

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000334

Lower Court No. 2015-CP-18- 00991

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.

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

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 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” to build and finance a project (“Project”) consisting of a hotel, restaurant, bar, garage, convention center and condominiums in

the Historic District of the Town of Summerville, South Carolina. (R. pp. 1-2, 12-13, 767, 794-852, 952).

Numerous citizens and organizations opposed this Project on the basis of its excessive mass and size; the creation of unacceptable levels of traffic, noise, tree cutting and the demolition of historic buildings; the absence of a scale model to demonstrate the appearance of the Project on the site; and its improper financing with public funds (R. pp. 372-375, 566-571, 643-646, 650-651, 655, 718-719, 767-768, 952, 953, 954-955, 956, 957-958, 959-960).

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. 3, 12, 14, 48). These appeals were consolidated into this one action. (R. pp. 19-21).

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. 1-7, 12-18). On October 9, 2019, the Court of Appeals affirmed the Circuit Court Order affirming the challenged BAR decisions. Croft v. Town of Summerville, 428 S.C. 576, 597, 537 S.E.2d 219, 230(Ct. App. 2019)(App. pp. 1215-1231). On October 24, 2019, Appellants filed a Petition for Rehearing. (App. pp. 1232-1264). On January 24, 2020, the Court of Appeals denied Appellants' Petition for a Rehearing. (App. pp. 1267-1268).

On February 24, 2020, Appellants filed with the Supreme Court a petition for a writ of certiorari. On August 20, 2020, the Supreme Court issued an order granting Appellants' petition for a writ of certiorari regarding the four issues stated below.

STANDARD OF REVIEW

The Supreme Court ruled in Austin vs. Board of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 213 (2004):

On appeal, “the Supreme Court shall” apply the same standard of review as the circuit court below: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A) (Supp.2003); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001). In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. *Id.* Furthermore, “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Restaurant Row Assocs. V. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). “However, a decision of a municipal zoning **board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.** 362 S.C. at 33, 606 S.E.2d at 213 (emphasis added.)

Thus, as with the factual findings of juries, courts should give deference to the factual findings of a BAR. However, BARs, like juries, must follow the law when making their decisions, and, as with juries, courts should not allow decisions of a BAR to stand when the BAR has failed to comply with laws in making its decisions.

ARGUMENT

This case presents the simple questions of whether the decisions of the Summerville Board of Architectural Review (“BAR”) to approve demolition and construction for the controversial Project that is the subject of this litigation were made in violation of applicable laws and, if so, what is the remedy for those violations.

The Town and the BAR took numerous illegal actions to obtain the BAR’s approval of applications for construction and demolition for a Project in the Historic District of Summerville which were sought by the Developer and by the Town as co-applicants but which were opposed by many residents of the Town. Those illegal tactics included avoiding public awareness of

information about the Project and public inputs regarding the Project in violation of numerous state and municipal laws, as stated below.

I. THE TOWN OF SUMMERVILLE BOARD OF ARCHITECTURAL REVIEW (“BAR”) VIOLATED THE FREEDOM OF INFORMATION ACT (“FOIA”),¹ THE COMPREHENSIVE PLANNING ENABLING ACT OF 1994,² AND THREE TOWN ORDINANCES³ WHEN SMALL GROUPS OF SPECIALLY APPOINTED BAR MEMBERS DISCUSSED AND CONDUCTED BAR BUSINESS WITH A DEVELOPER, TOWN STAFF AND THE TOWN MAYOR AT SUCCESSIVE SECRET “WORKSHOP” MEETINGS PURPOSEFULLY AND INTENTIONALLY HELD BY THE BAR TO EVADE COMPLIANCE WITH THOSE LAWS.

A. Each of the groups participating in the secret “workshop” meetings selected by the Town staff to avoid public scrutiny were committees formed by the Town subject to the open meetings laws.

On December 12, 2014, six of seven⁴ BAR members met secretly with the Developer and with the Town Planner in one of at least two successive “**BAR requested**,” (R. p. 945)(emphasis added), “workshop” meetings, (R. p. 945), “for the Dorchester Hotel Project,” (R. p. 945), held in “the Annex Building, 3rd floor Conference Room next to [Town] Council Chambers,” (R. p. 946), as arranged by official BAR email and telephone communications to those BAR members, the Developer and the Town Planner from the Secretary of the BAR, Lucy Dreyer. Croft v. Town of Summerville, 428 S.C. 576, 592, 537 S.E.2d 219, 227 (Ct. App. 2019) (“Developer held a series of ‘workshops’ with members of the Board to discuss the Project” . . .). Three members of the BAR attended the first “workshop” and three other members of the BAR 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. pp. 945, 946), “[t]o avoid any possibility of a

¹ S.C. Code Ann. §30-4-10, *et. seq.*

² S.C. Code Ann. §6-29-310, *et. seq.*

³ Summerville Town Ordinances 32-176(d), 32-176(e), 32-182(b)

⁴ The seventh member of the BAR, Jeff Bowers, attended neither of these “workshop” meetings because he had recused himself from participating in all BAR discussions about the Project due to his conflict of interest. (See, e.g., R. pp. 942, 943, 944).

quorum (as this is not a public meeting),” (Id.)(emphasis added)). The expressly stated purpose for these “workshop” meetings in BAR emails was “to give [the BAR members] an opportunity to review plans and discuss concerns [with the Developer] from prior [BAR] meetings” and “[t]o avoid any possibility of a quorum,” (R. p. 945); (see Croft v. Town of Summerville, 428 S.C. 576, 592, 537 S.E.2d 219, 227 (Ct. App. 2019) (App. p. 1227)), to try to justify meeting secretly without public notice, participation or records. (R. p. 41, § 50; R. p. 945; App. p. 1227).

