

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

**RECEIVED**

JAN 09 2017

**SC Court of Appeals**

Appellate Case No. 2015-002199

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

v.

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

---

**RESPONDENTS' INITIAL BRIEF**

---

CLAWSON AND STAUBES, LLC  
Timothy A. Domin  
126 Seven Farms Drive, Suite 200  
Charleston, South Carolina 29492-8144  
Phone: (843) 577-2026  
Email: tdomin@clawsonandstaubes.com

G. Waring Parker  
G. Waring Parker Law Firm, LLC  
518 W. Carolina Avenue  
Summerville, SC 29483-6632  
Phone: (843) 821-7323  
Email: [gwarinparker@bellsouth.net](mailto:gwarinparker@bellsouth.net)

Attorneys for Respondents

January 6, 2016

## TABLE OF CONTENTS

Issues for Review on Appeal. ....	1
Facts. ....	1
Argument:	
I.    BAR ACTED PROPERLY AND WITHIN ITS BROAD DISCRETION IN APPROVING DEMOLITION AND NEW CONSTRUCTION (RESPONSE TO SECTION IV OF APPELLANT'S BRIEF). ....	2
II.   NONE OF APPELLANTS' OTHER GROUNDS FOR APPEAL WARRANTS ARE MERITORIOUS OR REQUIRE REVERSAL OR REHEARING. ....	6
A.   The Circuit Court Did Not Err in Considering What the Appellant Calls "Additional Evidence" (Appellants' Issues I and II). ....	6
1.   The Decision of the Board Was Not Additional Evidence. ....	7
2.   The Affidavits and E-Mail Were Not Additional Evidence. ....	8
B.   The BAR Did Not Err With Respect to Various Arguments Raised by Appellants in Section III of its Brief. ....	9
1.   Rules of Procedure (Response to Appellants' III, A). ....	9
2.   Timely, Completed Application (Response to Appellants' III, B). ....	10
3.   Next Regularly Scheduled Meeting (Response to Appellants' III, C). ....	11
4.   Deferral of Application (Response to Appellants' III, D). ...	11
5.   180 Days (Response to Appellants' III, E). ....	12
6.   Each and Every Property, Separate Applications, Separate Decisions (Response to Appellants' III, F). ....	13
C.   The BAR Did Not Violate FOIA (Response to Appellants' V). ...	13
1.   Alleged Secret Meetings. ....	13

2.	Opportunity to Comment. . . . .	16
3.	Withholding of Applications, Project Designs. . . . .	16
4.	Claims of Refusing to Allow Persons to Speak. . . . .	16
D.	The BAR Did Not Err in Refusing to Consider Arguments That the Developer's Contract to Build the Project Was Invalid. . . . .	17
III.	THE APPEAL IS FATALLY DEFECTIVE AS A RESULT OF FAILING TO NAME THE PERMITEE APPLICANT. . . . .	18
	Conclusion. . . . .	19

## TABLE OF AUTHORITIES

<u>Austin v. Board of Zoning Appeals, Town of Hilton Head Island</u> , 606 S.E.2d 209 (S.C. Ct. App. 2004). . . . .	3, 4, 19
<u>Britt v. County of Niagara</u> , 82 AD.2d 65 (N.Y. Sup. Ct. 1981). . . . .	15
<u>City of Gary v. McCrady</u> , 851 N.E.2d 359 (Ind. Ct. App. 2006). . . . .	15
<u>Clear Channel Outdoor v. City of Myrtle Beach</u> , 602 S.E.2d 76 (S.C. Ct. App. 2004). . . . .	4
<u>Cf. Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.</u> , 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004). . . . .	3
<u>Gurganious v. City of Beaufort BAR</u> , 454 S.E.2d 912 (S.C. Ct. App. 1995). . . . .	4
<u>Heilker v. Zoning Bd. of Appeals for City of Beaufort</u> , 552 S.E.2d 42, 44 (S.C. Ct. App. 2001). . . . .	3
<u>Hispanic Educ. Comm. v. Houston Indep. Sch. Dist.</u> , 866 F. Supp. 606 (S.D. Tex. 1995). . . . .	15
<u>l'On, LLC v. Town of Mount Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000). . . . .	19
<u>Knowles v. City of Aiken</u> , 407 S.E.2d 639 (S.C. 1991). . . . .	4
<u>Moberg v. Indep. Sch. Dist. No. 281</u> , 336 N.W.2d 510 (Minn. 1983). . . . .	15
<u>Quality Towing, Inc. v. City of Myrtle Beach</u> , 345 S.C. 156, 547 S.E.2s 862 (2001). . . . .	15
<u>Restaurant Row Assocs. v. Horry County</u> , 516 S.E.2d 442, 446 (S.C. 1999). . . . .	3
<u>Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island</u> , 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988). . . . .	18
<u>Vulcan Materials Co. v. County of Greenville</u> , 536 S.E.2d 892 (S.C. Ct. App. 2000). . . . .	3, 8

