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.

PETITION FOR REHEARING BY APPELLANTS

Pursuant to Rule 221, Appellants hereby petition for a rehearing of the Court's decision in this appeal, Opinion No. 5678, filed on October 9, 2019.

The opinion of the Court, respectfully, overlooks and misapprehends the following particular points at issue in this appeal:

1. In ruling that the Circuit Court properly affirmed the Board's decisions based on the transcript of the Summerville Board of Architectural Appeal's ("BAR") deliberations, the Court overlooked that the BAR failed to comply with S. C. Code

Ann. § 6-29-900(A) that the Court quoted verbatim in the Opinion and which requires that the BAR provide a duly certified copy of the proceedings, including a transcript of the evidence heard before the BAR and the decision of the board including its findings of fact and conclusions within 30 days of notice of appeal, which the BAR did not do.

2. The Court's opinion mistakenly asserts that the "workshops" by Board members in numbers of less than a simple majority of the Board did not violate the provisions of S.C. Code Ann. §30-4-70(c)(2007) because the Board did not "act upon" the matter before them. The Court's opinion also did not consider or rule on whether those "workshop" meetings violated Sec. 32-176(e) by "transact[ing] [BAR] business" without a quorum of the total membership of the Board. The Board did indeed act upon and transact business regarding the matter by taking information from the applicant and discussing, negotiating and considering that information; "act upon" and "transact[ing] business" cannot simply meeting voting upon, since public bodies cannot vote on matters with less than a quorum.
3. The Court misapprehended that the Record demonstrates that the BAR received applications for new construction at least seven days before the next regularly scheduled meeting; there is nothing in the record to support this finding, despite its being raised in the Petitions of the Appellants and the BAR having not provided such evidence in the Record on Appeal that the BAR had the sole ability and responsibility to prepare.
4. The Court overlooked the fact that the Circuit Court did in fact rule on the Appellants' argument that the BAR unreasonably restricted access to the Developer's

applications and so was mistaken in ruling that since the Appellants had not filed a Rule 59(e) motion, the Court would not consider this argument.

5. The Court's opinion overlooked key facts when concluding that the public's rights to appear and speak at the public meetings of the BAR were not abridged.
6. The Court's opinion overlooked the fact that the BAR failed to promulgate any rules of procedure on which the public could rely in participating in its proceedings, as required by the Town's ordinances and state law.
7. The Court's opinion did not address the BAR's failure to create and follow a checklist for BAR applications.
8. The Court's opinion overlooked the BAR's failure to notice and allow the public to speak regarding demolition of buildings.
9. The Court's opinion did not address the BAR's failure to take action at the BAR's "next regularly scheduled meeting" in violation of Ord. Sec. 32-181(c)(6).
10. The Court's opinion did not address the BAR's failure to issue the Certificate of Appropriateness within 180 days of the time of the filing of the application with the designated Town Official in violation of Ord. Sec. 32-182 (c).
11. The Court's opinion did not address the BAR's failure to issue a separate certificate of appropriateness for demolition and for new construction on each property.
12. The Court's opinion did not address the BAR's failure to submit the final design to the Redevelopment Corporation for review and approval.
13. The Court misapprehended the facts and the law in finding that the BAR decisions were adequately supported by the facts.

14. The Court's opinion mistakenly shifted the burden of preserving the record before the BAR on the Appellants, when the statute places that burden on the BAR.

Law/ Analysis

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

In this petition, Appellants respectfully contend that the opinion of the Court overlooks or misapprehends the following particular points and further fails to address some of the arguments raised in the appeal:

1. **In ruling that the Circuit Court properly affirmed the Board's decisions based on the transcript of the Summerville Board of Architectural Appeal's ("BAR") deliberations, the Court overlooked that the BAR failed to comply with S. C. Code Ann. § 6-29-900(A) that the Court quoted verbatim in the Opinion and which requires that the BAR provide a duly certified copy of the proceedings, including a transcript of the evidence heard before the BAR and the decision of the board including its findings of fact and conclusions within 30 days of notice of appeal, which the BAR did not do.**

The Record is clear that the BAR failed to comply with this state statute governing boards of architectural review. The Court's opinion overlooked the plain language in this statute and the BAR's failure to comply with it in affirming the Circuit Court. The Court should address this

matter in a revised opinion and hold that the BAR's failure to comply with this statute invalidated its decisions under appeal.

2. **The Court's opinion mistakenly asserts that the "workshops" by Board members in numbers of less than a simple majority of the Board did not violate the provisions of S.C. Code Ann. §30-4-70(c)(2007) because the Board did not "act upon" the matter before them. The Court's opinion also did not consider or rule on whether those "workshop" meetings violated Sec. 32-176(e) by "transact[ing] [BAR] business" without a quorum of the total membership of the Board. The Board did indeed act upon and transact business regarding the matter by taking information from the applicant and discussing, negotiating and considering that information; "act upon" and "transact[ing] business" cannot simply meeting voting upon, since public bodies cannot vote on matters with less than a quorum.**

a. **The BAR "acted upon" and "transacted" business before it at the "secret meetings" or "workshops."**

In addition to the South Carolina Freedom of Information Act ("FOIA"), the Town adopted separate Town ordinances imposing special requirements regarding how the BAR considers and documents its consideration of construction and demolition applications, presumably to facilitate public accountability and to enable the public to be informed and to be able to comment to the BAR intelligently about BAR applications, as expressly allowed by Sec. 32-182(b).

Specifically, Sec. 32-176(e) states that "[a] quorum, consisting of a majority of the total membership of the [BAR], shall be required for the transaction of business." (Emphasis added.) In

addition, Sec. 32-176(d) requires 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." (Emphasis added.)

In addition, separate from FOIA, the State of South Carolina adopted:

- S.C. Code Ann. § 6-29-870(D) requiring 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 musts be filed in the office of the [BAR] and must be a public record" (emphasis added); and
- S.C. Code § 6-29-920(A), which says that the BAR "must file with the clerk a duly certified copy of the proceedings held before the [BAR]."

The Court's opinion did not address the applicability of any of these two Town ordinances and two state statutes regarding the two sets of secret[1] BAR meetings ((1) set one: two successive, back-to-back meetings on December 12, 2014, and (2) set two: three meetings on July 21,23 and 29, 2014) identified on the record by the Appellants, choosing instead to address only the applicability of FOIA regarding those secret meetings.

