THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.2015-002199 (S.C. Ct. App. filed Jan. 24, 2020)

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, Petitioners,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 24, 2020.

QUESTIONS PRESENTED

1. Did the Town of Summerville ("Town") Board of Architectural Review ("BAR") violate the Freedom of Information Act, S. C. Code Ann. §30-4-10, et. seq. ("FOIA"), other statutes and the Town's own open meetings ordinance when small groups of BAR members met to consider BAR business with a developer and Town staff at successive secret "workshop" meetings scheduled purposefully and intentionally by the BAR to evade those laws?

2. Did the Circuit Court incorrectly exclude from the BAR record material evidence Petitioners designated to be in the BAR record showing that the BAR transacted BAR business at its secret "workshop" meetings?

3. Did the Town BAR violate the FOIA, state statutes and Town ordinances by (a) unreasonably restricting access to inspect and copy the Developer's applications before the meetings at which the BAR would consider those applications; (b) preventing the public from seeing, hearing and participating in a public BAR meeting where the BAR made key decisions after considering those applications; and (c) failing to allow the public to speak at and to notice the public's right to speak at the meetings where the BAR considered the applications?

4. Did the Circuit Court err in allowing the BAR to add to the Record affidavits, a decision, findings and conclusions, and minutes of meetings created by the BAR months after the BAR's decisions had been made and appealed and after expiration of the thirty-day deadline in S.C. Code Ann. § 6-29-920(A)?

5. Did the Circuit Court err by failing either to find the BAR decisions to be incorrect or correct without accepting "additional evidence," or to remand those decisions to the BAR for a "rehearing," as specifically required by S.C. Code Ann. § 6-29-930(A)?

6. Did the Court of Appeals err by mistakenly shifting the burden of preserving a correct BAR record on the Appellants, when the statute places the burden on the BAR?

7. Did the Court of Appeals err when ruling that the Appellants had failed to preserve certain issues for appellate review because the Circuit Court allegedly had not ruled on those issues and Appellants had not filed a Rule 59(e) motion, when in fact the Circuit

Court had ruled on those issues by specifically ruling that "none" of the grounds for appealing the BAR decisions to a Circuit Court warranted reversal of those BAR decisions?

STATEMENT OF THE CASE

On July 9, 2014, the Town of Summerville ("Town") and a private developer ("Developer") entered into a "Public-Private Partnership Agreement" whereby they would build and finance a three-story hotel-condominium project ("Project") in the Historic District of the Town. (R. pp. 1-2, 12-13; Brief of Appellants, p. 6).

Numerous citizens and organizations opposed this Project because it would be improperly financed with public funds, historic buildings would be demolished, no scale model had been provided and the proposed Project involved excessive mass, size, noise, traffic and tree cutting (Brief of Appellants, p. 33, numerous citations omitted).

On May 6, 2015, and on May 22, 2015, Petitioners appealed to the Circuit Court two decisions made by the BAR, on April 6, 2015, and on May 11, 2015, respectively, approving the joint applications of the Town and the Developer to construct the Project and to demolish historic buildings in order to construct the Project (R. pp. 12, 14; Brief of Appellants, pp. 5, 13).

On September 24, 2015, the Circuit Court issued an Order, filed October 23, 2015, affirming the BAR decisions made on April 6, May 11 and August 3, 2015. (R. pp. 12, 18; Brief of Appellants, pp. 5, 13.) On October 9, 2019, the Court of Appeals affirmed the Circuit Court Order affirming the challenged BAR decisions. Croft v. Town of Summerville, Op. No. 5687 (S.C. Ct. App. filed October 9, 2019), pp. 1, 17. On October 24, 2019, Appellants filed a Petition for Rehearing, App. 1232-1264. On January 24, 2020, the Court of Appeals denied Appellants' Petition for a Rehearing. App. 1267-1268. Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

INTRODUCTION

This case asks just how many specific state statutes and Town ordinances a Board of Architectural Review can violate in a particular matter without having its controversial decisions invalidated and reheard by the BAR to reconsider correctly. Stated another way, the case asks whether due process1 requires that the Town's BAR comply with numerous applicable state statutes and Town ordinances when it approves a development project, and whether a Court must or should invalidate a BAR approval obtained in violation of those laws.2

This case presents important and novel questions, without clear precedence in South Carolina. For example, the Supreme Court should decide whether a BAR can evade the open meeting requirements of FOIA and of other specific statutes and ordinances by appointing slightly less than a quorum of the BAR members to meet as a group in secret "workshop" meetings with the Town Planner and the Developer to negotiate the redesign of a controversial Project; whether the BAR can exclude from the BAR record written evidence of those secret meetings thereby

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1 Amendments 5, 14, United States Constitution; Article 1, Section 3, South Carolina Constitution.

2 These issues include whether a BAR may unreasonably prohibit members of the public from inspecting and copying applications for approval of the controversial Project submitted to the BAR until after the meeting where the BAR considering the application already has occurred; orchestrate the inability of the public to hear, observe and speak at public meetings about the BAR applications, when a Town ordinance gave the public a right to speak and the FOIA gave them a right to attend, hear and observe; add as evidence to the BAR record for judicial review material documents prohibited by statute; withhold from that BAR record material documents required to be on the BAR record by statute; fail to file with the Circuit Court the BAR record within the prescribed time period; fail to make a decision without accepting "additional evidence" or to remand the case to the BAR for a "rehearing" as required by statute; fail to receive, or to evidence that it received, Bar applications within time periods prescribed by law; fail to promulgate and follow rules specifically required by statutes and ordinances; fail to create and follow a "checklist" as required by law; fail to issue a Certificate of Appropriateness within the time period required by ordinance; fail to take action on the BAR applications within the time period required by ordinance; fail to issue separate certificates of appropriateness for demolition and for new construction, as required by ordinance; and fail to obtain approval of the final design of the proposed Project from the Town's Redevelopment Corporation before the BAR considered the Project, as required by contract ratified by Town ordinance. (Brief of Appellants, pp. 1-2, 15-46; Reply Brief, pp. 1-9).

evading judicial scrutiny; and whether BAR decisions should be upheld when the BAR avoided meaningful citizen input by numerous violations of FOIA and other laws.

