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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge
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.

REPLY TO RESPONDENTS' INITIAL BRIEF

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TABLE OF CONTENTS

Table of Authorities....1
Appellants' Reply to Respondents' Initial Brief....2
Factual Errors and Omissions by Respondents....2
A. Section 32-1 82(b) Is Not a New Issue....2
B. Applegate Is Not the Sole Permittee-Applicant....2
C. The BAR Violated the Sec 32-176(e) Quorum Requirement and FOIA....3
D. The BAR Must Obey the Governing Statutes and Ordinances as Written....4
E. Applegate Is Not a Necessary Respondent and, In Any Event, Respondent Waived This Argument by Not Raising It Below....6
Conclusions....8

TABLE OF AUTHORITIES

CASES

Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975)....7

Spanish Wells Property Owners Ass'n v. Board of Adjustment, 295 S.C. 67, 367 S.E.2d 160 (1988)....8

STATUTES

S.C. Code Ann. §6-29-870(D)....6

S.C. Code Ann. §30-4-70(c)....4

OTHER AUTHORITIES

Summerville, S.C. Code of Ordinances §32-176(e)....3

Summerville, S.C. Code of Ordinances §32-182(b)....2

Summerville, S.C. Code of Ordinances §32-182(c)....6

APPELLANTS' REPLY TO RESPONDENTS' INITIAL BRIEF

The Appellants hereby reply to the Initial Brief of the Respondents by referring to Appellants' Revised Initial Brief, and documents listed in Appellants' Designation of Matter, and by stating the following:

FACTUAL ERRORS AND OMISSIONS BY RESPONDENTS

A. Section 32-1 82(b) Is Not a New Issue

The Respondents claim in their Initial Brief that Appellants' complaint that the Town failed to comply with Section 32-1-82(b) of the Town of Summerville's Code of Ordinances "is an entirely new issue not raised to the Circuit Court." Id. at 16. That claim is incorrect. Appellants raised that issue specifically in Section 3W on pages 6-7 of the Petition Appellants filed in Civil Action Case No. 2015-CP-18-877 on May 5, 2015, and in Section 3X on page 7 of the second Petition Appellants filed in Civil Action Case No. 2015-CP-18-991 on May 22, 2015.

B. Applegate Is Not the Sole Permittee-Applicant

The Respondents state in their Initial Brief that Applegate & Company ("Applegate") was "the permittee-applicant" "related to The Dorchester project." Id. at 1 (emphasis added). That statement is incorrect and misleading. The Town of Summerville was also a permittee-applicant **jointly with Applegate** each time Applegate was a permittee-applicant to the BAR regarding The Dorchester project. That is significant because one of the two permittee-applicants, i.e., the Town of Summerville, is a respondent in this appeal and, as shown below, the other permittee-applicant, Applegate, represented to the Circuit Court in a related case that Applegate did not want to defend against allegations regarding the BAR and, instead, wanted to be bound by any court rulings against the Town, thereby waiving any right Applegate had to defend the actions of the BAR

regarding The Dorchester project. See, Order of Judge Edgar W. Dixon, September 25, 2015, Faye Croft, et. al, v. Town of Summerville, et. al, (Case No. 2015-CP-18-00713).

C. The BAR Violated the Sec 32-176(e) Quorum Requirement and FOIA

The Respondents argue that the South Carolina Freedom of Information Act does not apply to meetings of three of seven members of the BAR when those meetings lacked a quorum. That argument omits the inconvenient truths that Sec 32-176(e) of the Town of Summerville's Code of Ordinances states that "[a] **quorum**, consisting of a majority of the total membership of the board, **shall be required for the transaction of business**" of the BAR; Id. (emphasis added), and that BAR business was transacted in at least two secret, non-public meetings attended by Applegate, the Developer; the Town Planner; and three members of the BAR not comprising a quorum. The specific business transacted at those meetings included the review, negotiation and approval of changes to the design of the Hotel project, which is the central business and purpose of the BAR. This business conducted at those meetings was so significant that John Kwist, a BAR member, referred in an official public meeting of the BAR on January 5, 2015, to the business that has been conducted at one of those non-public, secret meetings, Revised Initial Brief at 36-37, leaving the members of the public hearing Kwist's statements perplexed about what was the meeting and business to which Kwist was referring.