Both of these two secret BAR meetings on December 12, 2014, and of these three secret BAR meetings on July 21, 23 and 29, 2014, violated the two Town ordinances and two state statutes cited above. For example, the BAR arranged that different sets of three members of the BAR meet on December 12, 2014, at a Town office in two different successive back-to-back meetings with the developer and at least one Town official in charge of planning. The record shows that at these two December 12, 2014, meetings the BAR members, the Town planner and

[1] The Court used the term "secret" when referring to these meetings. Faye P. Croft, et. al, v. Town of Summerville and Town of Summerville Board of Architectural Review, Appellate Case No. 2015-002199 ("Decision"), at 12. The Appellants do also.

the developer negotiated changes to the design of the Hotel project which the developer had submitted to the BAR at two prior public BAR meetings[2] but which the BAR had not found satisfactory. That the content of these meetings was a transaction of BAR business is evidenced by the record including, with regard to the December 12, 2014, BAR meeting attended by BAR member John Kwist ("Kwist"), by the statements[3] made at the January 5, 2015, BAR meeting by Kwist. This negotiation between the developer, the Town planner and the BAR members attending the December 12, 1014, meeting was the transaction and "act[ing] upon" of BAR business and, therefore, should not have been conducted by BAR members without a quorum as required by Sec. 32-176(e). In addition, the July 21, 23 and 29, 2014, meetings at which the Mayor negotiated or discussed with BAR members the design of the Hotel project also was the transaction of BAR business and, therefore, should not have been conducted by BAR members without a quorum as required by Sec. 32-176(e).

All of these secret meetings should have been open to the public and reasonable notice of the time and place of the meetings given to the public, as required by Sec. 32-176(d). In addition, the BAR should have kept minutes of the meetings and records of its "examinations" of the new designs proposed by the developer at the December 12, 2013, meetings regarding which the developer sought BAR approval, as required by S.C. Code Ann. § 6-29-870(D).

In addition, the BAR was required to submit "minutes of its proceedings" and "records of its examinations and other actions" "immediately" (emphasis added) as a "public record" "in the office of the [BAR]." SC Code Ann. § 6-29-870(D). Despite this clear mandate, the Court stated

[2] Those two BAR meetings occurred on October 6, 2014, and November 3, 2014. See Decision, at 2-3.
[3] See Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 35, citing BAR Minutes, January 5, 2015, at 35 (R. p. 447). These statements by Kwist at the public BAR meeting on January 5, 2015, were the first indication to the public that the BAR's secret December 12, 2014, meetings had occurred.

that minutes need not be filed "immediately" but only within a reasonable period of time including after the next BAR meeting.[4] However, that is not what SC Code Ann. § 6-29-870(D) says, and this requirement to file minutes and records "immediately" means what it says, i.e., "immediately," not after the next BAR meeting after perhaps the passage of one or two months. Thus, according to this statute, the BAR must publish its minutes and other records right away, thereby enabling the public to access and use that information. The fact that the BAR or other bodies have adopted a custom of waiting until after the next meeting to approve minutes does not alter the intent and meaning of SC Code Ann. § 6-29-870(D) that publication of BAR minutes and records be immediate.

b. The Court mistakenly excluded material evidence on this issue that the Appellants designated to be included in the Record on Appeal.

On March 22, 2016, Appellants filed with the Court their initial Designation of Matter, which included two items, #5 and #12, which the Court later required Appellants to omit[5] from the record in response to a motion to exclude that evidence by the Respondents. Appellants vigorously objected to the exclusion of item #12, which are detailed notes handwritten by BAR member Kwist ("Kwist notes") describing the content of the secret meeting he attended on December 12, 2014, referenced above.

Appellants objected to exclusion of this item #12 from the BAR record in a filing[6] with the Court, due to Respondents' concealment of the existence of the notes, thereby preventing

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[4] See Decision, at 14.

[5] Appellants' Revised Designation of Matter clearly shows that items #5 and #12 were withdrawn from the record, as the Court instructed. See Order of the Court of Appeals, November 22, 2014.

[6] Appellants' Opposition to Respondents' Motion to Require Appellants to Remove from Their Designation of Matter Materials Which Are Not Related to This Appeal and Which Post-Date This Appeal and to Order Appellants to Remove All References to the Same From Their Initial Brief and to Extend Tim for Filing Respondents' Initial Brief and Designation of Matter Pending Ruling on This Motion, Appellate Case No. 2015-002199, especially at pp. 3-5.

Appellants from including these Kwist notes in the BAR record and the Circuit Court record, and Respondents' failing to provide those notes as part of the BAR record as required by S.C. Code § 6-29-920. Appellants told the Court that the Kwist notes strongly evidence that the BAR conducted BAR business at the December 12, 2014, meeting by examining developer plans, discussing disqualifying conflicts of interest of two BAR members and taking other official actions without the quorum required by law, without keeping records as required by law and without public knowledge and participation as required by law.[7] Further, Appellants told the Court that the BAR failed to provide those notes as part of the copy of the proceedings held before the BAR, as required by SC Code § 6-29-920(A), and argued that the BAR must not be rewarded for its misconduct by allowing it to obtain the dismissal then of relevant evidence that the BAR illegally failed to submit as part of the public BAR record to the Circuit Court as required by law.[8]

The BAR's evidence exclusion efforts were rewarded. By excluding item #12 from the record, the BAR succeeded in avoiding the Court considering relevant and material evidence that the BAR was "transact[ing] business" without a quorum of the entire BAR membership in violation of Sec. 32-176(e) and "acting upon" BAR business in violation of SC Code Ann. § 30-4-70(c) (2007).

It is true that there exists another lawsuit related to this BAR case, as shown in Item #5 that the Court excluded. It also is true that Item #12 provides evidence in that other lawsuit. Nevertheless, item #12 also is evidence highly relevant and material to this BAR proceeding and should not have been excluded from the record. By excluding it, the Court has rewarded the

[7] See id.
[8] See id.