In addition, the case presents novel questions of whether it was proper for the Circuit Court to allow the BAR to add documents evidencing its positions months **after** the BAR decisions being appealed; whether the BAR or the Appellants have the burden of proving compliance with the law by the BAR given that the BAR controls, defines and limits what evidence is in the BAR record; whether a Rule 59(e), SCRCP motion is required to preserve a specific issue on appeal when the Circuit Court specifically ruled that "none" of the grounds for appeal of the BAR decision to the Circuit Court were valid; whether BAR's the cumulative violations of law when making its decisions require the reversal and "rehearing" of those decisions; and whether the BAR articulated sufficient facts to support the BAR decisions when omitting from the BAR record evidence in violation of statutes and ordinances.

The effect of all of these legal violations was for the BAR to give approval to controversial Project applications to the detriment of the public opposing the Project in violation of the requirements imposed on the BAR and the rights of the public granted in the statutes and ordinances. The BAR should be required to reconsider its previous unlawful approval of the Project using a new process complying with legal requirements so that the public will be afforded their due process rights to provide comment, support, or opposition for the Project.

1. THE TOWN'S BAR VIOLATED FOIA, OTHER STATUTES AND THE TOWN'S OWN OPEN MEETINGS ORDINANCE WHEN SMALL GROUPS OF BAR MEMBERS MET TO CONSIDER BAR BUSINESS WITH A DEVELOPER AND TOWN STAFF AT SUCCESSIVE SECRET "WORKSHOP" MEETINGS SCHEDULED PURPOSEFULLY AND INTENTIONALLY BY THE BAR TO EVADE THOSE LAWS' REQUIREMENTS.

   At a January 5, 2015 BAR meeting a BAR member made the following statements to a

Developer about the Developer's controversial Project being considered by the BAR:

> . . . You addressed the height, and I appreciate that. I don't think you've addressed the mass. And **as I indicated to you in that workshop**, the elevation along Richardson Avenue, best I could tell, is about 320 feet of continuous building. (R. p. 447) (emphasis added).

Totally unknown to the public when the BAR member made those statements, BAR members had met secretly with the Developer and Town Staff on December 12, 2014, in at least two successive "workshop[s]" "for the Hotel Project" in a Town conference room arranged by official BAR email communications to six of the seven[3] BAR members from the Secretary of the BAR. (R. pp. 945-946). Three members of the BAR attended the first "workshop" and three other members attended the second "workshop" held immediately after the ending of the first "workshop," instead of all members of the BAR attending together one "workshop," (R. p. 946), for the purpose expressly stated in BAR emails of "giving [the BAR members] an opportunity to review plans and discuss concerns from prior meetings" and "[t]o avoid any possibility of a quorum," (R. p. 945), to try to justify meeting secretly without public notice, participation or records (R. p. 41, § 50; R. p. 945).

The business conducted at these successive "workshops" consisted of BAR members and the Town staff reviewing, discussing and negotiating with the Developer changes to the design of the Project demanded by public dissatisfaction with the design the Developer had proposed at a previous BAR meeting on October 6, 2014, (R. pp. 945, 946; R. p. 909)("Chairman Dixon . . . requested that the architect take comments under consideration and come back for conceptual approval with a re-design"), in preparation for an upcoming public BAR meeting on January 5, 2015, at which the Developer's and the Town's joint applications regarding the Project would be discussed, considered and possibly approved, delayed or rejected. (R.p. 945: "**[T]his is a workshop to give you an opportunity to review plans and discuss concerns from prior meetings**") (emphasis added).

In addition to the above, on July 21, 2014, the BAR Secretary arranged by BAR emails three secret meetings "in a casual setting" at the home of the Mayor of Summerville, on July 21, 23, and 29, 2014, each attended by "two [different BAR] members at a time . . . (no possibility of

3 The seventh member of the BAR attended none of these "workshops" because he had recused himself due to his conflict of interest. (R. pp. 942, 943, 944).

it looking like a quorum)" where the BAR members discussed with the Mayor whether the BAR might approve the project, (R. p. 947)("Mayor would like to get your input and thoughts on this project while still in the very early stages of design")(emphasis added).

The Court of Appeals mistakenly asserted that these "workshops" by BAR members in numbers of less than a simple majority of the BAR did not violate the provisions of S.C. Code Ann. §30-4-20(d) because "a `meeting' specifically requires the presence of a quorum" and "[t]here was no evidence a quorum was present during any of the workshops." S.C. Ct. App. Opinion No. 5687 at p. 14. These statements are incorrect and fail to recognize that S.C. Code Ann. § 30-4-20 defines a "[p]ublic body" as including "any public or governmental body or political subdivision of the State, including . . . municipalities . . . **including committees, subcommittees, advisory committees, and the like of any such body by whatever name known** . . .." (emphasis added), and states that a "meeting" is "the convening of a quorum. . . to **discuss or act upon** a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 34-4-20 (emphasis added). The above-described meetings of slightly less than a quorum of the full BAR membership at which the Project designs were discussed and acted on constitute *de facto* committees subject to the requirements of the FOIA.

The Court of Appeals opinion also mistakenly asserted that these "workshops" by BAR members in numbers of slightly 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. S.C. Ct. App. Opinion No. 5687 at p. 14. However, the FOIA does not require that a public body actually take an action for its open meetings requirements to apply; a meeting *per se* of the public body where discussion can or does occur is sufficient to invoke FOIA's open meeting requirements. S.C. Code Ann. § 30-4-20. Moreover, the very acts of the BAR members, the Developer and the Town staff discussing, planning, negotiating and reaching a consensus among themselves about changes in the design of the controversial project for which BAR approval was being sought involved BAR members "act[ing] upon" the project design application before them.