These two secret December 12, 2014, meetings were unknown to the public when they occurred and for weeks thereafter. Each of these meetings was attended by a different group of specially-appointed BAR members that consisted of just one less than a quorum of the entire BAR membership (i.e., 3 members appointed to each of two groups, when 4 members would have been a quorum of the entire seven person BAR membership) who at the meeting discussed and decided with the Town Planner and the Developer what Project redesigns the Developer should make to obtain BAR approvals and what construction and demolition requests BAR members would approve at an upcoming BAR meeting scheduled for January 5, 2015, without the public being aware they were meeting and without there being any of the openness and accountability safeguards and protections the FOIA and other applicable state statutes and Town ordinances required. (R. pp. 447, 945, 946; App. pp. 1274-1280).

These two meetings on December 12, 2014, were officially arranged by the BAR Secretary, who appointed by name in writing the three BAR members who comprised each of the two groups (i.e., committees) that met and who designated when and in which Town room each of the two groups would meet. (R. pp. 945, 946). **The BAR Secretary’s official designation of the members of each of these two groups for the official purpose of reviewing and discussing with the Developer and the Town Planner the redesign plans for the Project was the appointment of**

a “committee[] . . . and the like” within the meaning of S.C. Code Ann. § 30-4-20(a). Each of these two 12/12/14 *ad hoc* committees had three BAR members and since all three members of each appointed *ad hoc* committee attended each of these meetings, a quorum of each of the committees was present at each of the meetings. Therefore, each of those meetings was subject to the requirements of FOIA, which the BAR violated by holding those *ad hoc* committee “workshop” meetings without public notice,⁵ without an agenda,⁶ without minutes⁷ and, most importantly, without allowing the public to attend.⁸

In addition to the above, on July 21, 2014, the BAR Secretary arranged by her 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 it looking like a quorum)**” where the BAR members discussed with the Mayor and with the Developer 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); Croft, 837 S.E. 2d at 227 (“Developer held a series of ‘workshops’ with members of the Board to discuss the Project . . . Town employee reminded [BAR] members that **two members would meet with the Developer at a time so there would be `no possibility of it looking like a quorum`**”)(emphasis added). The BAR Secretary designated when and where each of these three meetings would occur and which BAR members would be a member of each of the three BAR groups that met with the Mayor and the Developer on July 21, 23 and 29, 2014, respectively, “to **get [their] input and thoughts on this project.**” (R. p. 947)(emphasis added).

⁵ See S.C. Code Ann. § 30-4-80(a)

⁶ See S.C. Code Ann. § 30-4-80(a)

⁷ See S.C. Code Ann. § 30-4-90(a),(b)

⁸ See S.C. Code Ann. § 30-4-60

At the January 5, 2015 BAR meeting at which the BAR considered applications for the Project, BAR member John Kwist (“Kwist”) publicly made the following statements about the Hotel Project to the Developer:

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

It was not until BAR member John Kwist publicly mentioned at that January 5, 2015, BAR meeting, as quoted above, the secret “workshop” meeting Kwist and other BAR members had attended on December 12, 2014, that the public became vaguely aware that 100% of the BAR members who would vote publicly at that January 5, 2015, BAR meeting whether to approve the redesign of the Project and whether to approve demolition for the Project had been appointed by the BAR to meet, and had met, with the Developer, the Town Planner and those other BAR members, secretly and in two back-to-back shifts at the same Town location where the January 5, 2015, BAR meeting was being held, to discuss and to make decisions about demolition and the design of the Project. (R. pp. 447-453; R. p. 945 (“this is a workshop to give [the BAR members] an opportunity to review plans and discuss concerns [with the Developer] from prior [BAR] meetings”); R. p. 946; App. p. 1227 (“Developer held a series of ‘workshops’ with members of the Board to discuss the Project”); App. pp. 1274-1280).

B. These committees of the BAR attending these secret “workshops” were conducting BAR business.

These two secret “workshop” meetings on December 12, 2014, were not innocuous. They were not just informal discussions among a couple of BAR members or of a BAR member with a developer. At these two secret December 12, 2014, meetings of the six BAR members who voted to approve the Project’s redesign and to approve demolition at the January 5, 2015, BAR meeting,

the BAR members, the Developer and the Town Planner discussed the height, size and mass of the Project; conflicts of interest by two of the voting BAR members whose businesses might profit from the Project; the purchase by the Town of new land for the Project; whether the condominiums and the hotel would be separated by a road or an ally; and other characteristics of the “revised plan” for design of the Project. (R. pp. 447-453, 956; App. pp. 1274-1280).

The business conducted at these successive December 12, 2014, committee “workshops” consisted of BAR members and the Town Planner 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; BAR Minutes, October 6, 2014, at 3, R. p. 909: “Chairman Dixon . . . requested that the architect take comments under consideration and **come back for conceptual approval with a re-design**”) (emphasis added)), in preparation for an upcoming public BAR meeting on January 5, 2015, at which the Developer’s and the Town’s joint applications for construction and demolition regarding the Project would be discussed, considered and possibly approved, delayed or rejected. (R. p. 945: “[T]his is a [12/12/14] workshop to give you an opportunity to review plans and discuss concerns from prior meetings”) (emphasis added).

