer to Six BAR Members; Petition BAR May 5, 2015, at 4,7,8,41,42; Petition BAR May 22, 2015, at 4,7,8;Transcript BAR 1/12/15, at 11-14; Respondents' Memorandum in Opposition to Petitions for Appeal, August 11, 2015, at 9**).

[26] 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**.

These documents evidence that 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.

This evidence 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)[27] as a prerequisite to the BAR's 'transacti[ng] business." (**Petition BAR May 5, 2015, § 66, at 41-42;Transcript Circuit Court 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 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 secret "workshop" 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

[27] 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).

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.

The public's right to comment (**Town Ordinance, Sec 32-182(b)**) on the demolitions proposed regarding the Hotel project undoubtedly were inhibited by the Town's deliberate orchestration of public unawareness of what transpired at these multiple serial secret meetings of BAR members and BAR staff with the Developer.

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 and demolitions the Developer was proposing and negotiating with BAR members and therefore was unable to comment on those design changes and demolitions to BAR members.[28] 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. As in Quality Towing, the "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.

[28] The public had a right to comment on proposed demolitions (Town Ordinance, Sec 32-182(b)) but could not adequately do so when information about the demolitions was withheld due to "secret" meetings.

In particular, the BAR's manipulatively orchestrating successive secret meetings of BAR members with the Developer, Town 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 . . . ." Id.

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. (See, e.g., **Transcript BAR 11/3/14, at 12).** 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, thereby limiting the record on appeal.[29] (See, e.g., **Transcript BAR 10/6/14, at 2-4, 49; 11/3/14, at 11-13; BAR Findings §§ 5, 13, 38 and 46**).

[29] See pp. 7-8, 11, 14-15, 34-36 supra.

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 and limiting the BAR record available for appeal.

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 8/14/16, at 10, 12-13**). [30]

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

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

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, had no place to stand in the hall and had to sit on the floor. 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 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 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; accord, Transcript Circuit Court 8/14/16, at 13; Transcript Part II BAR 5/11/15, at 38-40** (emphasis added)).

VI. The BAR wrongfully issued a certificate of appropriateness based on 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.

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 because of the Developer's failure to have complied with Paragraph 8a of the PPPA and, over the objections of the BAR President, read to the BAR Paragraph 8a to support that objection.[31] **(Transcript BAR 11/3/14, at 74-77)**. In

[31] 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.**

response, the BAR President declared "that's not part of our purview" because that PPPA "agreement is not between us" (**Transcript BAR 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[32] 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 or by law, and the plain language of Paragraph 8a of the PPPA requires that a "final" design be reviewed and approved by the

[32] **Petition BAR May 5, 2015, § 42, at 27; Petition BAR May 22, 2015, §§ 2,3,4,5, at 2-3.** 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.**

RDC "[p]rior to submission for review and approval to any public agency . . . ." (Id.)(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*.

Members of the public made the BAR aware[33] of the existence of a lawsuit 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. In addition, members of the public told the BAR on its record that the BAR lacked jurisdiction to consider applications regarding the Hotel project for the reasons stated in the lawsuit, including that the RDC had not approved the design of the Hotel as specifically was required by a statute.[34] The BAR not only did not consider whether these deficiencies 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.[35] Thus, according to the BAR's logic, the BAR automatically must

[33] 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.** [34] See **S.C. Code Ann. §§ 31-10-100(b),(c),(e),(f),(g); Petition BAR May 22, 2015, §§ 4-5, at 3.**

[34] See **S.C. Code Ann. §§ 31-10-100(b),(c),(e),(f),(g); Petition BAR May 22, 2015, §§ 4-5, at 3.**

[35] See pp. 11, 14-15, 34-36, 40-42, 44-46 supra. [36] 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, 7

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

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 7, 11-12, 44-46 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, so that the BAR and an appeal Court could 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.

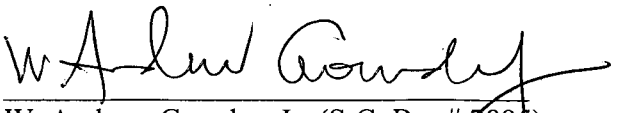
CONCLUSION

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.[36]

[36] 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, 7

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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December 8, 2016
Charleston, South Carolina

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.

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 REVISED INITIAL BRIEF OF APPELLANTS by U.S. Mail on December 8, 2016 to counsel of record as shown below:

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The Honorable Jenny Abbott Kitchings
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RE: BAR Appeal
Case No: 2015-002199
Our File: 7754.001

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Revised Initial Brief of Appellants, the Revised Designation of Matter by Appellants, and the Proof of Service. Please return the filed copy of the Revised Initial Brief of Appellants to us in the return envelope provided. 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.
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