This language of the Court of Appeals opinion regarding Respondents' strategy for evading the open meeting requirements of the FOIA is incorrect as a matter of law and will embolden public bodies to take steps to conduct public business outside of public view. The Court

of Appeal's opinion has endorsed the Respondent's evasion of the requirements of the FOIA by overlooking the portion of the definition of "public body" in the law that specifies that "public body" includes "committees, subcommittees, advisory committees, and the like of any such body by whatever name known." S.C. Code Ann. § 30-4-20(a).

The appointment of groups of members of a public body smaller than a quorum of the public body as a whole may not evade the open meeting requirements of the FOIA on the grounds that the convening of such groups does not constitute a quorum of the whole. This Court, in accepting the Petition for Writ of Certiorari, should address the fundamental nature of the selection of groups of two or three members to meet with a developer outside of public view to consider a controversial development proposal. Each of these groups constituted a committee of the [BAR], and as such, each was a public body with its own quorum arithmetic.

Section 30-4-70(c) provides that:

> No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this Chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

The three successive secret "workshop" meetings of two BAR members at a time with the Mayor at his home on July 21, 23 and 29, 2014, were "social meetings" arranged by BAR officials expressly so they could "circumvent the spirit of requirements" of FOIA "to act upon" the Project by discussing whether the BAR would approve the Project (R. p. 947)("no possibility of it looking like a quorum")(emphasis added).

The successive secret "workshop" meetings of BAR members with the Developer and Town staff at Town Hall on December 12, 2014, were not "chance" or "social" meetings. Rather, they were intentional, deliberate meetings whose purpose was to circumvent the spirit of the requirements of the FOIA, as demonstrated by the Town employee stating in her emails that the purpose of the meetings in small groups was to "avoid any possibility of a quorum" (R. p. 945).

It follows logically that if SC Code Section 30-4-70(c) prohibits chance or social meetings to circumvent the spirit of the requirements of the FOIA, deliberate, intentional meetings to circumvent the spirit of the requirements of the FOIA also are prohibited by the FOIA.

These secret meetings violated several provisions of the FOIA.4 This conclusion is supported by Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001), which held that the secret, non-public meeting of even an advisory committee to a public body was prohibited by the FOIA. Because the BAR's secret workshops were not open to the public, the public was unable to learn what design changes and demolitions the Developer was proposing and negotiating with BAR members and the Town staff, and therefore was unable to try to influence BAR decisions by commenting on those design changes and demolitions to BAR members.5 As in Quality Towing, the BAR has advanced no valid reason to hold the secret, non-public meetings and discussions by groups of BAR members with the Developer and the Town staff regarding whether the BAR would award the Developer a certificate of appropriateness for a project design to which many members of the public objected. As in Quality Towing, the issue being discussed in secret by BAR members involved the expenditure of public funds, in this case for the Project. As in Quality Towing, the "FOIA was enacted to prevent the government from acting in secret, South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 447 S.E.2d 843 (1994), and "[t]his kind of secret determination is exactly what FOIA was designed to prevent." 345 S.C. at 163.

These secret meetings also violated statutes and ordinance other than the FOIA. For example, Summerville Town Ordinance 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." Discussion by groups of BAR members of what design changes to make for approval of the Project is the transaction of business. In addition, the failures of the BAR to allow members of the public to attend and to give public notice of the time and place of these meetings violated Summerville Town Ordinance, Sec. 32-176(d)("[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). The failure

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4 S.C. Code Ann. § 30-4-60 ("[m]eetings of public bodies shall be open;" "[e]very meeting of all public bodies shall be open to the public"); S.C. Code Ann. § 30-4-80(a) requires public notice of all regular meetings and agendas of "[a]ll public bodies"); S.C. Code Ann. § 30-4-90(a) ("[a]ll public bodies shall keep written minutes of all of their public meetings"); S.C. Code Ann. § 30-4-90 (b)("[t]he minutes shall be public records and shall be available within a reasonable time after the meeting").

5 The public had a right by ordinance to comment at BAR meetings on proposed demolitions (Town Ordinance, Sec. 32-182(b)) and could try to communicate their views about the Project to BAR members at any time, but those opportunities were impaired and ineffective when the public was deprived of information about the Project due to "secret" meetings of BAR members, the Developer and Town staff about which the public was not aware.

of the BAR to keep records and minutes of the business it transacted at these secret "workshop" meetings violated Sec. 6-29-870(D)("the [BAR] shall keep minutes of its proceedings . . . and shall keep records of its examinations6 and other official actions, all of which **immediately** must be filed in the office of the [BAR] and must be a public record")(emphasis added). Moreover, the failure of the BAR to provide these documents regarding these secret meetings to the Circuit Court as part of the BAR record violated the requirements of Section 6-29-920(A) that the BAR "must file with the clerk a duly certified copy of the proceedings held before the [BAR]."7

2. THE CIRCUIT COURT INCORRECTLY EXCLUDED FROM THE BAR RECORD MATERIAL EVIDENCE PETITIONERS DESIGNATED TO BE IN THE BAR RECORD SHOWING THAT THE BAR ACTED UPON AND TRANSACTED BAR BUSINESS AT ITS SECRET "WORKSHOP" MEETINGS.

On March 22, 2016, Petitioners filed with the Court of Appeals their initial Designation of Matter, (App. 1271-1272), which included two items, #5 and #12, which the Court of Appeals later required Appellants to delete from the BAR record, (App. 1269), in response to a motion to exclude that evidence by the Respondents (App. 1282-1287). Appellants vigorously objected to the exclusion of item #12, (App. 1291-1299), which are detailed notes handwritten by BAR member John Kwist ("Kwist notes") describing what he witnessed at the secret BAR "workshop" meeting he attended on December 12, 2014, referenced above (App. 1274-1280).