At these December 12, 2014, “workshop” meetings all voting BAR members, the Developer and the Town Planner discussed and overtly or at least tacitly agreed what would be the height (3, not 4 stories), mass and design (e.g., one building or two, separating condominiums and the hotel) of the Project. The decisions made in these two meetings determined or at least influenced the fundamental changes to the design of the Project that had been submitted to the BAR but not approved at the BAR at its October 6, 2014, meeting (compare R. p. 909 with R. pp. 945, 946). As stated above, the transcript of the January 5, 2015, BAR meeting shows that at that

meeting BAR member Kwist expressly referred to what was discussed by the BAR members, the Developer and the Town Planner at the secret “workshop” meeting that Kwist attended on December 12, 2014. (R. p. 447). The fact that BAR member Kwist specifically referenced at the January 5, 2015, public BAR meeting what he had heard discussed at the secret December 12 “workshop” meeting Kwist had attended, (R. p. 447), shows that Kwist, and perhaps other BAR members who attended that meeting, relied upon and at least were influenced by what occurred at the secret December 12 “workshop” meetings.

Once these fundamental design changes were agreed upon at the December 12 meetings, those changes could not be and were not changed because the Developer had relied on those December 12, 2014, decisions when preparing the redesigns for presentation to the BAR at its January 5 meeting. That is evident from the inability at the January public BAR meeting of Kwist to overcome the resistance of the Developer to making changes to the fundamental design (e.g., 3 stories, one building 330 yards long instead of two buildings separated) of the Project (see R. pp. 447-453; App. 1274-1280), and that at the January public BAR meeting “[t]he Board [BAR] **gave conceptual/preliminary approval of the [Hotel] project.**” (R. p. 36 § 26 (emphasis added); R. pp. 459-460, 915)⁹ and “**approved the demolition of the structure** located at 200 W. Richardson Avenue. . . .” (R. p. 36 § 24 (emphasis added); R. p. 36 §§ 22, 23; R. p. 915).

C. These secret committee meetings of the BAR calculated to avoid public scrutiny violate the open meeting provisions of the Freedom of Information Act.

⁹ Handwritten by the BAR Chairman at the bottom of the BAR Application for the BAR meeting on January 5, 2015, is the following: “Approved as Noted [check mark made] conceptual & preliminary only.” (R. p. 858)(emphasis added).

These secret December 14, 2014, meetings violated the open meetings provisions of the FOIA, including S.C. Code Ann. § 30-4-60, requiring that "[m]eetings of public bodies shall be open" and that "[e]very meeting of all public bodies shall be open to the public . . ." (id.) (emphasis added); S.C. Code Ann. § 30-4-80(a), requiring public notice of all regular meetings and agendas of "[a]ll public bodies" (id.) (emphasis added); S.C. Code Ann. § 30-4-90(a), requiring that "[a]ll public bodies shall keep written minutes of all of their public meetings" (id.) (emphasis added); and S.C. Code Ann. § 30-4-90(b), requiring that "[t]he minutes shall be public records and shall be available within a reasonable time after the meeting." (id.) (emphasis added).

S.C. Code Ann. § 30-4-20, defines a "[p]ublic body" as including "any public or governmental body or political subdivision of the State, including . . . municipalities . . . including committees, subcommittees, advisory committees, and the like of any such body by whatever name known . . ." (Id.) (Emphasis added). At a minimum, the above-described groups of BAR members constituting less than a quorum of the total BAR membership appointed by the BAR Secretary to discuss and/or transact BAR business at meetings on Town property and at the Mayor's home whose locations and timings were designated by the BAR Secretary constitute de facto committees that are subject to all the requirements of the Freedom of Information Act applicable to public bodies. This conclusion is supported by Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001), which held that the secret, non-public meeting of even an advisory committee to a public body was prohibited by the Freedom of Information Act. As in Quality Towing, because the BAR's secret workshops were not open to the public, the public was unable to learn what design changes and demolitions the Developer was proposing and

negotiating with BAR members and therefore was unable to comment on those design changes and demolitions to BAR members.¹⁰

As in Quality Towing, the BAR has advanced no valid reason to hold the secret, non-public meetings and discussions by a group of BAR members with the Developer and the Town Planner regarding whether the BAR would award the Developer and the Town, as co-applicants, a certificate of appropriateness approving construction and demolitions 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. (See, e.g., R. p. 796 where by contract the Town conveys property and gifts \$8,950,000 of public funds for the Project and R. p. 797 where by contract the Town loans \$3,750,000 in public funds to the Developer). 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. Also as in Quality Towing, “the [BAR] has advanced no valid reason to hold the **meetings and discussions** of the [BAR] Committee concerning a public contract in private,” (id)(emphasis added), and “[b]ecause the [BAR] Committee was not open to the public, [the public] was unable to learn [the concerns of the BAR, the Town and the Developer] and to respond to the [BAR] Committee's concerns.”¹¹ 345 S.C. at 163.

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

¹⁰ The public had a right to comment on proposed demolitions, (Town Ordinance, Sec 32-182(b)), but could not adequately do so when information about the demolitions was withheld due to “secret” meetings.

¹¹ The public has a right to speak at BAR meetings where applications for demolition would be considered. (Town Ordinance, Sec 32-182(b)). The public should have access to BAR applications for demolition before BAR meetings at which demolition applications are discussed with BAR members, to enable their comments about demolition to be informed. However, access to BAR applications was denied. See pages 20-30 infra.

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.” Croft, 837 S.E. 2d at 228. 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,” (id.)(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(d) (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 BAR’s manipulatively orchestrating secret meetings of groups of BAR members with the Developer and the Town Planner on December 12, 2014, and with the Mayor and with the Developer on July 21, 23, and 29, 2014, without a quorum of the entire BAR membership to discuss, plan and negotiate the Hotel Project violated S.C. Code Ann. § 30-4-70(c), which 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 Court of Appeals opinion 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. Croft, 837 S.E. 2d at 228. 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(d). Discussion of the BAR applications for approval of construction and demolition certainly occurred at the December 12, 2014, secret meetings. Moreover, the very acts of the BAR members, the Developer and the Town Planner 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 and about demolition for the Project involved BAR members "act[ing] upon" the Project design and the demolition applications 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, unless overruled, will embolden public bodies to conduct more public business outside of public processes and beyond the public's view and oversight.