Further evidence of the business purpose and nature of these meetings conducted without a quorum in violation of Sec 32-176(e) include the facts that the meetings were conducted in Summerville Town Hall, a public building, and called by official written communications from a Town employee, the BAR Secretary, to each member of the BAR. Thus, these meetings were not merely discussions by two or three members of the BAR to discuss among themselves pending

issues, as the Respondents portray. Rather, they were joint meetings between the developer, the Town Planner and three of seven BAR members to negotiate and make decisions and agreements regarding the design of the Hotel project, which is the core business of the BAR. Everything about these successive meetings had the characteristics of a public meeting of the BAR, but the BAR unlawfully treated the meetings as non-public meetings by deliberately avoiding a quorum, which was a deliberate, orchestrated evasion and circumvention the SC Freedom of Information Act in violation of the specific non-circumvention requirements of S.C. Code Ann. § 30-4-70(c). As a result, the public was not allowed to view or participate in these discussions about the design of the Hotel project; no record has been kept by the BAR of the discussions, agreements and negotiations at the meetings; and the Appellants are deprived of evidence and a record of what transpired at those meetings upon which to base this appeal.

All of the above is explained and documented in pages 36-44 of the Appellants' Revised Initial Brief.

D. The BAR Must Obey the Governing Statutes and Ordinances as Written.

The Respondents argue that (1) the BAR decisions should be upheld if "any" evidence on the record supports those decisions; (2) the Court of Appeals automatically should defer to the BAR to uphold the BAR's decisions regardless of the incorrectness of the procedure followed by the BAR in reaching those decisions; (3) the burden is on the public to show the BAR violated the law instead of the burden being on the BAR to show it complied with specific legal requirements; (4) all BAR decisions should be upheld due to lack of evidence of invalidity even when the BAR illegally caused that lack of evidence due to its failure to keep required records, its curtailment of public input, its holding meetings in secrecy contrary to law, etc.; (5) because the BAR created

and complied with some laws, it does not matter that the BAR failed to create and/or abide by all the other laws the BAR was required to follow; and (5) it was acceptable for the BAR to justify their decisions with findings and conclusions created months after the decisions being appealed had been made and after Appellants had filed their appeal of those decisions with the Circuit Court, because those findings and conclusions are "not evidence," while simultaneously claiming the Courts should not overturn but must defer to those findings and conclusions.

None of the above is correct. As with a jury or any other government body, the BAR must comply with applicable laws when making its decisions and if the BAR does not comply with applicable laws, its decisions must be invalidated. If Courts will not enforce the rules, there is no point in having them, the BAR will continue to violate them, the public will be deprived of its protections and the BAR can simply justify any of its decisions/actions regardless of its law violations by identifying some evidence it puts somewhere on the record to justify any of its decisions while simultaneously excluding from the record evidence opposing its decisions, as it did with the Appellants. If the BAR does not document its compliance with legal requirements and the public can appeal a BAR decision based only on evidence the BAR chooses to allow on its record, the BAR effectively can avoid any overruling of its decisions simply by controlling what is and is not put on the BAR's record.

Numerous failures by the BAR to obey the law, as documented in Appellants' Revised Initial Brief, violated the Appellants' constitutional rights to due process, skewed the BAR's decisions and decision-making process and otherwise harmed the Appellants and the Town of Summerville, in numerous respects, including the following:

1. Failing to create and abide by numerous specific rules required by law, see Revised Initial Brief, at 20-28;

2. Failing to notify adjoining property owners by letter and the public by advertisements that the public had a right, pursuant to Section 32-1 82(b) of the Town of Summerville's Code of Ordinances, to comment at each BAR meeting where an application for demolition was considered,
3. Failing to even consider whether the design of the Hotel project allowed too much noise for the surrounding residents, see Revised Initial Brief, at 33-36;
4. Failing to allow to speak members of the public who wished to speak against demolitions at BAR meetings, including to explain that the demolitions were not warranted because alleged blight did not exist and that if it did exist, it was blight by neglect by the Town;
5. Telling members of the public who wished to speak against demolition at BAR meetings at the beginning of those BAR meetings that they did not have a right to speak, when they did have a right to speak;
6. Limiting what members of the public could say when they were allowed, on occasion, to speak at a BAR meeting;
7. Prohibiting members of the public from providing evidence on the record of the BAR proceedings, thereby preventing those members from having a BAR record which they could appeal;
8. Failing to document and make records of the BAR's examinations and other official actions, and to immediately file them in the office of the BAR as a public record, contrary to S.C. Code Ann. §6-29-870(D), thereby depriving Appellants of evidence of law violations to support Appellants' appeal, regarding, inter alia, each of the following: (a) dates of BAR applications; (b) names of applicants; (c) content of BAR applications; (d) dates action was taken regarding BAR applications; (e) whether the applicant seeking permission to demolish a building was an agent of property owners; and (f) what action, if any, was taken by the BAR on each of the applications;
9. Failing of the BAR Secretary to receive complete applications from all required parties at least fourteen days before the next regularly scheduled BAR meeting;
10. Failing of the Town's planning department f to receive complete applications at least ten days before the next regularly scheduled BAR meeting;
11. Failing to have applications include items on "the current checklist;"
12. Failing to take action upon each application at the BAR's "next regularly scheduled meeting;
13. Failing 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); and
14. Failing to issue 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.