## **ISSUES FOR REVIEW ON APPEAL**

1. Is there evidence in the record to support the decision of the Summerville Board of Architectural Review to approve "The Dorchester" project?
2. Are Appellants' procedural arguments regarding various points—including the timing of the application and the timing of the decision—without merit, and if any are with merit, should they result in reversal of the decision of the Summerville Board of Architectural Review?
3. Is the Appeal fatally defective as a result of failing to name and serve the permit applicant?

## **FACTS**

The Dorchester project is a multi-use development planned to include a boutique hotel, condominiums, meeting/event space, and a parking garage. It is a joint project of the Town of Summerville, the Town of Summerville Redevelopment Commission and Applegate & Company.

The Summerville Board of Architectural Review (sometimes hereinafter the BAR or Board) held a total of six (6) public meetings related to The Dorchester project, for which the public was duly notified and invited to attend. These meetings were held on October 6, 2014; November 3, 2014; January 5, 2015; January 12, 2015; April 6, 2015; and May 11, 2015. (Decision of BAR, R. \_\_.; Decision of Circuit Court R \_\_.; , Meeting Transcripts for 6 meetings. R \_\_ to \_\_. ) During all such meetings, members of the public were invited to view the presentations made by the permittee-applicant Applegate & Company and their architects. At nearly all of these meetings, members of the public were permitted to comment and express concerns openly. The board held two meetings where it made suggestions to the developer to revise the project in order to address

various aesthetic aspects of the project. (Transcript of 10/6/2014, R. \_\_\_ to \_\_\_)  
(Transcript of 11/3/14 meeting R. \_\_\_ to \_\_\_); At the third meeting during which the Board heard a presentation about the development, it gave preliminary/conceptual approval. (Meeting transcript, 1/5/2015 pp. 47-49; R. \_\_\_) Further, the conditions of several structures set to be demolished in connection with the Project were discussed at length. It was noted some of these structures were in extremely poor condition, with rotting wood, mold issues, plant material growing within wall cavities, and asbestos materials. (Transcript 1/5/15 p. 16-18, R. \_\_\_)

## ARGUMENT

### I. BAR ACTED PROPERLY AND WITHIN ITS BROAD DISCRETION IN APPROVING DEMOLITION AND NEW CONSTRUCTION (RESPONSE TO SECTION IV OF APPELLANT'S BRIEF).

Of the many arguments raised by the Appellants, the Respondents elect to address the question of whether there is evidence to support the BAR's decision, as it is the central issue for this Court to consider. Stated another way: is there sufficient evidence in the record to support the decision of the Board of Architectural Review to approve demolition of existing structures and construction of a public-private project called "The Dorchester"---a project which involves a hotel, conference area space, a parking garage, and private condominiums? The standard of review in appeals from decisions of architectural review boards is virtually outcome-determinative, and properly so. The local board of architectural review is in the best position to look at the drawings, hear the presentations, and understand the unique local characteristics of the area where the project is located. In every case, the Board reviews drawings or other representations of the project and uses their knowledge of the area to make a determination as to whether the project is aesthetically compatible with the surrounding

area. Because of this, it is very rare to see a architectural review board's decision reversed. Reversals are typically reserved for decisions in which the Board's comments show a denial was based on things which had nothing to do with aesthetics. Cf. Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004) (declaratory judgment ruling it was improper for the BAR to refuse to consider any plan because their erroneous interpretation of the covenants barred construction).

The findings of fact by a board of architectural review shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. See S.C. Code Ann. § 6-29-930; Austin v. Board of Zoning Appeals, Town of Hilton Head Island, 606 S.E.2d 209 (S.C. Ct. App. 2004); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 552 S.E.2d 42, 44 (S.C. Ct. App. 2001). In this regard, it is well-settled that "the factual findings of the jury will not be disturbed unless a review of the record discloses there is *no evidence* which reasonably supports the jury's findings." Vulcan Materials Co. v. County of Greenville, 536 S.E.2d 892 (S.C. Ct. App. 2000) (emphasis in original). Further, the court's review is "strictly limited to the facts and arguments raised to the board. Indeed, the circuit court is expressly forbidden from considering any new facts." Austin, 606 S.E.2d at 214. Additionally, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Restaurant Row Assocs. v. Horry County, 516 S.E.2d 442, 446 (S.C. 1999). The statute governing BAR appeals, S.C. Code Ann. § 6-29-930, specifically provides "the findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence.... In determining

the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.”