Appellants objected to exclusion of this item #12 from the BAR record in a filing with the Circuit Court, (App. 1291-1299), due to Respondents' concealment of the existence of the notes, thereby preventing Appellants from including these Kwist notes as part of the BAR record as required by S.C. Code Ann. § 6-29-920. Appellants told the Court of Appeals that the Kwist notes evidenced that the BAR conducted BAR business at the December 12, 2014, secret meetings

6 What occurred at the secret meetings on December 14, 2014, precisely were "examinations" by BAR members and the Town staff of the Developer's new designs of the Project.
7 Because the examinations of the Project designs should have been made in public, a record of those examinations should have been filed and available to the public, instead of having been kept secret.

by examining developer plans, discussing disqualifying conflicts of interest of two BAR members and taking other official actions without the quorum required by both the FOIA and by Summerville Town Ordinance Sec. 32-176(e), without keeping records as required by law and without public knowledge and participation as required by law. Further. Appellants told the Court of Appeals 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 BAR record to the Circuit Court as required by SC Code § 6-29-920(A).

By excluding item #12 from the record, the BAR succeeded in avoiding the Court of Appeals 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 was "acting upon" BAR business in violation of SC Code Ann. § 30-4-70(c). By having secreted these documents and not included them in the BAR record submitted to the Circuit Court, the BAR succeeded in evading judicial review of its secret meetings by the Circuit Court.

It is true that there exists another lawsuit indirectly 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 BAR record.

3. THE BAR VIOLATED FOIA, STATE STATUTES AND TOWN ORDINANCES BY (A) UNREASONABLY RESTRICTING ACCESS TO INSPECT AND COPY THE DEVELOPER'S APPLICATIONS BEFORE THE MEETINGS AT WHICH THE BAR CONSIDERED THOSE APPLICATIONS; (B) PREVENTING THE PUBLIC FROM SEEING, HEARING AND PARTICIPATING IN A PUBLIC BAR MEETING WHERE THE BAR MADE KEY DECISIONS AFTER CONSIDERING THOSE APPLICATIONS; AND (C) FAILING TO ALLOW THE PUBLIC TO SPEAK AT AND

TO NOTICE THE PUBLIC'S RIGHT TO SPEAK AT THE MEETINGS WHERE THE BAR CONSIDERED THE APPLICATIONS.

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" (id.) (emphasis added). Neither the BAR nor the Town created or applied reasonable rules regarding pubic requests to inspect or copy BAR applications. 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 Summerville Town Ordinance Sec. 32-182(b) (R. pp. 957-958; Brief of Appellants, pp. 41-42). 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 of Appeals' ruling to the contrary was incorrect because, in violation of S.C. Code Ann § 30-4-30(a), 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 by applying its rule that inspection and copying be allowed only after the passage of 15 days after having received a written FOIA request even when that would cause delay until after the BAR meeting at which the BAR would consider the requested documents (R. pp. 957-958; Brief of Appellants, pp. 41-42).

Similarly, the public's rights to oppose the Project were violated when the BAR abridged the public's ability to see, hear and participate at the key BAR meeting on January 5, 2015, (R. pp.

957-958; R. pp. 921-922, 957-958; Brief of Appellants, pp. 42-43), where the BAR made the critically important decisions to approve unanimously demolition of a structure and to approve by a 5-1 vote "conceptual/preliminary approval" of the project (R. p. 922). Moreover, as found by the Court of Appeals, no member of the public was allowed or given an opportunity to speak at this meeting, Opinion No. 5687 at p. 6 ("The [BAR] did not take public comment at this meeting"), including about demolition about which the public had a right to speak according to Summerville Town Ordinance Sec. 32-182(b), (Brief of Appellants, pp 39-41), even though the advertisement the BAR published noticing that meeting specifically had represented that at that meeting the BAR would "accept public comment" (R. p. 865).

The BAR avoided public input also by deliberately causing this critical January 5, 2015, meeting to occur in a room too small to contain the overflow crowds attempting to attend the meeting instead of in a much larger room available in the same building nearby, causing the crowds to stand and to sit on the floor in a hallway outside the meeting room without any sound or amplification system and causing the public not to be able to see, hear or participate in the meeting. (R. pp. 956; 957-958; 916-917). 8 That violated the Freedom of Information Act. See Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998).

The Wiedemann case pertains to the right of a Town council to hold a meeting out-of-town when there was "**no undue burden to the public**," Wiedemann, 330 S.C. at 537 (emphasis added), and when "there was **no evidence any members of the public were prevented from attending the meeting.**" Id. (emphasis added). However, Wiedemann provides no authority allowing, as in

8 These documents evidencing these facts were submitted on the record by the Appellants and not objected to by the Respondents. Therefore, this evidence should be considered as valid and correct as regarding evidence submitted on the record by the Respondents.

this case, a BAR to create an "undue burden to the public" by unnecessarily holding a BAR meeting where the public could not see, hear or participate in the meeting and the public was forced to stand and to sit on the floor in a hallway out of view and hearing of the meeting when a larger room in which that meeting could be held in the same building was readily available (R. pp. 956; R. pp. 957-958; R. pp. 916-917). 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," (Wiedemann, 330 S.C. at 535 fn2), and the fact that the BAR placed members of the public in a hallway not containing speakers, a microphone or audio or visual equipment thereby preventing the public to hear, speak at and see the BAR meeting. (R. pp. 956; R. pp. 957-958; R. pp. 916-917).