Respondents for their concealment and failure to produce item #12 timely and enabled the Respondents to persuade the Court, based on an incomplete record, that the secret meetings of BAR members on December 12, 2014, were not violations of law.

c. <u>The Court mistakenly allowed extraneous evidence created after the Appellants filed the Petitions appealing the BAR decision.</u>

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.[9] The record on appeal should have contained only the record that existed on the dates when the BAR made the approval decisions the Appellants appealed, and not the additional evidence consisting of findings of fact and conclusions of law created by the BAR on August 3, 2015, after the Appellants had filed their appeals. At an absolute minimum, the BAR was prohibited by the thirty day deadline stated in S.C. Code Ann. § 6-29-900(A)(Supp. 2018) from submitting to the Circuit Court any document that did not exist within thirty days of the dates Appellants filed their notices of appeal (May 5, 2015, and May 22, 2015), and the documents excluded by this thirty day deadline includes the additional evidence consisting of findings of fact and conclusions of law created by the BAR on August 3, 2015.

d. <u>The BAR violated the South Carolina Freedom of Information Act in several respects, as follows:</u>

(1) Illegal Secret Meetings

The documents cited by the Appellants in its filings with the Court show that the two successive, back-to-back secret meetings of BAR members without a quorum of the entire BAR membership on December 12, 2014, in a Town conference room as arranged by the

[9] See <u>Decision</u>, at 5, 11; <u>Brief of Appellants</u>, at 1, 15-19..

BAR consisted of BAR members, the developer and the Town Planner reviewing, discussing and negotiating design changes[10] regarding the Hotel project, prior to and in preparation for the January 5, 2015, public BAR meeting at which the applications for construction and demolition for the Hotel project would be discussed, considered and possibly approved, delayed or rejected. Item #12 excluded by the Court would have provided evidence of the above if the Court had not excluded it, wrongfully, from the record.

Those December 12, 2014, meetings, and the meetings of BAR members on July 21, 23 and 29, 2014, described above, were all by "public bodies" as defined by S.C. Code Ann. § 30-4-20(a), which defines a "[p]ublic body" as including "any public or governmental body or political subdivision, including . . . municipalities . . . including committees, subcommittees, advisory committees, and the like of any such body by whatever name known[11] . . . ." (Emphasis added.)

Very significantly, the Court was mistaken when it relied on its interpretation[12] of the word "meeting" in SC Code Ann. § 30-4-20(d) without simultaneously utilizing this definition of a "public body" as defined in SC Code Ann. § 30-4-20(a). If the Court had used the definition of "public body" stated in SC Code Ann. § 30-4-20(a) when interpreting the meaning of "meeting"

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[10] The BAR and members of the public had rejected or criticized the developer's design proposals at BAR meetings on October 6, 2014, and November 3, 2014, see Decision, at 2-3; BAR Minutes, October 6, 2014, at 3 (R. 909); BAR Minutes, November 3, 2014, at 3 (R. 913). These secret meetings of BAR members on December 12, 2014, were for the purpose of trying to rectify or placate the criticisms of the developer's design proposals the BAR and members of the public had expressed at and after the October 6, 2014, and November 3, 2014 BAR meetings. See Decision, at 2-3. Design changes negotiated at these December 12, 2014, meetings were adopted by the BAR at its January 5, 2015, meeting. Decision, at 4. Those secret meetings on December 12, 2014, should have been held in public as required by the FOIA, by Sec 32-176(e) and by Sec. 32-176(d).

[11] S.C. Code Ann. § 30-4-20(a). The South Carolina General Assembly amended the definition of "public body" in 1987 by adding the phrase "including committees, subcommittees, advisory committees, and the like of any such body by whatever name known." Id. Thus, clearly the Legislature intended for subgroups of public officials discussing or acting on public business to be covered by this definition.

[12] See Decision, at 12.

as used in SC Code Ann. § 30-4-20(d), the Court should have recognized that a quorum of the subgroups of the Bar membership attended these secret meetings as de facto "committees" of the BAR and therefore were subject to all the requirements of the FOIA. The Legislature clearly intended to require a quorum of any subgroup of a "public body" created as a "committee, subcommittee, advisory committee and the like of any such body by whatever name known"[13] to be subject to the FOIA. When on December 12, 2014, and July 21, 23 and 29, 2014, the BAR members divided themselves into subgroups that met with the developer and the Town planner at a public building to discuss and negotiate design changes and to meet with the Town's Mayor to discuss the BAR members' positions regarding the Hotel project's design, they formed "committees, subcommittees, an advisory committee and the like" of the BAR "by whatever name known," and any meeting of a quorum of those individual subgroups was subject to the requirements of the FOIA.

Thus, while a quorum of the entire BAR did not meet at the December 12, 2014, and July 21, 23 and 29, 2014, secret meetings, a quorum of the "committees" or "subcommittees" of the BAR "by whatever name known" did meet at the December 12, 2014, and July 21, 23 and 29, 2014, secret meetings. Based on the definition of "meeting" in SC Code Ann. § 30-4-20(d) in conjunction with the definition of a "public body" as defined in SC Code Ann. § 30-4-20(a), the December 12, 2014, and July 21, 23 and 29, 2014, secret meetings were subject to the requirements of the FOIA.

Therefore, as such "public bodies," the FOIA required that all of those secret BAR meetings attended by subgroups of the BAR referenced above be "open to the public," S.C. Code

[13] S.C. Code Ann. Sec. 30-4-20(a).

Ann. § 30-4-60; that public notice of the meetings and their agendas be published, S.C. Code Ann. § 30-4-80(a); that written minutes of those meetings be kept, S.C. Code Ann. § 30-4-90(a); and that those minutes be public records and available within a reasonable time after the meeting, S.C. Code Ann. § 30-4-90. In violation of FOIA, none of these requirements was complied with by the BAR regarding the BAR's secret meetings on December 12, 2014, and on July 21, 23 and 29, 2014.

This conclusion is supported by the South Carolina Supreme Court in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001), which held that a secret, non-public meeting of even an advisory committee to a public body was prohibited by the FOIA. The Court recognized that it does not need to look any further than the language of this statute to find the committees of BAR members who attended these secret meetings were subject to FOIA. See *Quality Towing, Inc. v. City of Myrtle Beach, supra* at 162, *citing Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing the rules of statutory interpretation. The court has no right to look for or impose another meaning.").

Moreover, it is very clear from the Record that Town and BAR employees deliberately sought to circumvent the FOIA by scheduling small groups of BAR members to meet in these successive secret meetings so there would be "no possibility of it looking like a quorum"[14] or "[t]o avoid any possibility of a quorum (as this is not a public meeting)".[15] This violated the requirement of SC Code Ann. § 30-4-70(c) (2007) that: "No chance meeting, social meeting, or electronic

[14] Decision, at 13. The Respondents expressly stated by emails that the purpose of BAR members meeting in small groups at the December 12, 2014 and July 21, 23 and 29, 2014, meetings was to avoid any possibility of there being or looking like a quorum. Id.
[15] Id.