The Summerville BAR has broad discretion under both the Summerville Town Code and the law of South Carolina to approve or disapprove demolitions of existing structures and construction of new buildings. See, e.g., Town of Summerville Code of Ordinances §§ 32-175(f) & 32-176(h) (it is the duty of the BAR to determine the appropriateness of moving or demolishing any structure within the historic district upon consideration of historic, architectural and aesthetic features); Austin v. BZA, Town of Hilton Head Island, 606 S.E.2d 209 (S.C. Ct. App. 2004); Gurganious v. City of Beaufort BAR, 454 S.E.2d 912 (S.C. Ct. App. 1995). South Carolina appellate courts repeatedly have held a decision of a board of architectural review is to be given “great deference,” such that it must remain “undisturbed if the propriety of that decision is even ‘fairly debatable.’” Gurganious, 454 S.E.2d at 915 (quoting Knowles v. City of Aiken, 407 S.E.2d 639 (S.C. 1991) (other internal citations omitted)). Further, courts are bound to substantially defer “to the decisions of those charged with interpreting and applying local zoning ordinances,” as they are in the best position to interpret, consider and apply those local rules. Id. at 916; Clear Channel Outdoor v. City of Myrtle Beach, 602 S.E.2d 76 (S.C. Ct. App. 2004). “To this end, a court will uphold the decisions of a reviewing body if there is *any evidence* in the record to support its decision.” Clear Channel, 602 S.E.2d at 79 (emphasis added). An appellate court is therefore not free to substitute its own judgment for that of the BAR, but rather must affirm the board’s decision unless it is clear the BAR’s findings of fact have no evidentiary support or the BAR has committed an error of law. Id.

In the present case, the proceedings before the Summerville BAR demonstrate the existing structures on the premises were in poor condition and need to be demolished. For example, the Summerville Building Official advised the BAR to demolish the structure located at 210 W. Richardson Avenue because it was in bad shape, with mold growing in it and weeds growing inside the walls. (1/5/15 Meeting Transcript, p. 16-18). Further, as evidenced by the meeting minutes, the Summerville and Applegate Defendants made every effort to salvage entire structures or portions thereof wherever possible or practical, including repeatedly advertising the structures would be given free of charge to any person willing to haul them away (though no one accepted these offers) and by pursuing salvage of the building materials.

As to the new project that was to be built, the transcripts of the hearings, the minutes, and the decision of the BAR show the BAR made numerous suggestions and requests for improvements in the design and aesthetics before final approval was given. (BAR Decision)(R.\_\_). It is evident the Board had before it plans and drawings of the project and made appropriate comments regarding the scale and mass of the project and other design features. (Transcript 10/6/14, 11/3/14). In fact, the first two meetings resulted in suggestions for changes only and not approval. (Id.). Preliminary and conceptual approval was granted on January 5, 2015 on a 4-1 vote with various comments being made about the aesthetics of the project and how the developer had made changes in light of comments made by the Board. (Transcript, 1/5/15, R. at \_\_ to \_\_).

There was public opposition. However, the role of the BAR is not to simply count the number of heads "for" and "against" a particular project. Furthermore, the decision of the Board in no way reflects that the opinions of the Appellants were ignored. Certainly,

those persons who wanted the Board to reject the project altogether were not successful in persuading the Board, but the Board duly considered the issues relating to the aesthetics of the structure, including those considerations set forth in Town Ordinance. After the initial submission, the project was scaled back, reducing an entire floor off the project and making other changes.

The Appellants seem to suggest the Board is somehow required to make a specific factual finding with a citation of evidentiary support for each consideration set forth in the Town's ordinances. However, that kind of finding is not required and has never been required. The Board is not required to note why each roof line, shingle color, or window is compatible with the neighborhood. It is sufficient for the Board to conclude the entire project is compatible, which it has done. It is incumbent on the Appellants to show the decision of the Board is unsupported by the evidence, which the Appellants have not done.