The three successive secret "workshop" meetings of two BAR members at a time with the Developer and with the Mayor at the Mayor's home on July 21, 23 and 29, 2014, may or may not have been "social meetings," depending on how that term is defined. While those three meetings were characterized by the BAR Secretary as going to be held "in a casual setting" at the home of the Mayor, (R. p. 947), those three meetings nevertheless were held with the BAR members for the following business purposes: "to **get [their] input and thoughts on this project,**" (R. p. 947)(emphasis added), and "to **DISCUSS the Project**" with the Developer, (Croft, 837 S.E. 2d at 227 (emphasis added). Regardless of whether the meetings are considered to be "social", those three secret meetings were held by BAR members with the Developer and the Mayor and were arranged by the BAR Secretary in small groups expressly to "circumvent the spirit of requirements" of the FOIA and to "**DISCUSS or act upon,**" S.C. Code Ann. § 34-4-20(d)

(emphasis added), the design and approval of the Project without complying with the FOIA. (R. p. 947)(“no possibility of it looking like a quorum”)(emphasis added).

The two successive secret “workshop” meetings of BAR members with the Developer and Town Planner 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 BAR Secretary stating in her emails that the purpose of the meetings being in small groups was to “avoid any possibility of a quorum.” (R. p. 945).

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

D. These secret committee meetings of the BAR calculated to avoid public scrutiny also violate other provisions of state law and local ordinances.

In addition to the open meetings provisions of the FOIA, the Legislature passed both S.C. Code Ann. §§ 6-29-870(D) and 6-29-920(A) and the Town passed Summerville Town Ordinances 32-176(d), 32-176(e) and 32-182(b) as additional special safeguards to ensure that BARs operate with transparency and accountability. These legislative actions evidence the intent and special concerns by both the Legislature and the Town that the public be protected from abuses by BARs and that citizen input be facilitated by requiring BARs to act openly and not secretly.

In addition to violating FOIA, the December 12, 2014, meetings of the two groups of appointed BAR members also violated S.C. Code Ann. § 6-29-870(D) by not keeping “a record of its examinations” of the Developer’s new designs in the secret “workshop” meetings and filing

that record “**immediately**” with the BAR and making it a public record, (id.) (emphasis added), and violated S.C. Code Ann. § 6-29-920(A)’s requirement that the BAR “must file with the [circuit court] clerk a duly certified copy of the proceedings held before the [BAR].” (Id.)

In addition, these December 12, 2014, secret meetings of two groups of appointed BAR members violated (1) Town Ordinance 32-176(e), which states “a **quorum**, consisting of a majority of the total membership of the [BAR], shall be **required for the transaction of business;**” (id.)(emphasis added); (2) Town Ordinance 32-176(d), which provides that “[**a**]**ll meetings** of the [BAR] shall be **open to the public and reasonable notice** of the time and place shall be given to the public;” (id.)(emphasis added); [and] “[t]he [BAR] shall keep **minutes** of its proceedings . . . and shall keep **records of its examinations** and other official actions, all of which **immediately must be filed** in the office of the [BAR] and **must be a public record**” (id.)(emphasis added); and (3) Town Ordinance, Sec 32-182(b), which states in part that the BAR Secretary “shall publish a display advertisement . . . at least 14 days before the meeting informing the public that [an] application [for demolition] has been received, detailing the date, time and place of the meeting at which it will be considered and **stating the public will have an opportunity to comment at such meeting**” (Id.)(emphasis added).

The BAR transacted business at these December 12, 2014, meetings by discussing, negotiating and agreeing among themselves and with the Developer and the Town Planner (both the Developer and the Town were co-applicants whose designs were being considered) at those meetings what changes were required in the Project designs to obtain BAR approval. If the two groups of three BAR members did not have a quorum, then they violated Town Ordinance 32-176(e) by transacting Town business without a quorum. (Id.) If the two groups did have a quorum, they violated Town Ordinance 32-176(d) and the FOIA by not having the meetings open to the

public, reasonably noticed and documented by public minutes and records immediately available to the public. (Id.) Either way, the way the meetings were scheduled and conducted did not allow or notify the public of their right to speak at those meetings about the applicants' proposed demolitions.

II. THE COURT OF APPEALS INCORRECTLY EXCLUDED FROM THE BAR RECORD MATERIAL EVIDENCE APPELLANTS DESIGNATED TO BE IN THE BAR RECORD SHOWING THAT THE BAR DISCUSSED, ACTED UPON AND TRANSACTED BAR BUSINESS AT ITS SECRET "WORKSHOP" MEETINGS.

On March 22, 2016, Appellants filed with the Court of Appeals their initial Designation of Matter, (App. pp. 1271-1273), 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. pp. 1282-1287). Appellants vigorously objected to the exclusion of item #12, (App. pp. 1291-1299), which are seven pages of detailed notes ("Kwist notes") handwritten by BAR member John Kwist ("Kwist") describing what he witnessed at the secret BAR "workshop" meeting he attended on December 12, 2014, referenced above, (App. pp. 1274-1280).