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."

The July 21, 23 and 29, 2014, meetings were "social meetings," at the home of the Town's Mayor, as referenced in SC Code Ann. § 30-4-70(c) (2007) above.

The Court "acknowledge[d] the problematic nature" of the BAR's attempts to circumvent the requirements of FOIA by holding meetings with BAR subgroups and characterizing the secret meetings as "workshops," and "not[ed] that `workshops' should not be used to circumvent FOIA requirements. "[16] Nevertheless, the Court in its decision allowed the BAR to get away with doing exactly that – circumventing FOIA requirements. The BAR and the Town deliberately violated the FOIA by meeting secretly to discuss BAR business, for which they could be guilty of a misdemeanor. See S.C. Code Ann. § 30-4-110.

The Court also misapprehended the facts and the law when it stated that the secret meetings did not violate S.C. Code Ann. § 30-4-70(c) (2007) because "it is clear from minutes and transcripts of the [BAR] meetings that the [BAR] did not "act upon" the matter of the project."[17] On the contrary, there is nothing anywhere on the BAR record evidencing that the BAR members who attended those secret meetings did not "act upon" Hotel project matters at the secret meetings. It is hard to know what exactly transpired at those secret meetings when they were secret, the public did not attend, and no public record of the secret meetings was made. However, statements made by John Kwist at the January 5, 2015, BAR meeting show that Kwist thought actions and discussions had occurred at the secret meeting he attended on December 12, 2015. The Kwist

[16] Decision, at 13.
[17] Id.

notes, which the Court excluded from the BAR record, show in detail what transpired at the December 12, 2014, BAR meeting Kwist attended. By discussing and negotiating with the developer and the Town planner the design changes that would be presented at the next BAR meeting on January 5, 2015, the BAR members attending the secret meetings on December 12, 2014, did "'act upon' the matter of the project"[18] at those meetings. The facts that at public BAR meetings the BAR members discussed the Project, made changes to the design of the Project, etc., after the secret BAR meetings evidence that the BAR members attending the meetings could have "'act[ed] upon' the matter of the project" by reaching a consensus or agreement on changes manifested at subsequent public BAR meetings.[19]

Very significantly, SC Code Ann § 30-4-20(d)(2007) clearly states that a "meeting" "means the convening of a quorum of the constituent members of a public body . . . to discuss or act upon a matter . . ."[20] (emphasis added), and the record shows that at the secret meetings the BAR members in fact did "discuss" the business of the BAR, i.e., design changes to the Hotel project. In particular, the BAR members attending those "secret" meetings did "act upon" the business of the BAR by discussing and negotiating at the meeting design changes with the developer and the Town planner; by clarifying which BAR members supported and did not support certain design features; and by reaching a consensus on certain issues.

Nothing in the BAR record shows that actions were not taken or decisions were not made at the December 12, 2014 meetings, or that the BAR did not rely upon or be influenced by what transpired (actions and discussions) at the secret meetings when making subsequent decisions that

[18] Decision, at 13.
[19] Id. Design changes negotiated at the December 12, 2014, meetings were adopted by the BAR at its January 5, 2015, meeting. Decision, at 4.
[20] SC Code Ann § 30-4-20(d)(2007); Decision, at 12.

were on the public record. Indeed, the transcript of the January 5, 2015, BAR meeting expressly refers to what was discussed at one of the two secret BAR meeting on December 12, 2014. Moreover, item #12 excluded from the BAR record by the Court shows actions taken at the December 12, 2014 secret meeting attended by John Kwist. The fact that BAR member John Kwist specifically referenced[21] at the January 5, 2015, public BAR meeting what he heard discussed at the secret December 12, 2014, meeting he attended shows that John Kwist, and perhaps other BAR members, relied upon and were influenced by what occurred at that secret December 12, 2014, meeting.

The Court was also mistaken in stating that the fact that public BAR meetings were held after the secret meetings on December 12, 2014, and on July 21, 23 and 29, 2014, precluded those secret meetings from violating the FOIA. Nothing in the FOIA in any way exempts the BAR from the requirements of FOIA because the BAR held subsequent public meetings, especially when the public was not allowed to speak at some of those subsequent BAR meetings and had not been noticed of their right to speak about demolition at some of those meetings as required by Sec. 32-182(b).

3. **The Court misapprehended that the Record demonstrates that the BAR received applications for new construction at least seven days before the next regularly scheduled meeting; there is nothing in the record to support this finding, despite its being raised in the Petitions of the Appellants and the BAR having not provided such evidence in the Record on Appeal that the BAR had the sole ability and responsibility to prepare.**

[21] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 35, citing BAR Minutes, January 5, 2015, at 35 (R. p. 447).

Sec. 32-176(i) states:

Submittal requirements. Complete applications must be received by the **town's planning department** at least **ten days prior** to the regularly scheduled meeting and shall include items listed on the current checklist. (Emphasis added.)

Sec. 32-181(c)(6) states:

Certificate of appropriateness—Procedure

The board shall take action upon such applications at the next regularly scheduled meeting following receipt of the application, which should be submitted to the **board's secretary** at least seven days before that meeting **unless** the application is for **new construction of 700 or more square feet** or for a **demolition** then the application should be submitted to the board's secretary **at least 14 days before the meeting**. (Emphasis added.)

Contrary to statements by the Court, the Sec. 32-181(c)(6) deadline for submitting the application(s) in this case was fourteen days, not seven days,[22] and there is no evidence in the Record, that the applications were submitted to the BAR at least seven[23] days, to the Town's planning department at least ten days and to the BAR secretary at least fourteen days before the next BAR meeting. None of the applications to the BAR nor any other document shows the dates the applications were received by the BAR or the Town, and the BAR did not identify any such evidence. In fact, there is no evidence on the Record about the date on which any of the BAR applications about the Hotel project were submitted, because the BAR failed to document when the BAR received those applications. Because the BAR record on appeal was created and

[22] Because the Hotel project that is the subject of the BAR decision being appealed involves new construction of 700 or more square feet and for demolition, the application regarding the Hotel project was required to have been submitted to the BAR secretary at least 14 days before the meeting at which the application would be considered. That is contrary the seven day deadline stated by the Court. Decision, at 15. Again, there is no evidence on the record of any kind whatsoever that applications were submitted to the BAR within seven days of the meeting at which the BAR considered the applications. The finding by the Court that applications were submitted within seven days is completely unsupported.