**II. NONE OF APPELLANTS' OTHER GROUNDS FOR APPEAL WARRANTS ARE MERITORIOUS OR REQUIRE REVERSAL OR REHEARING.**

**A. The Circuit Court Did Not Err in Considering What the Appellant Calls "Additional Evidence" (Appellants' Issues I and II).**

The Appellants claim the Circuit Court relied upon "additional evidence". This appears to be a reference to the "Decision of the Board of Architectural Review, Including Findings of Fact and Conclusions of Law" which the Board signed at a subsequent meeting after the appeal was initiated. The Appellants' argument also appears to relate to an e-mail with attachments from Respondents' counsel to the Circuit Court (and properly copied to opposing counsel). The e-mail and attachments were solely related to a motion for injunction which the Appellants sought from the Circuit Court to stop the project. Additional evidence is not improper with respect to a

separate motion for injunction to the Circuit Court. These are two separate issues which will be addressed individually.

1. The Decision of the Board Was Not Additional Evidence.

The BAR signed an order on August 11, 2015 which included finding of facts and conclusions of law. Appellants claim this amounted to the submission of "additional evidence." Of course, the decision of a board or, for that matter, a court of law, is not evidence. The decision of a Board or court of law is based on evidence, but is not itself evidence. The order of a board or commission may set forth conclusions which were drawn from the evidence. That evidence must ultimately be in the record in order for the board's written decision to be sustained on review. In the present case, there is clearly sufficient evidence in the record to support the BAR's decision.

The Appellants' objection that the order was signed after the appeal is not persuasive. As the Appellants noted, one option of the Circuit Court is to remand the matter for a rehearing to prepare an order with findings. S.C. Code § 6-29-920. However, this is not for a rehearing de novo, unless too much time has passed for the board to be able to render a decision or unless the record itself is unavailable for review. A remand to prepare an order is merely for the purposes of the board expressing its findings and conclusions. Given the complexity of the issue and the amount of opposition, it was entirely reasonable for the Board to sign an order prior to the Circuit Court's hearing the matter. If the Circuit Court had not only the ability, but the duty, to remand if the record was not clear as to the Board's findings and conclusions, how can it be in error for the Board to provide this information to the Court? And where is the prejudice to Appellants from the Board preparing its findings of fact and conclusions of law for the reviewing Court? If there is evidence in the record that supports the decision

of the Board, the reviewing court is required to affirm. See Section I of Respondents' Brief, above. If there is not information in the record to support a point, then the written order of the Board cannot save a lack of evidence.

In Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892, (Ct. App. 2000), the Court considered and rejected an order signed after the appeal, but rejected it principally because it was not the decision of the body as a result of a meeting with a quorum, but instead was the unilateral decision of the Board Chairman acting in conjunction with the Secretary. In the present case, the BAR's order was signed in a public meeting after all board members reflected on the Order and gave authority to the Chairman to sign the document based on a proper motion and vote. (BAR Minutes 8/3/15 at 3).

At best, even if Appellants' argument were correct, the BAR's order is a nullity. If the Board's order is a nullity, this Court would be obliged to review the record to see if there was evidence to support the Board's decision. This Court will quickly conclude the BAR decision must be affirmed because there is ample evidence in the record to support the Board's decision. It is clear the Board reviewed the aesthetics of this project and made suggestions---many of which were then incorporated. The Board then used its knowledge of local conditions and found the project was compatible with the surrounding areas. There is nothing to suggest the Board's decision was controlled by a misunderstanding of law or fact.

2. The Affidavits and E-Mail Were Not Additional Evidence.

The Appellants make the argument the Circuit Court was improperly sent Affidavits dated July 8, 2015 and July 9, 2015. (Appellant's brief at 18-19). These affidavits were submitted to the Court solely to address a pending motion for an

injunction Plaintiff-Appellants filed with the Circuit Court to stop construction of the project. (Motion for Temporary Injunction, July 10, 2015). These affidavits had nothing to do with the issues related to the BAR appeal. However, because the Appellants chose to file a motion for injunction in the BAR appeal action, additional evidence was appropriate as to the injunction. The harm that would have resulted from an injunction is an issue which would not have been decided by the BAR and for which there would be no evidence in the record below. There would be no reason for anyone to present evidence to the BAR relevant only to the issues that go to an injunction in including the harm to the parties and amount of bond for an injunction. There is no indication the affidavits were used to supplant evidence missing from the BAR record. Indeed, there is no indication the Circuit Court relied on these affidavits in any way in deciding the issue of the BAR appeal. The circuit court did not cite the affidavits in any way in its decision affirming the Board. And the affidavits do not relate to the issues addressed by the circuit court.