Appellants objected to exclusion of this item #12 from the BAR record in a filing with the Court of Appeals, (App. pp. 1291-1299), due to these two secret "workshop" meetings with the Developer and the Town Planner on December 12, 2014, violating the FOIA, other state statutes and Town ordinances, as stated above, and because the Respondents concealed the existence of the Kwist Notes, thereby preventing Appellants from including the Kwist notes as part of the BAR record as required by S.C. Code Ann. § 6-29-920(A). (Id.) Appellants told the Court of Appeals that the Kwist notes evidenced that the BAR conducted BAR business at the December 12, 2014, secret meetings by examining Developer plans, discussing potentially 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, (App. pp. 1291-1299, 1274-1280). 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), (App. pp. 1291-1299).

The Kwist Notes evidence what happened at both of the two “workshop” meetings, only one of which was attended by Kwist but both of which had an identical purpose and was attended by the same Developer and Town Planner,¹² including the date and time of each meeting and the names of the five¹³ attendees at each meeting. The Kwist Notes state in part that the following occurred at the secret December 12, 2014, meeting attended by Kwist:

I. [BAR member] David [Price] indicated that . . . he himself thought that by bringing more tourists to Summerville, **his bed and breakfast business would thrive because of it. Applegate indicated that those opposed to this project are in the minority few and unfortunately got all the ‘press.’**

II. **Applegate presented the revised drawings:**

III. [BAR member] Beth [Huggins] asked if there was room on site for a "TENTEVENT." **She is in the event planning**

¹² R. pp. 946; 945 (purpose of “workshop” meetings was “to give [the BAR members] an opportunity to review plans and discuss concerns [with the Developer] from prior [BAR] meetings;” Croft v. Town of Summerville, 428 S.C. 576, 592, 537 S.E.2d 219, 227 (Ct. App. 2019) (“Developer held a series of ‘workshops’ with members of the Board to discuss the Project” . . .).

¹³ The attendees at each of the secret December 12, 2014, meetings were three BAR members; the Developer, Arthur Applegate; and the Town Planner, Madelyn Robinson. (Kwist Notes, at 1, App. p. 1274).

business, and would like to see that if possible."

"IV. "[John Kwist] acknowledged improvement, but still feels that the mass is a problem. Asked if the Hotel and Condos can be separated with a drive/alley for use by the condo owner. Applegate said maybe, but not to get my hopes up. David said he did not necessarily agree with me. Applegate changed his tune quickly. He said he would not consider it. I feel betrayed by the Chairman . . . David and Beth clearly seem to be too eager to endorse the revised plan. I will e-mail the other members and explain my recommendations.

Maybe they will listen and support me at the **next BAR meeting on 1/5/15**. (Kwist Notes, at 1-2, App. pp. 1274-1275) (emphasis added).

These Kwist Notes show that at the December 12, 2014, "workshop" Kwist attended the design topics discussed regarding the Hotel Project included HVAC; noise; pollution; traffic; entrance & egress; height, mass and scale; aesthetics; whether an urban project; size & scale; preserving the neighborhood and quality of life; noise ordinance; entrance and egress; whether a tower is appropriate; demo; setbacks; height; and conference center. In addition, these Kwist Notes evidence that two members of the BAR (David Price, Beth Huggins) had direct or indirect interests in property that would be affected by a decision of the BAR and therefore, in accordance with Town Ordinance, Sec 32-174(h), were "disqualified from participating in the discussion, decision of proceedings of the [BAR] in connection" with the Hotel Project. (Id.; Kwist Notes at 1-2, App. pp. 1274-1275).

Thus, the Court of Appeals was wrong when it stated in its opinion that it had "previously ordered Appellants to strike from their designation of matter items **related ONLY** to the challenge of the Agreement because these items were part of the record in the separate action before the circuit court." Croft v. Town of Summerville, 428 S.C. 576, 597 fn5, 537 S.E.2d 219, 230 fn5 (Ct. App. 2019) (emphasis added)). The Kwist Notes, Item #12, (App. pp. 1274-1280), definitely do

relate to this BAR appeal and do not relate only to the challenge to the Agreement in the separate action before the circuit court.

These Kwist Notes showing what happened at the December 12, 2014, secret meetings should have been considered by the Court of Appeals when determining whether those meetings were unlawful. Excluding the Kwist Notes as evidence considered by the courts helped enable the BAR to get away with wrongfully excluding the Kwist Notes from the Bar record as required by S.C. Code Ann. § 6-29-920(A) and with conducting its secret meetings without the public transparency required by law regarding the redesign of the Project, the demolition of historic structures and potentially disqualifying conflicts of interest.

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 conducting a “meeting” subject to the requirements of the FOIA by “**discuss[ing] or act[ing]** upon a matter over which the [BAR] has supervision, control, jurisdiction, or advisory power” as provided in S.C. Code Ann. § 30-4-20(d) (emphasis added). By having secreted these documents and not included them in the BAR record submitted to the Circuit Court and the record considered by the Court of Appeals, the BAR succeeded in evading judicial review of its secret meetings by the Circuit Court.

The Respondents state in their Return to Appellants’ Petition for a Writ of Certiorari in part as follows:

Nothing prohibited Quist (*sic*) from raising at a public meeting the issue of what was discussed at a gathering of less than a quorum. Nothing prohibited Quist (*sic*) from asking that his notes be marked as part of the official records of the Board. That would have allowed the Board as a whole to address his contentions. That would have made the notes part of the record. But none of that happened. Return to Petition for Writ of Certiorari, at 14.