[23] The Court stated "[t]he record establishes that the [BAR] received applications for new construction at least seven days before the next regularly scheduled meeting . . . ." Decision, at 15. There is absolutely no evidence on the record that this statement is correct, and it not correct. If the Court still finds there is evidence supporting this statement, Appellants ask the Court to identify that evidence so Appellants can clear up any misunderstanding, because Appellants are severely prejudiced when the Court makes findings wholly unsupported by the record.

controlled exclusively by the BAR,[24] the burden should be on the Respondents to show they complied with these time requirements, and all other BAR requirements, when the Appellants have provided evidence of non-compliance, such as the lack of dates on the applications the BAR did put on the record. Failure to submit applications within these ten-day and fourteen-day deadlines was prejudicial and significant because that resulted in the public having insufficient time to inspect or copy those applications before they were considered by the BAR at a BAR meeting. That particularly is true given the Town's policy of not allowing inspection or providing a copy of applications until fifteen days after receipt of a written Freedom of Information Act application.

4. **The Court overlooked the fact that the Circuit Court did in fact rule on the Appellants' argument that the BAR unreasonably restricted access to the Developer's applications and so was mistaken in ruling that since the Appellants had not filed a Rule 59(e) motion, the Court would not consider this argument.**

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 the time and place of access." (Emphasis added.) Neither the BAR nor the Town created those reasonable rules regarding pubic requests to inspect or copy BAR applications, and the Court should take judicial notice that no such reasonable rules exist. The record shows that the Respondents would not allow the public to inspect and to copy BAR applications before the BAR meetings at which the applications would be considered and at which the public had a right to speak according to Sec.

[24] If the Appellants have evidence of non-compliance with these required deadlines, they could not submit that evidence to the Court because only the evidence considered by the BAR when making its decision was allowed to be considered on appeal. The best evidence available showing non-compliance with the deadlines is the absence of any date on any document considered by the BAR. The BAR should have the responsibility of proving its compliance with applicable laws, given that the BAR controls and can and does exclude evidence of non-compliance from its BAR record.

32-182(b).[25] That denied the public the right to inspect or copy those public records in accordance with reasonable rules concerning the time and place of access, and to comment on those documents as allowed by Sec. 32-182(b). It was not reasonable for Respondents to refuse to allow the public to inspect a BAR application before the BAR meeting at which the application would be considered and, instead, to require Appellants and the public to file a written FOIA request for a BAR application and to wait fifteen days to receive a copy of the application after the BAR meeting at which the BAR application would be considered.

The Court stated that the "circuit court did not rule on [the] question" of whether the BAR "unreasonably restricted access to the Developer's applications."[26] That is not correct. The Circuit Court stated in its opinion the following:

> "Many `grounds for appeal' raised by the Appellants, such as issues related to the Town's request for proposal process or to the funding of the project, were matters beyond the purview of the [BAR] and accordingly would have been inappropriate for the [BAR's] or this Court's consideration. [. . .] None of the grounds for appeal warrants this Court's reversal of the decisions of the [BAR]. The [BAR] had the authority to act as it did, and the [there is no basis to reverse the decisions of BAR]." (Emphasis added.)

By ruling that none of the grounds for appeal warrants reversal of the decisions of the BAR, the Circuit Court clearly ruled against all of the grounds for appeal. Based on that ruling and representations by the Circuit Court quoted above, the Circuit Court did rule on all grounds stated by the Appellants in their petitions to the Circuit Court; there was no need, therefore, to file a

[25] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 2,4,40-41, 43.
[26] Decision, at 15.

Rule 59(e) motion to preserve any issue for appeal; and all issues stated in Appellants' petitions are reviewable on appeal as a matter of law.

Moreover, the Court of Appeals also specifically ruled that "the Town's response [to these requests to inspect and copy BAR applications] was consistent with State law" and "[found] no Freedom of Information Act violation."[27] That ruling and that finding were misapprehensions of the Record, because the BAR and the Town denied the right to inspect or copy the BAR applications before the BAR meetings at which the applications were considered, which was not a reasonable rule and therefore was a violation of S.C. Code Ann § 30-4-30(a).

5. **The Court's opinion overlooked key facts when concluding that the public's rights to appear and speak at the public meetings of the BAR were not abridged.**

At a public meeting on January 5, 2015, the BAR approved unanimously demolition of a structure at 200 W. Richardson Avenue, Summerville, and approved by a 5-1 vote "conceptual/preliminary approval" of the Hotel project.[28] Thus, this was a critical meeting at which the BAR made very important decisions approving demolition and construction of the Hotel project. However, no member of the public was allowed to speak at this meeting,[29] including about demolition about which the public had a right to speak according to Sec. 32-182(b), even though the advertisement the BAR published noticing that meeting specifically represented that at that meeting the BAR would "accept public comment."[30]

Very significantly, the BAR deliberately arranged for this meeting to occur in a room too small to contain the crowds attending the meeting, causing the crowds to stand in a hallway without

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[27] Decision, at 15.
[28] BAR Minutes, January 5, 2015,at 2 (R. p. 922).
[29] Id; Decision, at 6 ("The [BAR] did not take public comment at this meeting.")
[30] Advertisement in Summerville Journal Scene, 12/19/14.

any sound or amplification system causing the public not to be able to see, hear or participate in the meeting.[31] That violated the Freedom of Information Act. See Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998).

The Court's opinion mistakenly stated that the FOIA did not require the BAR to provide an available meeting room where the public could hear, see and participate in the BAR meeting at which they had a right to speak about demolition.[32] The Court's opinion misinterpreted the decision in Wiedemann V. Town of Hilton Head, 344 S.C. 233, 542 S.E.2d 752 (Ct.App. 2001) to excuse the BAR of responsibility under the FOIA to provide a meeting place where the public could hear, see and participate in the meeting at which the public had a right to speak, because the Wiedemann case pertained to the right of a Town council to hold a meeting out-of-town if doing so was not an undue burden to the public, not to whether a meeting could be held so that the public could not see, hear or participate in the meeting.

Moreover, the Supreme Court in Wiedemann[33] issued a ruling specifically relying on the facts that "there was no evidence any members of the public were prevented from attending the meeting"[34] and "no undue burden to the public."[35] However, the record in this case shows that many members of the public were prevented from attending the January 5, 2015, BAR meeting in the room where the meeting was held because the meeting was held in a tiny room too small for the crowd wanting to attend the meeting, and those forced to stand or sit on the floor in the hallway

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[31] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 41-43; R. pp. 957-958; see also pp. 717-719, 760, 956. Documents evidencing these facts were submitted on the record by the Appellants and not objected to by the Respondents. Therefore, that evidence should be considered valid and correct, as with other evidence submitted on the record by the Respondents.