**B. The BAR Did Not Err With Respect to Various Arguments Raised by Appellants in Section III of Its Brief.**

1. Rules of Procedure (Response to Appellants' III, A).

The Appellants claim the BAR failed to adopt "rules of procedure" which is generically required by S.C. Code § 6-29-870(D). However, the Appellants go on to cite various procedures they claim were violated. Therefore, Appellants' argument is not truly that there are no procedures, but rather that the Board was obligated to have written regulations regarding all eventualities and problems which might arise---or at least all those which it raises.

Clearly, the BAR does not lack procedural rules. There are rules regarding the dates of their meeting. Section 32-176(b). There are rules regarding the right of the

chairman to call a special meeting. Section 32-176(c) There are rules regarding the public notices required. Section 32-176(d). There are rules regarding BAR keeping records or minutes. Section 32-176(e).

There is a provision in the Town code which states the Board will adopt "rules of order." Section 32-176(e). Each meeting the chairman provides these general rules providing the right of the applicant and any opponents to speak. General parliamentary rules are followed with regard to making and voting on motions.

Part of the Appellants' argument in this section relates to the fact that the Board made decisions for "preliminary approval" and "final approval." The Appellants suggest there must be rules regarding what a "preliminary approval" or a "final approval" entails. The Respondents do not believe there have to be regulations regarding these terms. Additionally, the Board is not prohibited from giving a preliminary approval as to certain aspects such as general size, while withholding approval as it pertains to certain details or until certain conditions, such as providing a color sample, are met.

2. Timely, Completed Application (Response to Appellants' III, B).

The Appellant argues the BAR did not receive completed applications and suggests a rule requiring all applications be signed by all persons who may have interests in the application. First, Appellant's primary argument is, because the receipt dates are not stamped and the attachments to the application are not date-stamped, "there is no evidence on the BAR record that any of these Applications were submitted . . . within fourteen days and ten days as required by Town Ordinance" (Appellants' brief, p. 25). Of course, it is Appellants' duty to show there was some error. There is no evidence the applications were not submitted in a timely fashion.

The appellants also use this section to claim the application needed to be signed

by all persons having any legal or beneficial interest in the project. Appellants claim an application signed by the developer is not sufficient. Yet, there is no rule or statute that requires all persons having a legal or beneficial interest in the project must sign the application. In fact, the rule specifically states the application can be signed by the owner or agent of the property. There is no evidence or even an after-the-fact suggestion the developer lacked the authority to submit the application on behalf of the various property owners on whose property the project would eventually be built.

3. Next Regularly Scheduled Meeting (Response to Appellants' III, C).

The Appellants then take the position the BAR was required to hear the matter "at its next regularly scheduled meeting." It submits in this section that, because BAR applications are not marked with "individual identifiers such as number or dates," it is "confusing and uncertain" whether "specific applications were ever considered or acted on". Again, it is Appellants' duty to show error. The Appellant is merely speculating as to when applications were submitted. A footnote states there is no evidence the individual applications for demolition were acted upon, yet the Board did decide to allow demolition of certain structures in poor condition. (BAR Hearing, \_\_\_\_). What Appellants are attempting to say is that because the Board failed to refer to the application by the specific name on the application, there was potentially no decision on the application. There is no doubt about what the Board decided.

4. Deferral of Application (Response to Appellants' III, D).

Appellants take the position that the BAR is only empowered to defer a decision if it decides the application is "incomplete or [if] unanswerable questions arise," and claim it was error for the BAR to defer the decision in October and November 2014. During those meetings the Board made comments and suggestions to the developer

and asked the developer to consider changes.

First, this presumably would have to have been raised by an appeal of the October and November 2014 decisions. Those decisions were not appealed. Second, the argument is based on the erroneous position that incomplete applications and unanswered questions are the only grounds for a deferral. Respectfully, even if “unanswered questions” were the only grounds for a deferral, the phrase is broad enough to encompass the Board’s concern that a project is not compatible unless certain design changes are considered. The “unanswered question” is whether the applicant is willing to submit a design change which will meet the Board’s concerns.

5. 180 Days (Response to Appellants’ III, E).