The BAR also violated the public's rights to try to influence the BAR decisions by failing to provide written notice of the public's right to speak at BAR meetings where the BAR considered the Developer's applications for demolitions of buildings, in violation of Summerville Town Ordinance Sec. 32-182(b),9 and by in other respects interfering with the public's right to speak at BAR meetings (Brief of Appellants, pp. 37-38, 39-41, 42-43). The BAR published notice, as required by Sec. 32-182(b), that the public would have an opportunity to comment at a BAR meeting about proposed demolition only regarding one of the eight BAR meetings where demolition was considered by the BAR, i.e., at the BAR meeting on January 5, 2015, (R. p. 865), but the BAR failed to allow or give an opportunity to any member of the public to speak to the

9 No advertisement was placed stating people could speak at the following BAR meetings where the BAR considered demolition: 10/6/2014; 11/3/2014; 1/12/2015; 4/6/2015; 5/11/2015; 6/1/2015; 7/6/2015; 8/3/2015. (R. pp. 864, 865, 866, 867). In addition, none of the letters of notification sent to adjacent property owners as required by Summerville Town Ord., Sec. 32-176(d) advised the public could comment at the BAR meetings. (R. pp. 869-872, 873-874, 875-876, 877-880, 881-883).

BAR at that January 5, 2015 meeting. (Opinion No. 5687, at p. 6; Brief of Appellants, pp. 39-41).

4. THE CIRCUIT COURT SHOULD NOT HAVE ALLOWED ON THE BAR RECORD AFFIDAVITS, A DECISION, FINDINGS AND CONCLUSIONS, AND MINUTES OF MEETINGS, CREATED BY THE BAR MONTHS AFTER THE BAR'S DECISIONS HAD BEEN MADE AND APPEALED AND AFTER EXPIRATION OF THE THIRTY-DAY DEADLINE.

The decisions appealed to the Circuit Court were made by the BAR on April 6, 2015, and on May 11, 2015. Petitioners' appeals to those two BAR decisions were filed with the Circuit Court on May 6 and May 22, 2015, respectively.10

On August 5, 2015, the BAR submitted to the Circuit Court Clerk, as required by S.C. Code Ann. § 6-29-920(A), a "certified copy of the proceedings [previously] **held** before the [BAR], including a transcript of the evidence [previously] **heard** before the [BAR]," id. (emphasis added), on April 6 and May 11, 2015, the dates on which the BAR had made its two decisions regarding which the Petitioners already had filed appeals on May 6 and May 22, 2015, respectively. (R. pp. 14-15). That "certified copy" included minutes of the April 6 and May 11, 2015, BAR meetings evidencing the decisions the BAR **had made** on April 6 and May 11, 2015 (R. pp. 14-15; Brief of Appellants, R. p. 5).

However, added to the "copy of the proceedings **held** before the [BAR]" on April 6 and May 11, 2015, that the BAR submitted to the Circuit Court Clerk was a new seventeen-page document entitled "Decision of the Town of Summerville Board of Architectural Review, Including Findings of Fact and Conclusions of Law" ("BAR Findings") purporting to constitute a new "decision" and new "findings and conclusions" not adopted by the BAR previously on April 6 or May 11, 2015, but adopted instead on August 3, 2015, (R. p. 3; R. pp. 939-941), nearly **three**

10 Both these appeals were consolidated into this one action. (R. pp. 19-21).

months after the BAR had made the specific April 6 and May 11, 2015, decisions that Petitioners already had appealed.

In addition, at the August 14, 2015 hearing about the appeals to the BAR's April 6 and May 11, 2015, decisions, the Circuit Court Judge requested *sua sponte* that the BAR supplement the record of the May 11, 2015, BAR meeting with "minutes" (but not with the transcript record and the agenda as provided for all other BAR meetings) "of the BAR meetings of June, July and August of 2015, wherein the BAR [findings were] discussed and ultimately approved" (R. p. 4). The BAR provided the Court these June 1, July 6 and August 3, 2015 minutes, along with the Bar Findings adopted by the BAR on August 3, 2015, as part of the BAR record existing when the Circuit Court rendered its decision on September 24, 2015, upholding the BAR decisions the Appellants had appealed on May 6 and May 22, 2015, that the BAR had made on April 6 and May 11, 2015.

In addition, the Respondents gratuitously sent the Circuit Court two Affidavits, dated July 8 and July 9, 2015, to add to the BAR record despite the fact that the BAR decisions being appealed were made on April 6 and May 11, 2019, for the stated purpose of trying to persuade the Judge not to make a decision adverse the Developer (who was not even a party to the BAR appeal) and, if the Court did so, to require a bond (R. pp. 156-163; R. pp. 164-167; R. p. 1023).

On September 24, 2015, the Circuit Court issued an Order, filed October 23, 2015, affirming the decisions of the BAR made on April 6 and May 11, 2015 (R. p. 1, 7). The BAR record upon which that Order was issued included as evidence, in error, the two new affidavits, the new "decision," the new "findings and conclusions" and the three sets of new Minutes referenced above newly created after the BAR decisions being appealed had been made (on April 6 and May 11, 2015) and the appeals of those BAR decisions had been filed (on May 6 and May

22, 2015) (R. p. 3, 4; R. pp. 156-163; R. pp. 164-167; R. p. 1022).

The addition of these affidavits, new "decision," new "findings and conclusions" (emphasis added), and June, July and August, 2015, BAR meeting minutes on the BAR record already filed with the Circuit Court on August 5, 2015, violated the clear mandate in S.C. Code Ann. § 6-29-930(A) that "[t]he findings of fact by the [BAR] are final and conclusive on the hearing of the appeal [and] the **court may not take additional evidence**." (Id.) (Emphasis added.) These new documents added to the BAR record were "additional evidence" taken, in violation of S.C. Code Ann. § 6-29-930(A), after the BAR's April 6 and May 11, 2015, decisions had been rendered and appealed. If they were not evidence, the BAR and the Circuit Court would not have requested, submitted or allowed them. The very purpose of these documents having been added to the Bar Record after the BAR's April 6 and May 11, 2015 decisions was to provide additional evidentiary support to help justify and persuade this Court to uphold those BAR decisions after the BAR had the opportunity to read and respond to the grounds for appeals of the April 6 and May 11, 2015, BAR decisions that had been filed by the Appellants on May 6 and May 22, 2015. That additional support is "additional evidence" prohibited by S.C. Code Ann. § 6-29-930(A). No claim that the Court did not consider or rely on this "additional evidence" changes the fact that this "additional evidence" in fact was allowed but prohibited.