Kwist's failure to have provided the Kwist Notes to the public or to the Appellants as part of the BAR record may have occurred for any number of reasons, including because of Kwist's inadvertence or because of peer pressure on Kwist by other BAR members. As shown in the companion case that is Exhibit #5, which also was excluded from the BAR record as stated above, BAR members conducted another non-public, secret meeting attended by all BAR members at which BAR members chastised Kwist for making and disclosing notes of the secret meeting he attended on December 12, 2014, and for stating what BAR members claimed to be errors in the Kwist Notes. After receiving those criticisms from his peers, Kwist resigned from the BAR, apparently seeking to avoid conflict and pressure on him from other BAR members. This peer pressure to maintain the secrecy of BAR actions illustrates why the BAR's discussions and decisions at the December 12, 2014, meetings should have been made public.

Regardless, the Kwist Notes evidence what occurred at the secret meetings that the Appellants contend violated laws, as stated above, and the Appellants were prevented, through no fault of their own, from using the Kwist Notes to prove their claims.

It is true that there exists another lawsuit indirectly related to this BAR case, as shown in Item #5 that the Court of Appeals 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 appeal and should not have been excluded from the BAR record.

III. THE TOWN AND THE BAR VIOLATED 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 DISCUSSED AND MADE KEY DECISIONS ABOUT BAR BUSINESS AFTER CONSIDERING THOSE APPLICATIONS; AND (C) FAILING TO ALLOW THE PUBLIC TO SPEAK AT THE MEETINGS WHERE THE BAR CONSIDERED THE APPLICATIONS.

A. The Town unreasonably restricted the inspection and copying of public BAR records.

Town Ordinance 32-176(i) states in part:

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**. Id. (Emphasis added.)

Similarly, Town Ordinance 32-181(c)(6) states in part that the BAR “**application . . . should be submitted** to the [BAR’s] secretary **at least seven days before** [the] meeting” at which the application will be considered by the BAR. (Id.) (Emphasis added.)

Thus, the Town expressly requires that BAR applications for construction and demolition be provided to the Town’s planning department and to the BAR’s Secretary at least ten and seven days, respectively, **before** the BAR meeting at which the applications would be considered. Town Ordinances 32-176(i), 32-181(c)(6). Moreover, the application “shall include items listed on the current checklist.” Town Ordinance 32-176(i).

The BAR prevented the public from knowing details about the Hotel Project, and thereby prevented effective citizen input for or against the Project, by unreasonably refusing to let citizens inspect or copy the BAR applications for the Project until **after** the BAR meetings at which the applications were considered by the BAR, in violation of S.C. Code Ann. § 30-4-30(a).

For example, on January 2, 2015, members of the public asked the BAR Secretary to be allowed to inspect an application by the Developer and the Town that would be considered by the BAR three days later at its January 5, 2015 meeting. (R. pp. 957, 757, 760-761). The BAR Secretary replied that the application could be viewed by the public only in response to a written FOIA request and that that FOIA request would not be answered until fifteen days after the date

of the request. (R. p. 957). Objections that that procedure requiring a fifteen-day delay to respond to a FOIA request was not reasonable because that would not allow the public to inspect the application before it was considered at the BAR's January 5, 2015, meeting were unheeded and no viewing or copying of the application was allowed by the BAR before the January 5, 2015, meeting at which the application was considered by the BAR. (R. pp. 957-958, 757, 760-761).¹⁴

Respondents incorrectly claim that Appellants' complaint that citizens did not have a reasonable opportunity to inspect or copy applications to be considered by the BAR is unsupported by the record. In truth, the document from the East Historic District Civic Association on the BAR Record at R. pp. 957-958 evidences that on January 2, 2015, the BAR would not allow the public to inspect or to copy the new BAR applications to be considered by the BAR at the BAR's outcome-determinative meeting at which the BAR approved demolition for the Project and gave conceptual/preliminary approval of the Project on January 5, 2015, regarding which the public had a right to speak according to Summerville Town Ordinance Sec. 32-182(b) (id.; R. pp. 957-958, 757, 760-761). That document at R. pp. 957-958 is an official part of the BAR Record; has never been objected to by the Respondents; and, therefore, should be given as much weight as is given to documents on the BAR Record generated by the BAR.¹⁵

The BAR violated S.C. Code Ann § 30-4-30(a) by refusing to allow the public to inspect or copy a BAR application before the BAR meeting at which the application would be considered and, instead, having a policy requiring Appellants and the public to file a written FOIA request for a BAR application and to wait fifteen days to inspect or copy the application **after** the BAR

¹⁴ Similarly, delays in public access to BAR meeting minutes prevented the public from knowing what actions the BAR had taken, what the BAR would do next and what the public needed to do to express their opinions and protect their rights, including on appeal. (See R. pp. 760-761).

¹⁵ That especially is true because BAR meeting minutes have contained errors that the BAR refused to correct. See R. p. 953. There is no basis for giving more credence or weight to documents generated by the BAR than to documents submitted by citizens to the BAR about the BAR.

meeting at which the BAR application would be considered. (Id.; R. pp. 957-958, 757, 760). That refusal ensured that the public did not know before or at the January 5, 2015, BAR meeting the content of the Project redesigns and details about the demolition and other aspects of the Project that were proposed for approval to the BAR and that were approved by the BAR at that meeting, even though Town Ordinance Sec 32-182(b) gave the public a right to speak about demolition at that meeting.

This intentional delaying of the public's ability to inspect the Developer's application to the BAR before the BAR meeting considering that application violates S.C. Code Ann. § 30-4-30(a), which states that “[a]ny person has a right to inspect or copy any public record of a public body . . . in accordance with reasonable rules concerning time and place of access.” (Id.) (emphasis added).