The Appellants claim there was a violation of a 180 day rule. Ordinance 32-182(c). The rule, which relates to the demolition of a structure, actually provides a route for the BAR to delay a demolition for 180 days (and even for an additional 180 days for a structure of extreme historical important) to ascertain whether a historic structure can be preserved. First, this is a rule that gives the Board time to see if there are alternatives to save a historic structure while simultaneously trying to place a reasonable timeline on such efforts. This is not a rule where there is an automatic denial of an application after 180 days. That is not expressed anywhere in the Ordinance. In fact, the ordinance specifies that if the postponement has elapsed and the board has been unable to determine an adequate alternative to demolition, the certificate of appropriateness may be granted.

Appellants then argue that on top of the automatic denial, the application cannot be resubmitted for 180 days in order to address the argument that each modification could be construed as a new application. (A common rule is that the same application

cannot be submitted for 6 months which has been denied, although this rule does not apply to an application which is a change from the prior application). In making this argument, plaintiffs attempt to take a rule designed to give the Town and BAR a bit of additional time investigate alternatives to demolition of a historic structure into a Kafkaesque rule whereby the Board's failure to act in 180 days then blocks the developer from re-submitting for another 180 days.

6. Each and Every Property, Separate Applications, Separate Decisions (Response to Appellants' III, F).

The Appellants take the position that this project, which would span over several TMS numbers (which would later be reconfigured and title vested solely in the hands of the developer and the Summerville Redevelopment Authority), must therefore involve separate decisions, separate hearings and separate certificates of appropriateness. There is nothing in the Ordinances which states this. Furthermore, it is absolutely counter to normal and good planning principles. If a project is going to be built over separate parcels, it is generally wise to consider the whole project. It is nonsensical to have separate hearings and decisions as to each parcel.

**C. The BAR Did Not Violate FOIA (Response to Appellants' V).**

1. Alleged Secret Meetings.

The Appellants allege there were secret meetings of the BAR to make decisions on this project. This is clearly false. The Circuit Court dealt with this issue, finding there was no evidence in the record to support this decision. (Circuit Court Order, R. \_\_\_).

The Respondents have admitted there was a gathering of less than quorum to look at the project with the developer. (Respondent's Memorandum in Opposition to Petitions for Apepal, Aug. 22, 2015 p. 9, R. \_\_\_). However, this was not a "meeting" under the South Carolina Freedom of Information Act. Under the Act, a "meeting" is defined as

“the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power”. S.C. Code § 30-4-20.

Such “meetings” must be properly announced and open to the public. S.C. Code § 30-4-60. However, when less than a quorum meets, there is no requirement for a public meeting. The Appellants cite S.C. Code § 30-4-70(c) which prohibits “chance meeting, social meeting, or electronic communication to circumvent the spirit of (sic) requirements of this chapter. . . .” However, this is designed to prohibit a majority of City Council or some other public body from claiming to have met by chance or at a social party.

There has never been and likely will never be a prohibition on two or three members of a public body (so long as that is less than a quorum) meeting to discuss a matter within their jurisdiction and control. It is extremely common and in fact required for good governance that a City Council member or two or three members with common interests may need to meet to discuss an issue which is presented, or that two or more members of a Public Service District or commission or Board may need to meet with staff to discuss to discuss an issue. Appellants’ version of the Freedom of Information Act would effectively mean two members of a public body could never talk about any issues except in a public meeting.

There is no evidence a quorum of the BAR ever met to discuss this matter in a non-public meeting. Furthermore, there is no evidence any decisions were made except by a quorum in a public meeting. No decisions could have been made by less than a quorum of members.

Numerous other jurisdictions throughout the country hold that informal meetings of groups of less than a quorum do not violate FOIA or open meetings requirements. See, e.g., City of Gary v. McCrady, 851 N.E.2d 359 (Ind. Ct. App. 2006) (“The legislature has specifically defined ‘meeting’ under the Open Door Law as requiring a majority of the governing body; thus, without a majority present, no meeting occurs for purposes of the Open Door Law.”); Hispanic Educ. Comm. v. Houston Indep. Sch. Dist., 866 F. Supp. 606 (S.D. Tex. 1995) (school district board of trustees, meeting in numbers less than quorum, did not violate Open Meetings Act; “limiting board members’ ability to discuss school district issues with one another outside formal meetings would seriously impede the board’s ability to function,” reasoning that “with fewer than a quorum present, nothing can be formally decided; without a formal decision, no act is taken. Without action, there is no illegality”); Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983) (“it is important that the rule not be so restrictive as to lose the public benefit of personal discussion between public officials”); Britt v. County of Niagara, 82 AD.2d 65 (N.Y. Sup. Ct. 1981) (the statutory requirement of a quorum is paramount; where no quorum was present at the meetings, there was no violation of the law).