[32] Decision, at 14.

[33] Wiedemann v. Town of Hilton Head, 330 S.C. 532, 537 (1998).

[34] Wiedemann v. Town of Hilton Head, 330 S.C. at 537.

[35] Wiedemann v. Town of Hilton Head, 330 S.C. at 537.

outside that room could not see, hear or otherwise participate in the meeting, given that no chairs and no audio or visual equipment were provided enabling them to do so.[36] Because many members of the public could not hear, see or participate in the January 5, 2015, BAR meeting, the BAR placed an "undue burden"[37] on the public, totally unnecessarily and with the effect and possible purpose of curtailing public attendance, observance and input at the meeting, and therefore violated the FOIA. That is evidenced by the Supreme Court's specific reliance in Wiedemann on Sovich v. Shaughnessy, 705 A.2d 942 (Pa.Cmwlth. 1998), which held that there was "no violation of the Sunshine Act where members of the public were placed in an adjoining facility with speakers and microphone"[38]and the fact that the BAR placed members of the public in a hallway not containing speakers, a microphone or audio or visual equipment enabling the public to hear and see the BAR meeting.

Thus, the point made regarding the Wiedemann case in this Court's decision[39] is not relevant to the facts regarding the January 5, 2015 BAR meeting at which many members of the public were excluded.

Applying the "balancing test" mandated by Wiedemann, there simply was no necessity and no reasonable basis for the BAR not to simply move its January 5, 2015, meeting to the adjoining larger room where other meetings routinely had been held, as requested by the public at the January 5, 2015, meeting, instead of insisting that the meeting remain in the room that obviously was too

[36] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 41-43; R. pp. 957-958; see also pp. 717-719, 760, 956.
[37] Wiedemann v. Town of Hilton Head, 330 S.C. at 537.
[38] Wiedemann v. Town of Hilton Head, 330 S.C. at 535 fn2.

[39] Decision, at 14.

small to contain the large crowd trying to attend the meeting at which the BAR would decide whether to allow demolition and construction for the Hotel project.

The fact that the amount of time a member of the public speaks may be limited to a reasonable time, e.g., three minutes, as stated by the Court, has nothing to do with the issue of whether the BAR deliberately could hold a meeting in a room too small to hold members of the public wanting to attend the meeting and not provide the means to speak and to hear and see what transpired at the meeting to the members of the public in the hallway adjoining the room because they were unable to fit in the small room. While limiting the amount of time a person speaks to three minutes may not be unreasonable, requiring the public to sit or stand in a hallway without being able to hear or see what transpired or to speak at the public meeting they sought to attend clearly was unreasonable and an "undue burden"[40] on the public.

6. **The Court's opinion overlooked the fact that the BAR failed to promulgate any rules of procedure on which the public could rely in participating in its proceedings, as required by the Town's ordinances and state law.**

The BAR failed to adopt and to follow the specific rules and guidelines which South Carolina law required that the BAR adopt and follow. For example, S.C. Code Ann § 6-29-870(D) required that "[t]he [BAR] **shall adopt** rules of procedure . . ." (emphasis added), but the BAR per se utterly failed to do so. The BAR has not and cannot cite or provide any specific rule or rules that the BAR per se adopted or followed. The record shows, for example, the BAR did not create or use a "checklist" as required by Sec. 32-176(i); did not define the meaning, criteria or procedure for critical terms, including "conceptual approval" and "preliminary approval;" and did not adopt

[40] Wiedemann v. Town of Hilton Head, 330 S.C. at 537.

or publish in writing any rules for the conduct of BAR meetings. The BAR did not publish any rules, reasonable or otherwise, allowing the public to inspect or copy BAR applications before the BAR meetings at which those applications would be considered, in violation of S.C. Code Ann § 30-4-30(a), and did not publish any rule or guideline requiring the BAR to document whether and when BAR applications were received as required by law and what information was provided by the developer with those applications. As a result of all of this, the BAR acted on an *ad hoc* basis and it was impossible for the public to determine what the BAR was required to do, to learn what it was doing timely, to effectively influence what the BAR was doing and to hold the BAR accountable for not doing what it was required to do.

Further, Sec. 32-176(h)(4) requires that the "[BAR] shall **develop** guidelines for the administration of [this] section" (emphasis added), but the BAR failed to do so. Sec. 32-175(f) authorized the BAR to approve applications "in accordance with **prescribed** procedures and guidelines" (emphasis added), but the BAR never prescribed procedures and guidelines. Sec. 32-176(h) states that "[i]t is the duty of the [BAR] to follow the **established guidelines** governing . . . new construction . . ." (emphasis added), but the BAR did not follow guidelines established by the BAR because none had been established by the BAR. Sec. 32-176(e) required the BAR to "**adopt** rules of order," but it failed to do so and there is no record of its having done so or of specifically what it did "adopt" when if it did so. SC 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 the time and place of access" (emphasis added), but neither the BAR nor the Town created those reasonable rules. The fact that state law and Town ordinances impose some requirements on a BAR is not a substitute for the specific mandates that the BAR itself adopt specified rules. As a result of all of this, the BAR acted *ad hoc* and it was impossible for the

public to determine what the BAR was required to do, to learn what it was doing timely, to effectively influence what the BAR was doing and to hold the BAR accountable for not doing what it was required to do.

The Court's opinion mistakenly stated that Sec. 32-174 and Sec 32-175 show that the BAR adopted rules of procedure.[41] The Town, not the BAR, promulgated those ordinances, which are not rules of procedure. The BAR itself has not promulgated or adopted any rule of procedure or guidelines.