There is nothing “reasonable” about requiring the public to view an application for demolition of a structure **only after** the BAR's meeting to decide whether to grant that application had occurred, especially when Town Ordinance, Sec 32-182(b) expressly allows the public to comment to the BAR about that application. It is not reasonable for the public not to be able to determine before the BAR considers and approves an application for construction or demolition what is the content of the application, including for example whether the application contained each of the items on the “current checklist” as required by Town Ordinance 32-176(i) and whether the application was submitted to the Town's planning department and to the BAR's Secretary at least ten and seven days, respectively, **before** the BAR meeting at which the applications would be considered, as required by Town Ordinances 32-176(i), 32-181(c)(6).

Without being able to review an application before a BAR meeting about that application, members of the public cannot have critical knowledge necessary for them to influence BAR

officials about the applications before or at the BAR meeting about the applications; cannot make informed comments about that application at the BAR meeting; and, therefore, cannot put on a BAR record a basis for appealing to the Circuit Court an adverse decision of the BAR about that application.

B. The Town prevented the public from viewing, hearing and participating in the critical outcome-determinative January 5, 2015 BAR meeting.

The public's abilities to oppose and to be informed about 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, as is documented in the Record. (R. pp. 957-958; R. pp. 921-922). At that January 5, 2015, meeting the BAR made the critically important decisions to approve demolition of a structure for the Project that the Plaintiffs did not want demolished, (R. p. 952), and to give "conceptual/preliminary approval" of the entire Project. (BAR Meeting Minutes, January 5, 2015, at 2, R. p. 922). However, as stated by the Court of Appeals, no member of the public was allowed or given an opportunity to speak at that meeting, Croft, 837 S.E. 2d at 223 ("The [BAR] did not take public comment at this meeting"), including about demolition, even though the public had a right to speak about demolition according to Summerville Town Ordinance Sec. 32-182(b), (id.); the advertisement the BAR published noticing that meeting specifically had represented that at that meeting the BAR would "accept public comment," (Advertisement, Summerville Journal Scene, December 19, 2014, R. p. 865, left column, para 1); the BAR Chairman had represented at the beginning of the meeting that the public would be allowed to speak, (R. p. 957); and the Developer applicant was allowed to speak for forty-five minutes about the Project. (R. pp. 921-922, 957-958).

Incredibly, and very significantly, the BAR also avoided public input and participation at the January 5, 2015, BAR meeting by deliberately and unnecessarily causing that critical meeting

to occur in a “Town Hall Annex – Training Room,” (BAR Meeting Minutes, January 5, 2015, R. p. 916), too small to contain the large overflow crowds attempting to attend the meeting to oppose or support the Project instead of in the much larger “Town Hall Annex - Council Chambers,” (e.g., R. p. 919), meeting room available one floor up in the same building **where the BAR routinely and usually held its meetings and HAD HELD ALL ITS PREVIOUS MEETINGS ABOUT THE PROJECT.** That caused the crowds to stand and to sit on the floor in a hallway outside the “Town Hall Annex – Training Room,” (R. p. 916), without being able to see or hear due to the absence of any video, 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;¹⁶ 914-917). Many of the people who attended this meeting were elderly. Because they had no place to sit or stand in the Town Hall Annex – Training Room, they had to stand in the hall or sit on the floor in the hallway outside the Town Hall Annex – Training Room. Many of them were unable to endure those conditions had to leave rather than attend all or part of the BAR meeting. (R. pp. 957-958, 760).

The President of the East Historic District Civic Association complained about the conditions at the BAR’s January 5, 2015, meeting to the Chairman of the BAR, the BAR Secretary and members of Town Council, as follows:

The B.A.R. actions at your January 5, 2015 meeting to approve the conceptual design of the Dorchester hotel complex **without allowing public comment** was **disrespectful, unkind and demonstrated a disregard for your duty** to the citizens of Summerville.

. . . .

Before the meeting was called to order, it was obvious that there were **far too few seats to accommodate the number of people crowded into the second-floor hearing room of the Town Hall.** Courtesy dictates that the meeting should have been **moved to the third-floor Council chambers,** especially since many of the attendees were **seniors.** Not only

¹⁶ 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.

did you refuse to move the meeting, you **changed the order of the hearing items, forcing approximately 30 people to stand for 90 minutes to await member discussion of the Applegate proposal.**

When you opened the meeting, you asked members of the public present to limit their remarks to three minutes and not to repeat previous testimony. Members of the public present had prepared remarks and every expectation that they would be given the opportunity to offer them. Yet, after your committee heard from [the Developer] for 45 minutes and discussed the matter among yourselves, you called for the vote and then declared the meeting closed, effectively denying the public any chance to participate in a decision regarding how their tax money will be spent by the Town. (R. p. 957; *accord*, R. pp. 745, 760) (emphasis added).

The BAR easily could have avoided these obstructions to citizen viewing, hearing and participating in this January 5, 2015, BAR meeting if it had moved the meeting from the tiny “Town Hall Annex – Training Room” to the much larger “Town Hall Annex - Council Chambers” nearby, or otherwise had scheduled the BAR meeting at a time when the “Town Hall Annex - Council Chambers” was available for the meeting, but instead deliberately choose not to do so to minimize citizen input. Respondents’ claim that the BAR “used the Board’s regular meeting room,” (Return to Petition for Writ of Certiorari, at 11 (emphasis added)), at the January 5, 2015, BAR meeting is incorrect. In truth, eight of the nine BAR meetings about this Project, including two BAR meetings **before** 1/5/15, were held in the much larger “Town Hall Annex - Council Chambers,” on October 8, 2014; November 3, 2014; January 12, 2015; April 6, 2015; May 11, 2015; June 1, 2015; July 6, 2015; and August 3, 2015 (R. pp. 907, 911, 919, 923, 925, 928, 930, 933, 935, 939). The only meeting the BAR held about the Project in the much smaller “Town Hall Annex – Training Room”¹⁷ was the one meeting held by the BAR on January 5, 2015. (R. p. 914). Thus, the BAR **deliberately chose this much smaller “Training Room”** for this critical January

¹⁷ The name “Training Room” itself implies it is small in comparison to the larger “Council Chambers.”