The Appellants’ reliance on Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2s 862 (2001) is misplaced. In that case, an advisory committee was formed. The entire advisory committee met in secret and made decisions and recommendations. The Court determined the advisory committee was a “public body” and, therefore, its meetings were subject to FOIA. This is an entirely different question from the issue of whether less than a quorum of a public body can meet (with or without a third party) to discuss important matters within their jurisdiction.

2. Opportunity to Comment.

The Appellants allege the Town failed to comply with its demolition rules by publishing a meeting notice in the newspaper without expressly stating "the public would have an opportunity to comment" and letters did not specifically note persons could comment. Not only is this reasonably inferable from a public meeting notice, it is also clear that the BAR did allow public comment, and no person established on the record they attended but failed to understand they could comment. Finally, this is an entirely new issue not raised to the Circuit Court.

3. Withholding of Applications, Project Designs.

The Appellants maintain they were denied access to the applications. This is incorrect. All applications are available to anyone willing to come to the office in person. The Appellants make the assertion they were denied access, but the record and the citations to the record do not support their position.

4. Claims of Refusing to Allow Persons to Speak.

Again, the record here does not support the Appellants' claims. They cite a letter from Peter Gorman offering his interpretation of what happened. But if the January 5, 2015 transcript is reviewed, the BAR chairman did not stop anyone from speaking and did not even prevent persons from discussing matters which were entirely outside the jurisdiction of the BAR. The Chairman did request persons limit their remarks to the issues the BAR had jurisdiction to decide (aesthetics, not the legality of the contract) and requested the persons not repeat one another and limit their remarks to three minutes. This is not improper and is not a violation of the Freedom of Information Act or any other law. This is customary at across the state at various BAR meetings, BZA

meetings, and meetings of other Boards and Commissions. There is no requirement that every person who wishes to speak against the project be collectively or individually given the same amount of time as the applicant to outline their position.

**D. The BAR Did Not Err in Refusing to Consider Arguments that the Developer's Contract to Build the Project Was Invalid.**

The agreement between the Town, Summerville Redevelopment Corporation, and the developer to build this project is the Public Private Partnership Agreement, or PPPA. The Appellants have filed a separate suit attempting to void the PPPA as an ultra vires contract. (Croft v. Town of Summerville, R. \_\_\_) They also simultaneously allege the BAR was in error for failing to address issues of the PPPA including the Appellants' argument that the agreement was improperly entered into and ultra vires. The Appellants also allege the Board should have considered issues of compliance with the agreement. They state the Board should also have considered the qualification of the applicant without explaining as to what "qualifications" issues they believe the Board was to address.

The Appellants arguments as to the PPPA and the qualifications of the developer are without merit. A board of architectural review is meant to address the issue of the aesthetics of a new building and the appropriateness of demolition of existing structures. It is not the role of a board of architectural review to consider the legalities of whether the developer has a proper contract and whether there has been compliance or non-compliance with the private contract.

There are typically a variety of business relationships underlying any given development project---from lenders, to construction firms, architects, business partners, property owners, and joint venturers. It is certainly not the role of a board of architectural review to attempt to determine the legalities of all of those relationships, even in the

face of some dispute. A Board of Architectural Review is not qualified to decide whether a contract was properly bid, or whether a party to a contract is properly bound. These Appellants have filed an action to declare the contract invalid and ultra vires with the Circuit Court. The Summerville BAR is not the proper place to decide those issues.

Nor is it the place of the BAR to decide the applicant or developer is "unqualified" to build the project. This is a matter which is entirely up to the parties to the underlying development, whether public or private.

Appellants also use this section to repeat their argument that each owner of the project had to sign the application. This is addressed above at pp. \_\_\_\_ of Respondents brief.

### **III. THE APPEAL IS FATALY DEFECTIVE AS A RESULT OF FAILING TO NAME THE PERMITEE APPLICANT.**

In the present case, the appellants made a decision to name only the Town of Summerville and the Summerville Board of Architectural Review as a party to the appeal. The appellants did not name Applegate and Company as a party to this appeal. It is impossible to conclude Applegate and Company is not a permittee applicant. In Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988) the South Carolina Supreme Court determined the permittee applicant was a necessary party. In Spanish Wells, the circuit court dismissed an appeal from a decision of the Hilton Head Island Planning Commission for failure to name the development permittee, but allowed the appellant fifteen days leave to add the permittee as a party. Instead, the appellant appealed the court's ruling that a development permittee is a necessary party. The Supreme Court, addressing only that issue, adopted the majority view that a development permittee is a necessary party to an appeal of its permit. Id. at 69, 367 S.E.2d at 161.