E. Applegate Is Not a Necessary Respondent and, In Any Event, Respondent Waived This Argument by Not Raising It Below

As shown above, the Town of Summerville and Applegate are joint permittee-applicants regarding the BAR decisions that are the subject of this appeal. As such, the Town can represent, and is representing, the interests of Applegate regarding this appeal.

Indeed, Applegate has consented to relying on the Town to defend against allegations of illegal conduct by the BAR regarding The Dorchester project. Judicial notice should be taken that on September 25, 2015 Circuit Court Judge Edgar W. Dixon signed an Order granting a motion by Applegate to dismiss Applegate from Civil Action No. 2015-CP-18-00713 based on the stipulation by Applegate that it would be bound by orders of the Circuit Court in that lawsuit. That lawsuit, which is still pending, contains substantially the same claims by many of the same plaintiffs against the Town and the BAR that are pending in this appeal. Applegate voluntarily disavowed and waived its interest in defending against Appellants' claims that decisions about The Dorchester project were invalid due to law violations by the BAR and agreed to be bound by whatever decisions the Circuit Court made regarding those allegations if Applegate were dismissed from the lawsuit. In reliance on those representations by Applegate, the Court dismissed Applegate from the lawsuit and included Applegate's stipulation that it consented to be bound in the order dismissing Applegate.

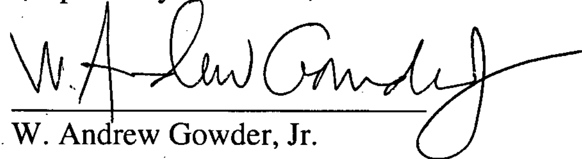
Most significantly, the Respondents waived any right they had to object to Applegate not being a respondent in this appeal, by failing to raise that issue when the decisions of the BAR were being appealed to the Circuit Court, see, e.g., Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). Not including this party is not jurisdictional, as the Respondent contends, and the Respondent's failure to raise this

issue below deprived the Appellant the ability to address it and the lower court the ability to rule on that question. See Spanish Wells Property Owners Ass'n v. Board of Adjustment, 295 S.C. 67, 367 S.E.2d 160 (1988)(respondent raised the argument that the permittee was a necessary party at the hearing before the trial court and the trial court allowed Appellant an opportunity to amend to add the permittee before the appeal).

CONCLUSIONS

For all the reasons stated herein and in the Appellants' Revised Initial Brief, the decisions of the BAR should be reversed.

Respectfully submitted,



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January 13, 2017
Charleston, S.C.

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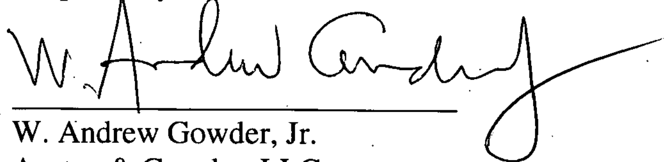
CERTIFICATE OF COUNSEL

I certify that the Reply to Respondents' Revised Initial Brief to be included in the Record on Appeal contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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PROOF OF SERVICE

I, Frances Butler, of Austen & Gowder, LLC hereby certify that I have served a true and accurate copy of the REPLY TO RESPONDENTS' REVISED INITIAL BRIEF by U.S. Mail on January 13, 2017 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: 00023-Croft

Dear Ms. Kitchings,

Enclosed please find the original and one copy of the Reply to Respondents' Initial Brief of Appellants, the Certificate of Counsel, and the Proof of Service. Please return the filed copy of the Reply to Respondents' Initial Brief to us in the return envelope provided. Thank you for your assistance and please let me know if you have any further questions.

Sincerely,

AUSTEN & GOWDER, LLC

Frances Butler
Assistant to W. Andrew Gowder, Jr.

/hfb
Enclosures as stated.
cc: Timothy Domin, Esq.
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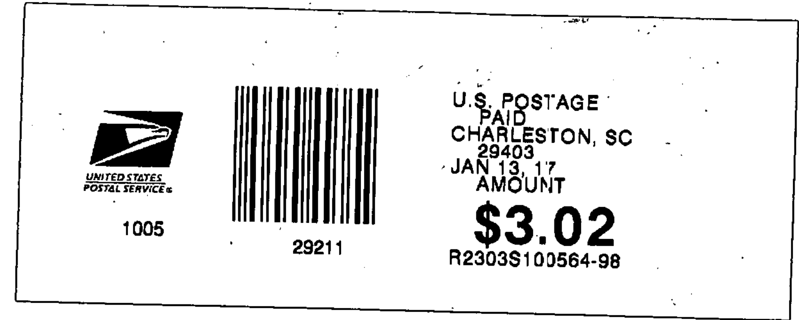

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