Moreover, the Court's opinion mistakenly placed the burden of providing evidence that the BAR failed to adopt rules of procedure as required by SC Code Ann § 6-29-870(D)[42] on the Appellants. The Appellants cannot possibly prove that something does not exist, and the Court should take judicial notice that in fact the BAR per se never adopted any rules of procedure, prescribed procedures or guidelines, "adopt[ed] rules of order" or created "reasonable rules concerning the time and place of access" to "inspect or copy" BAR documents. The fact is that the BAR never "adopted" or promulgated any rule, guideline or procedure, and there is no record, in any minutes, resolution or otherwise, that the BAR did so, when it did so and what is the specific content of any said rule, guideline or procedure. The BAR itself selected and controlled all evidence allowed on the record on appeal, and never has identified any specific "rules of procedure" or "rules of order" that the BAR claims the BAR itself formally adopted. While the BAR does claim it follows parliamentary procedure, there is no evidence of when or exactly what the BAR adopted or of which version of such procedure the BAR follows. The public is left to simply guess at what specific rules or procedures the BAR claims it must follow, while at the same

[41] Decision, at 16.
[42] Id.

time not being able to obtain a copy of said rules or procedures because none has been promulgated by the BAR. The BAR should be required to identify, publish and prove it has adopted the specifically required rules and guidelines it claims to have adopted and the law requires it to adopt, since it controls the evidence on the record, the BAR has not identified any specific rule or guideline "adopted" by the BAR and no document showing the BAR adopted rules or guidelines exists.

7. The Court's opinion did not address the BAR's failure to create and follow a checklist for BAR applications.

Sec. 32-176(i) requires that BAR applications include all items on the "current checklist." However, no record exists that a "checklist" of the BAR exists and, therefore, the public could not determine whether the applicants complied with Sec. 32-176(i). Moreover, there was no checklist for the developer to follow and, instead, the BAR made up *ad hoc* the requirements for BAR applications, making it impossible for the public to determine what the developer was supposed to provide the BAR and whether the developer provided what was required. The failures of the BAR to have a checklist,[43] to document that it had a checklist and to require compliance with the checklist violated Sec. 32-176(i).

8. The Court's opinion overlooked the BAR's failure to notice and allow the public to speak regarding demolition of buildings.

Sec. 32-182(b) states in part:

> "**Demolition**. . . **Upon receipt** of an **application to demolish a structure**, the secretary to the [BAR] shall **publish a display advertisement** in a newspaper . . .

[43]Appellants have evidence the BAR did not have a "checklist" as required by Sec. 32-176(i), but cannot submit it because the BAR failed to include that evidence on the BAR record. The BAR should be required to disprove credible allegations of law violations or at least to allow in the record evidence of the BAR's law violations, instead of avoiding accountability for its illegal actions by simply omitting evidence of the illegalities on the record. See Decision, at 12-13.

stating the public will have an opportunity to comment at such meeting."[44] (Emphasis added.)

The BAR record shows that (1) seven separate applications seeking approval of demolition of multiple structures for the Hotel project were submitted to the BAR;[45] (2) the BAR held meetings at which the BAR considered the demolition of structures on nine different dates;[46] and (3) an advertisement was placed in a newspaper only regarding only three of those nine BAR meetings.[47]

The Court stated that "[a]t least one of the advertisements provided in the record announced the Board would be meeting on May 11, 2015 at 6:00 pm . . . and noted the [BAR] would 'accept public comment.'"[48] It appears that BAR advertisement did state the BAR would "accept public comment" at BAR meetings considering two of those applications, i.e., for the BAR meetings on January 5, 2015, and May 11, 2015. However, that leaves five other applications and seven other BAR meetings regarding requested demolitions for which no advertisement was published by the BAR stating the public would have an opportunity to comment about demolition at a BAR meeting. In addition, none of the letters sent to property owners surrounding the Project states that the public could comment at a meeting about demolition. The record shows those letters failed to inform the public it had a right to speak to the BAR about proposed demolitions, in violation of Sec. 32-182(b).

Moreover, the advertisement published in December 2014 regarding "Free Houses in Summerville!!!" and the publication of notices about meetings on line, if any, are not relevant

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[44] See Decision, at 12-13.
[45] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 8-15.
[46] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 8-15, 39-40.

[47] BAR Minutes, January 5, 2015,at 2 (R. p. 922).
[48] Decision, at 14.

to the issue of whether the BAR complied with the requirement in Sec. 32-182(b) that advertisement be published notifying the public of its opportunity to comment about a proposed demolition at an upcoming BAR meeting.

Very significantly, as the Court's opinion recognized,[49] the BAR failed to allow any member of the public to speak at its January 5, 2015, meeting, even though the BAR had represented to the public in its advertisement that the BAR would "accept public comment" at that meeting.[50] The BAR's refusal to allow the members of the public who attended the January 5, 2015, 2015, BAR meeting to speak at that meeting, especially against demolition, was highly significant and prejudicial, because at that meeting the BAR "unanimously approved demolition of the structure at 200 W. Richardson Avenue contingent upon final approval of the entire project" and voted to give "conceptual/preliminary approval of [the entire] project."[51] Moreover, the BAR's failing to allow the public to speak at the BAR's January 5, 2015, meeting is a far worse violation of law than any failure by the BAR to state in an advertisement that the public would be allowed to speak at the meeting as required by Sec. 32-182(b).

Indeed, at some BAR meetings the BAR Chairman stated the public had no right to speak,[52] even though the public did have a right to speak and to be informed of that right as stated above. At other meetings the BAR Chairman objected to members of the public making statements for the record.[53]

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[49] Decision, at 4 ("The [BAR] did not take public comment at this meeting.")
[50] Advertisement in Summerville Journal Scene, 12/19/14 (R. p. 865).
[51] BAR Minutes, January 5, 2015, at 2 (R. p. 922).
[52] See R. pp. 957-958; 989 (BAR Chairman tells public at BAR meeting that BAR "not required to solicit comments"); see also R. p. 956.
[53] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 43.

9. The Court's opinion did not address the BAR's failure to take action at the BAR's "next regularly scheduled meeting" in violation of Ord. Sec. 32-181(c)(6).

The Court's opinion did not address but should address on its merits whether the BAR violated Sec. 32-181(c)(6). The BAR violated this ordinance and the Appellants and other members of the public were prejudiced thereby, unable to follow and to respond to the progress of the BAR applications at issue.

10. The Court's opinion did not address the BAR's failure to issue the Certificate of Appropriateness within 180 days of the time of the filing of the application with the designated Town Official in violation of Ord. Sec. 32-182 (c).

The Court of Appeals did not address but should address on its merits whether the BAR violated Sec. 32-182(c). The BAR violated this ordinance and the Appellants and other members of the public were prejudiced thereby, unable to follow and to respond to the progress of the BAR applications at issue.

11. The Court's opinion did not address the BAR's failure to issue a separate certificate of appropriateness for demolition and for new construction on each property.

The Court of Appeals did not address but should address on its merits whether the BAR issued a certificate of appropriateness improperly, as stated above and in Section IIIF of its Brief. The BAR issued the certificate of appropriateness improperly and the Appellants and other members of the public were prejudiced thereby.