Problematically, there is no means by which the appellant can cure this issue. Respondent cannot amend their appeal as it is untimely and there is no procedure by which they can do so. Under Austin v. Board of Appeals, 362 S.C. 29, 38, 606 S.E. 2d 208, 214 (Ct. App. 2004), the court concluded the statute makes no provision for "amendment of the grounds set forth in the petition," nor is there any way for the Appellants to add the permittee applicant to the appeal. Id. at 37, 606 S.E.2d at 213.

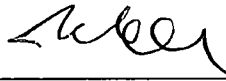
The only remedy is for the appeal to be dismissed as not having been perfected in a timely manner.

Although this issue was not raised and ruled upon by the lower court, the issue of whether the appeal was properly made is a jurisdictional issue which can be raised at any time. Although the appellate court can only reverse based on issues raised in to the lower tribunal, it can affirm on any grounds shown by the record. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

### **CONCLUSION**

For all of these reasons, the decision of the Summerville Board of Architectural Review should be affirmed.

*(Signature on next page)*



---

Timothy A. Domin  
Clawson and Staubes, LLC  
126 Seven Farms Drive, Suite 200  
Charleston, South Carolina 29492-8144  
Phone: (843) 577-2026  
Fax: (843) 722-2867  
Email: tdomin@clawsonandstaubes.com

G. Waring Parker  
G. Waring Parker Law Firm, LLC  
518 W. Carolina Avenue  
Summerville, SC 29483-6632  
Phone: (843) 821-7323  
Fax: (843) 821-7097  
Email: gwaringparker@bellsouth.net  
Attorneys for Respondents

Charleston, South Carolina

January 6, 2017

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2015-002199

RECEIVED

JAN 09 2017

SC Court of Appeals

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

v.

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

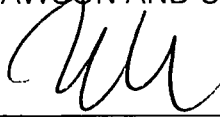
**CERTIFICATE OF SERVICE**

I hereby certify that on January 6, 2017, I have mailed, regular first class mail, postage prepaid, one copy of Respondent's Initial Brief to:

W. Andrew Gowder, Esquire  
Pratt-Thomas Walker, P.A.  
PO Box 22247  
Charleston, SC 29413-2247

Michael T. Rose, Esquire  
Mike Rose Law Firm, PC  
409 Central Avenue  
Summerville, SC 29483-5903

CLAWSON AND STAUBES, LLC



---

Timothy A. Domin  
126 Seven Farms Drive, Suite 200  
Charleston, South Carolina 29492-8144  
Phone: (843) 577-2026  
Email: [tdomin@clawsonandstaubes.com](mailto:tdomin@clawsonandstaubes.com)

G. Waring Parker  
G. Waring Parker Law Firm, LLC  
518 W. Carolina Avenue  
Summerville, SC 29483-6632  
Phone: (843) 821-7323  
Email: [gwarinparker@bellsouth.net](mailto:gwarinparker@bellsouth.net)

Attorneys for Respondents

**CLAWSON  
AND  
STAUBES**  
LLC

Timothy A. Domin  
Licensed in SC  
tdomin@clawsonandstaubes.com

January 04, 2017

File No.: 20150083.000

**VIA US MAIL**

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

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

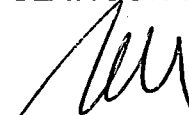
Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondents' Initial Brief and  
Designation of Matter regarding the above-referenced case. After filing, please return  
the copies to me in the enclosed envelope.

Thank you for your assistance in this matter.

Very truly yours,

CLAWSON and STAUBES, LLC



Timothy A. Domin

**RECEIVED**

JAN 09 2017

SC Court of Appeals

TAD/paa  
Enclosures

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

**RECEIVED**

JAN 09 2017

**SC Court of Appeals**



**CLAWSON  
AND  
STAUBES**

LLC

126 Seven Farms Drive Suite 200  
Charleston, SC 29492-8144  
File No.: 20150083.000

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

**Hasler**

01/06/2017

**US POSTAGE**



FIRST-CLASS MAIL

**\$03.25<sup>0</sup>**

ZIP 29492  
011D11621707