The language contained in S.C. Code Ann. § 6-29-930(A) evidences the Legislature's intent that the appeal to the Circuit Court be based on the evidence that existed at the time the BAR made its decisions being appealed, not based on subsequent affidavits, and a purported "Decision," "Findings and Conclusions" and "Minutes" created by the BAR nearly three months after the occurrence of the BAR decisions being appealed and after the filing of the appeal regarding the decisions being challenged.

That the Legislature did not intend for a BAR to be able to create and provide the Circuit Court a BAR record containing new affidavits, a new "Decision," new "Findings and Conclusions" and three new sets of "Minutes" created months **after** the making of the BAR decisions being appealed and **after** the filing of the appeal of those decisions had occurred is further evidenced by the requirement in S.C. Code Ann. § 6-29-920(A) that the BAR was required to file with the Circuit Court Clerk the Bar Record, "**including its findings of fact and conclusions**" "**within thirty days from the BAR's receipt of notice[s]**" of the appeals. (Emphasis added.) Because the BAR received notices on May 6 and May 22, 2015, that its previous BAR decisions were being appealed, the BAR was required to submit to the Circuit Court within thirty days after the BAR's receipt of those notices of appeal, i.e., no later than June 22, 2015, whatever it had as of that date or nothing at all, and was prohibited from taking, as it did, a couple of extra months to manufacture new evidence in violation of the "no new evidence" prohibition of S.C. Code Ann. § 6-29-920(A). The BAR, the Circuit Court and the Court of Appeals clearly violated S.C. Code Ann. § 6-29-920(A) when it allowed inclusion in the BAR Record of the new affidavits, the new "Decision," the new "Findings and Conclusions" and three sets of new "Minutes" created nearly three months after the BAR's receipt of the Appellants' notices of the appeals.

The BAR's findings of fact considered by the Circuit Court should have been **only those findings, if any, that existed on April 6, 2015 and May 11, 2015**, the respective dates the BAR made the decisions that were appealed. After the BAR decisions made on April 6 and May 11, 2015, were appealed to the Circuit Court on May 6 and May 22, 2015, the BAR lacked jurisdiction to take any additional action regarding those decisions except to furnish the Circuit Court a copy of the "proceedings held [on April 6 and May 11, 2015] before the" BAR as required by S.C. Code Ann. § 6-29-920(A). The affidavits, decision, findings and conclusions that did not exist on the

dates the April 6, 2015 and May 11, 2015 decisions being appealed were made logically could not be part of the record of those appeals and could not be consistent with the mandate in S.C. Code Ann. § 6-29-930(A) that the "court may not take additional evidence."[11]

The Court's allowing this "additional evidence" on the BAR record was extremely prejudicial to the Appellants. The Respondents generated this "additional evidence" after the Appellants had filed both of their Petitions for appeal, and literally crafted their purported "findings and conclusions" adopted on August 3, 2015 to rebut, often in conclusory fashion and without supporting evidence, the grounds for appeal stated by the Appellants in their Petitions on May 6 and May 22, 2015 (R. pp. 752-754). As just one of many examples, in response to claims by Appellants in their Petitions on April 6 and May 11, 2015 that the BAR had violated the Freedom of Information Act, the "additional evidence" the BAR adopted on August 3, 2015 and filed with the Court on August 5, 2015 included conclusory and unsupported findings by the BAR that the BAR had not violated the Freedom of Information Act (R. p. 46, § 59).

If this precedent of accepting "additional evidence" after final BAR decisions already have been made and after Petitions to appeal those decisions already have been filed with a Circuit Court is allowed to stand, in the future this BAR and other BARs in South Carolina will be able to nullify and render moot judicial appeals of BAR decisions simply by allowing BARs to create and add to BAR records "additional evidence" "to clean up the record" and to supply "rolling facts and conclusions" rebutting the grounds stated in the Petitions for appeal. The BAR clearly lost jurisdiction over each BAR decision appealed the moment the Appellants filed a Petition with the

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11 At oral argument on August 14, 2015, counsel for Appellants asked the Circuit Court to "disregard the findings of fact and conclusions of law . . . filed on August the 5th, 2015 [because] [t]hey're not part of the record . . . are not the contemporaneous findings or determinations of the board, but they are an after-the-fact attempt to clean up the record." (R. p. 752).

Circuit Court appealing that decision, and therefore lacked the authority to take any action thereafter to supplement with "additional evidence" the BAR record being appealed.

5. THE CIRCUIT COURT ERRED BY FAILING EITHER TO FIND THE BAR DECISIONS TO BE INCORRECT OR CORRECT WITHOUT ACCEPTING "ADDITIONAL EVIDENCE," OR TO REMAND THOSE DECISIONS TO THE BAR FOR A "REHEARING," AS REQUIRED BY S.C. CODE ANN. § 6-29-930(A).

For reasons stated herein, the Circuit Court should have determined that the BAR decisions were incorrect. As explained above, the Circuit Court should not have determined, as it did, that the BAR decisions were correct after accepting as "additional evidence" affidavits, a "decision," "findings and conclusions" and three sets of minutes that were not part of the BAR record at the time the appeals were noticed and the decisions being appealed had been made. Instead of ruling the BAR was correct on a record containing that additional evidence, the Circuit Court should have ruled the BAR decisions were correct or incorrect without that evidence or, in the alternative, determined that the certified record was insufficient for review and remanded the case to the BAR "for rehearing" as provided in S.C. Code Ann. § 6-29-930(A).