12. The Court's opinion did not address the BAR's failure to submit the final design to the Redevelopment Corporation for review and approval.

The Court of Appeals did not address but should address this issue, and all other issues raised by the Appellants, on their merits because the Circuit Court did rule on those issues and the Appellants and other members of the public were prejudiced by this BAR action, as explained in Appellants' appeal to the Court of Appeals.

13. The Court misapprehended the facts and the law in finding that the BAR decisions were adequately supported by the facts.

The BAR decisions being appealed were insufficiently supported for two reasons.

First, while the BAR did engage in a lot of discussion and other activity regarding the BAR applications whose approvals are being appealed, the BAR did not create a record showing that specific facts support, or specifically how specific facts support, the specific criteria the BAR was required by law to use when determining whether to approve the applications. Thus, while the Court stated that "the [BAR] considered exactly the factors required by the ordinance through its extensive discussions at the various meetings about the Project's mass, scale, height, and exterior materials,"[54] neither the Court nor the BAR identified specific facts supporting or justifying the BAR's approvals, conclusions and decisions about those "factors" the BAR "considered" or discussed. Instead, the BAR members merely voted to approve the project and/or said in a conclusory manner they were satisfied with the project, without specifying what facts or how any facts supported that vote or conclusion.

Moreover, the BAR made no findings of fact and conclusions at the time it decided to approve the demolition and constructions applications for the Hotel project and, instead, created and

[54] Decision, at 11.

published purported findings and conclusions only months after the BAR had been served the specific grounds for appeal filed with the Circuit Court by the Appellants.

Secondly, any facts or conclusions supporting the BAR decisions being appealed are invalid and fatally flawed because they were obtained using procedures in violation of law, as stated in this Motion and otherwise in the record, resulting in facts and conclusions based on partial, incomplete and distorted information not considered at the appropriate time, by the appropriate persons and in the appropriate manner.

14. The Court's opinion mistakenly shifted the burden of preserving the record before the BAR on the Appellants, when the statute places that burden on the BAR.

The Court stated that the burden of proving its claims was on the Appellants.[55] That statement is not completely accurate, given the special legal requirements imposed on the BAR.

South Carolina law allows the Appellants to appeal to this Court based only on the BAR record considered by the Circuit Court and requires the BAR to submit to the Circuit Court the complete record considered by the BAR when making its decisions being appealed.[56] Thus, the BAR controls the record considered on appeal and makes it impossible for the Appellants to prove law violations if the Respondents exclude relevant evidence of the violations from the record. The BAR had the duty to provide the Circuit Court and the Court of Appeals the complete record of what the BAR considered when making its decisions, including the identity of all rules, regulations, guidelines, statutes and other laws the BAR claims to have followed, the existence of the BAR's secret meetings and what was discussed, provided and negotiated in the BAR's secret meetings. The BAR failed to identify those laws it claims to have followed and which the

[55] Decision, at 15.
[56] Brief of Appellants, Appellate Case No. 2015-002199, March 15, 2017, at 15-19.

Appellants claim do not exist and were not followed. The burden of proof that those laws disputed by the Appellants in fact do exist and were followed by the BAR and about what actions were taken and information discussed and shared at the BAR's secret meetings rests with the Respondents, not the Appellants, and the Respondents have failed to sustain that burden of proof, as required by due process of law.

CONCLUSION

The Court's opinion acknowledged that "[t]he discretion of a [BAR] to approve proposed construction is `constrained only by reasonableness and good faith.'"[57] In addition, the BAR must comply with all legal requirements imposed by the United States and South Carolina statutes, and by applicable state statutes, Town ordinances and BAR ordinances, regulations and guidelines. The BAR has failed to comply with all of these requirements, as shown above and in the record before the Court.

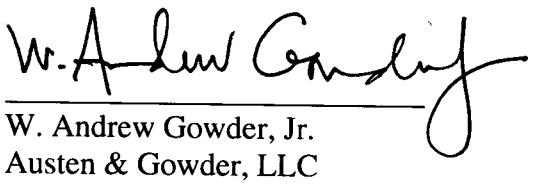
The fact that the BAR complied with some of the applicable legal requirements does not excuse the BAR's non-compliance with other applicable legal requirements. The developer and the BAR gamed the process by selectively laying a record appearing to comply with some requirements while utterly failing to comply with other requirements to the prejudice of the public including the Appellants. The fact that the developer submitted a grossly inappropriate design inconsistent with what it had represented in writing it would submit and later changed it bit-by-bit to obtain BAR approval does not change the fact that the process followed by the BAR was legally flawed and resulted in prejudice to the public including the Appellants.

[57] Decision, at 9 (citations omitted).

The Court should require the BAR to comply with all applicable laws and not reward its non-compliance with those laws in this case by affirming its illegally obtained decisions.

For all the reasons stated herein and in the record of this case, including in the Appellants' briefs submitted to the Court, the decision of the Circuit Court should be reversed.

Respectfully submitted,



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October 24, 2019
Charleston, S.C.

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.

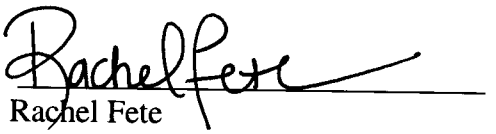
Town of Summerville and
Town of Summerville Board of Architectural Review .....Respondents.

PROOF OF SERVICE

I, Rachel Fete, of Austen & Gowder, LLC hereby certify that I have served a true and accurate copy of the REPLY TO RESPONDENTS' INITIAL BRIEF by U.S. Mail on October 24, 2017 to counsel of record as shown below:

Timothy A. Domin
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144

G. W. Parker
200 South Main Street
Summerville, SC 29483



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October 24, 2019
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October 24, 2019

Jenny Abbott Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Faye P. Croft, et al. v. Town of Summerville, et al.
Case No.: 2015-CP-18-00991
Appellate Case No.: 2015-002199

Dear Ms. Kitchings,

Enclosed please find for filing an original Appellants' Petition for Rehearing accompanied by 6 copies. Respondents' counsel has been served as described in the included Certificate of Service. Please call me with any questions or concerns.

Thank you for your attention and assistance with this matter.

Sincerely,

AUSTEN & GOWDER, LLC

Rachel Fete

Rachel Fete
Assistant to W. Andrew Gowder, Jr.

Cc:
Tim Domin
G.W. Parker