At a minimum, the Circuit Court should have remanded the case to the BAR "for **rehearing**." Id. (Emphasis added.) Courts should not assume that the BAR would reach the same result upon remand "for rehearing." Indeed, the BAR very well may have reached a different result as a result of a "rehearing" without the wrongfully added evidence due to any number of factors, including that BAR members may change their minds after receiving citizen inputs or other additional information and/or that different BAR members may attend a BAR meeting at which a "rehearing" and a new decision would occur than attended the meetings at which the original decisions being appealed were made. The one option the Circuit Court did not have was the one it did, which was to decide the BAR decisions were correct but based on a BAR record containing

affidavits, minutes, a "decision" and "facts and conclusions" that were additional evidence placed in the BAR record in violation of S.C. Code Ann. § 6-29-930(A).

6. THE COURT OF APPEALS ERRED BY MISTAKENLY SHIFTING THE BURDEN OF CREATING AND PRESERVING THE BAR RECORD ON THE APPELLANTS, WHEN THAT BURDEN WAS ON THE BAR.

Petitioners contend that the BAR Secretary did not receive complete applications from all required parties at least fourteen days before, and the Town's Planning Department did not receive complete applications from all required parties at least ten days before, the next regularly scheduled BAR meeting, in violation of Summerville Town Ordinance Sec. 32-176(i), 32-181(c)(6), and that there is nothing in the BAR record evidencing when the BAR applications were received (Brief of Appellants, p. 23).

Respondents answered those allegations by stating "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" (Respondents Final Brief, p. 10). In addition, Respondents stated "it is Appellants' duty to show error. The Appellant is merely speculating as to when applications were submitted" (Respondents Final Brief, p. 11).

Those claims by the Respondents are not correct. That the applications were not submitted within the time limits of Sec. 32-176(i), 32-181(c)(6) is evidenced circumstantially by the facts that the BAR did not have a date on any of the Developer's applications, (Brief of Appellants, at 23), and refused to let the public inspect or copy any of those applications before the BAR meeting at which the applications were considered (R. pp. 957-958; Brief of Appellants, pp. 41-42). Moreover, Respondents are in error when they claim that even when specific statutes and ordinances impose specific requirements on the operation of the BAR, the BAR can avoid enforcement of those requirements simply by not documenting the BAR's failures to comply with

the requirements and then claiming no enforcement is allowed because there is no evidence of a violation.

Implicit in the requirements in the statutes and ordinances and in the mandate that the BAR provide the Circuit Court a record of its actions when its decisions are appealed, S.C. Code Ann. § 6-29-920(A), is that the BAR document that it has complied with these mandates. For example, since Town ordinances require BAR applications to be submitted to certain Town parties within ten and fourteen days, respectively, the burden is on the BAR to evidence its compliance with those requirements and not on the public to prove non-compliance. The public's proving non-compliance with specific legal mandates on the BAR would be an impossibility unless the BAR documented its compliance with those mandates and requiring the public to prove non-compliance based only on the incomplete record allowed by the BAR would enable the BAR to avoid enforcement of any BAR requirement.

Similarly, Petitioners contend that the BAR published a notice of the January 5, 2015, BAR meeting in which it said that the BAR would "accept public comment," (R. p. 865), and that coupled with Sec. 32-182(b) gave the public a right to speak about proposed demolitions considered by the BAR at its January 5, 2015 meeting. Respondents replied by saying that, according to the transcript of the January 5, 2015, meeting, "the BAR chairman did not stop anyone from speaking and did not prevent persons from discussing matters which were entirely outside the jurisdiction of the BAR," (Respondents' Final Brief, p. 16), and that the BAR Chairman gave instructions at the beginning of the meeting about limitations on any public remarks. Id.

The public also had a right to speak at the January 12, 2015, meeting where the BAR considered demolition for the Project, but there is no evidence that the BAR publicized that meeting or the public's right to speak about demolition at that meeting as required by Sec. 32-

182(b), and the public did not speak at that meeting (R. pp. 919-920).

While the agendas of the January 5 and 12, 2015, meetings clearly show that at those meetings the BAR was to consider demolition for the Project, nowhere in those agendas was a time allowed for members of the public other than the Developer to speak at those meetings (R. p. 887; R. p. 888). Moreover, nowhere in the transcripts of those meetings were the members of the public other than the Developer told when they could speak and the transcripts show that in fact no member of the public other than the Developer did speak even though they wanted to speak (R. pp. 413-482; R. pp. 483-501). The burden of proof should be on the BAR to show it offered a time for the public to speak at a BAR meeting where Sec. 32-182(b) gave them a right to speak, not on the public to prove it tried to interrupt the BAR meeting to be allowed to speak. That especially is true when, as at the January 5, 2015, meeting the BAR had advertised that the public could speak and the BAR Chairman had stated the public would be allowed to speak, and the burden therefore was on the BAR to tell the public when it could speak at the meeting instead of abruptly ending the meeting before they had an opportunity to speak.

Again, the BAR completely controls what it accepts on its Record and has the statutory duty, S.C. Code Ann. § 6-29-920(A), to give the Circuit Court a complete copy of the Record it created when an appeal to a BAR's decision has been filed. The BAR must have the responsibility of documenting its compliance with the legal requirements imposed on it, including allowing people to speak when Summerville Town Ordinance Sec. 32-182(b) gives them a right to speak and submitting a complete BAR record when S.C. Code Ann. § 6-29-920(A) mandates it do so. If the BAR is not responsible for documenting compliance and instead the public has to prove the BAR's non-compliance, the BAR can avoid virtually any judicial scrutiny simply by omitting evidence of its non-compliance from the Record.

7. THE COURT OF APPEALS INCORRECTLY RULED THAT APPELLANTS COULD NOT APPEAL CERTAIN ISSUES BECAUSE THE LOWER COURT HAD NOT RULED ON THEM AND APPELLANTS HAD NOT FILED A RULE 59(e) MOTION, WHEN IN FACT THE CIRCUIT COURT SPECIFICALLY HAD RULED THAT "NONE" OF THE GROUNDS FOR APPEALING BAR DECSIONS TO THE CIRCUIT COURT WARRANTED REVERSAL OF THOSE BAR DECISIONS.

The Court of Appeals stated that it would not rule on Petitioners' claim that the BAR unreasonably had restricted access to inspect and copy the Developers' BAR applications because the Circuit Court had not ruled on that issue and the Appellants had not filed a Rule 59(e) motion Opinion No. 5687 at p. 15. Despite that ruling, the Court of Appeals nevertheless did rule on that claim, incorrectly, by denying it. Id.

Petitioners did not file a Rule 59(e) motion because the Circuit Court specifically had ruled that "**[n]one** of the grounds for appeal warrants this Court's reversal of the decisions of the [BAR]" (R. pp. 7, 18) (emphasis added). By stating this, the Circuit Court plainly and clearly communicated that the Circuit Court had ruled on and rejected **all** of Appellants' grounds for appeal, and thereby lead the Petitioners to believe there was no issue the Circuit Court had not ruled on that required Petitioners to file a Rule 59(e) motion to preserve the issue.

Clarification is needed by the Supreme Court of whether or not a lower court's ruling that "none of the grounds for appeal warrants . . . reversal" of a government decision avoids the requirement of filing a Rule 59(e) motion to preserve for appeal issues not otherwise specifically ruled upon by the lower court. Otherwise, appellants may continue to be misled by courts into believing no Rule 59(e) motion is required when a court rules that "none" of the grounds for a court appeal warrants reversal of a government decision, and the Court of Appeals may continue incorrectly refusing to address issues because of its mistaken belief that a Rule 50(e) motion was required. If the Supreme Court rules that a Rule 59(e) motion was required under these

circumstances, that ruling should be applied only prospectively and not in this case because the Appellants were entitled to rely on the Circuit Court's clear and plain ruling that "**[n]one** of the grounds for appeal warrants this Court's reversal of the decisions of the [BAR]" (R. pp. 7, 18) (emphasis added).

CONCLUSION

For the reasons stated, petitioners ask the Court to Court to grant the petition for a writ of certiorari.

Respectfully Submitted,

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Attorneys for Appellants

February 24, 2020
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

Certificate of Service

The undersigned hereby certifies that a true copy of Plaintiffs' Petition for Writ of Certiorari has been served upon opposing counsel listed below on the 24th of February, 2020 via U.S. Postal Service.

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February 24, 2020

Jenny Abbott Kitchings
Court of Appeals
PO Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed please find a copy of the following documents filed with the South Carolina Supreme Court today:

Appellants' Petition for Writ of Certiorari
Certificate of Service

Please call me with any questions or concerns.

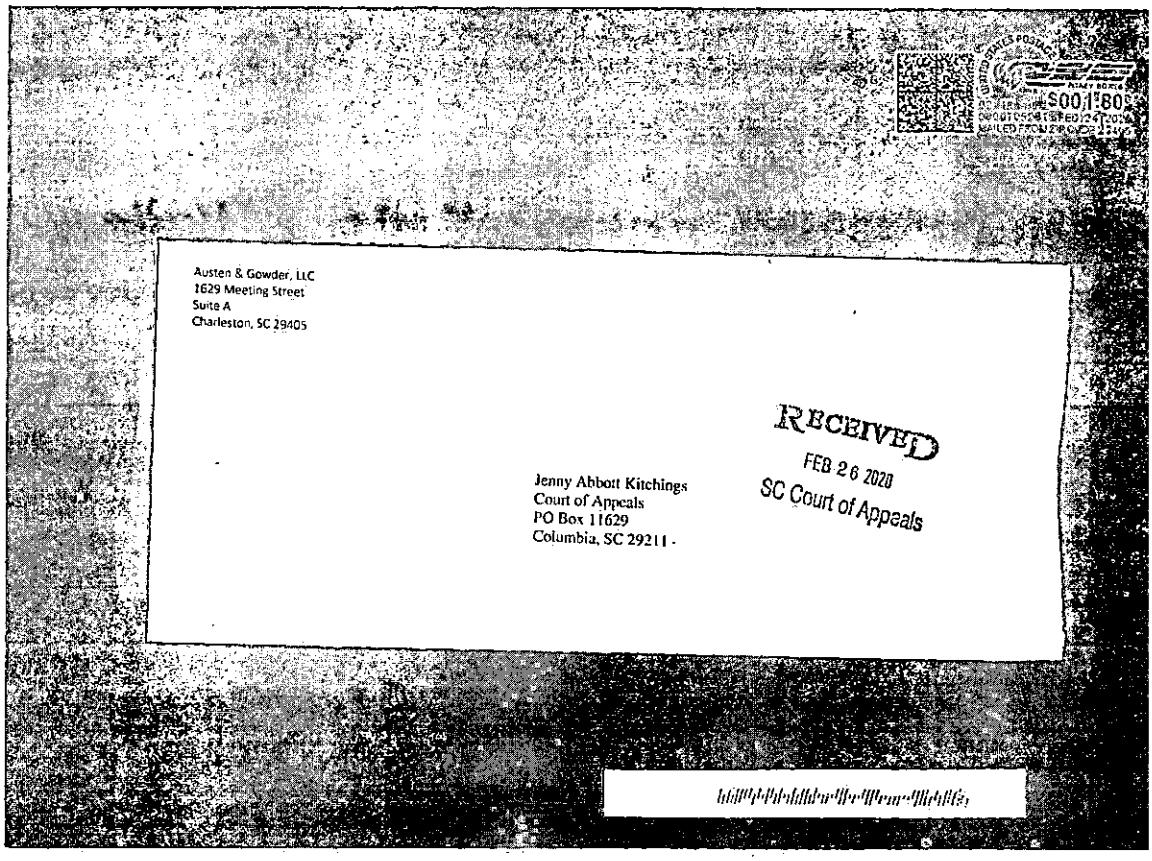
Thank you for your attention and assistance with this matter.

Sincerely,

AUSTEN & GOWDER, LLC

Rachel Fete

Rachel Fete
Assistant to W. Andrew Gowder, Jr.



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FEB 26 2020
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