5, 2015, meeting where the BAR approved demolition and gave conceptual/preliminary approval of the Project, to avoid and minimize public input. That violated the Freedom of Information Act. See Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998).

These BAR actions were deliberate, unnecessary, and unconscionable burdens imposed on the public with the effect and for the purpose of discouraging and avoiding citizen awareness of and participation in the BAR process in order to ram through BAR approval of the Hotel Project. These actions violated the Freedom of Information Act. See Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998).

The Wiedemann case addresses 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 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 and in which previous BAR meetings about the Project had been held in the same building was readily available. (R. pp. 956; R. pp. 957-958; R. pp. 914-917). 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 instead of in the large room containing that equipment where the BAR routinely had met thereby

preventing the public to hear, speak and see at the BAR meeting. (R. pp. 956; R. pp. 957-958; R. pp. 916-917).

The BAR completely controls what it accepts on its Record and has the statutory duty when an appeal to a BAR's decision has been filed to give the Circuit Court a complete copy of the Record it created. S.C. Code Ann. § 6-29-920(A). The BAR must have the responsibility of documenting its compliance with the legal requirements imposed on it, including allowing people to speak about demolition requests when Summerville Town Ordinance Sec. 32-182(b) gives them a right to speak about demolition 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.

C. The Town failed to allow the public to speak at BAR meetings considering the applications for demolition.

Town Ordinance, Sec 32-182(b) states in part:

Demolition. . . . Upon receipt of an application to **demolish** a structure, the secretary to the [BAR] shall published a display **advertisement in a newspaper** . . . in the town at least 14 days before the meeting informing the public that such application has been received, detailing the date, time and place of the meeting at which it will be considered and **stating the public will have an opportunity to comment at such meeting.** (Id.)(emphasis added).

The BAR violated the public's rights to try to influence the BAR decisions about applications to approve demolition by interfering with the public's right to speak at BAR meetings. Plaintiffs opposed demolition, (e.g., R. p. 952), and even filed this BAR appeal to stop demolition, but were not allowed to speak to the BAR about demolition at the January 5, 2015, meeting at which the BAR approved demolition. (R. pp. 914-917; R. p. 914 lines 5-6 ("At this point the Board unanimously approved the demolition of the structure at 200 W. Richardson Avenue contingent

upon final approval of the entire project”); Croft v. Town of Summerville, 428 S.C. 576, 583, 537 S.E.2d 219, 223 (Ct. App. 2019) (“The Board did not take public comment at this meeting”). The BAR published notice, as required by Sec. 32-182(b), that the public would have an opportunity to comment at the BAR meeting on January 5, 2015, (Advertisement, Left Column, 1st paragraph, R. p. 865 (“[will] accept public comment”)), but failed to allow or give an opportunity to any member of the public to speak to the BAR at that January 5, 2015, meeting, Croft v. Town of Summerville, 428 S.C. 576, 583, 537 S.E.2d 219, 223 (Ct. App. 2019) (“The Board did not take public comment at this meeting”).

The BAR also failed to allow or give an opportunity to any member of the public to speak to the BAR at that January 5, 2015 meeting, (BAR Meeting Minutes, January 12, 2015, R. pp 919-920), where the “[BAR] approved demolition of the structures upon final approval of the Project at a January 12, 2015, [BAR] meeting.” Croft v. Town of Summerville, 428 S.C. 576, 583, 537 S.E.2d 219, 223 (Ct. App. 2019).

Thus, the BAR avoided any public comment about demolition before the Town, based on the BAR’s approvals of demolition on January 5, 2015, and January 12, 2015, (R. pp. 914-917, 919-920), demolished buildings Plaintiffs were suing to avoid being demolished.

Moreover, while the agendas of the January 5 and 12, 2015, BAR meetings 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. pp. 887, 888). Moreover, the transcripts of those BAR meetings 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, 483-501).

In addition, the public's right to comment (Town Ordinance, Sec 32-182(b)) on the demolitions proposed regarding the Hotel Project undoubtedly were inhibited by the Town's deliberate orchestration of public unawareness of what transpired at the secret meetings of BAR members with the Developer and with the Town Planner on December 12, 2014, and with the Developer and the Mayor on July 21, 23 and 29, 2014, discussed above.

IV. THE COURT OF APPEALS ERRED 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.

The Court of Appeals stated that:

"Appellants also contend the Board [BAR] unreasonably restricted access to the Developer's applications because the Town required that they file a FOIA request to review documents. The **circuit court did not rule on this question, and no Rule 59(e) motion was filed. Thus, the issue is unpreserved.** See *Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court)." *Croft*, 428 S.C. at 595, 837 S.E.2d at 229 (emphasis added).

Despite this ruling by the Court of Appeals that this issue was not preserved, the Court of Appeals nevertheless in fact did rule on that issue by stating "[i]n any event, the Town's response was consistent with State law and **we find no Freedom of Information Act violation.**" (Id).

Similarly, the Court of Appeals stated:

"Appellants argue the Board [BAR] erroneously issued a certificate of appropriateness based on an unqualified development application. Appellants further contend the Board erred in considering the Project design because the public-private partnership Agreement was illegal and the applicants failed to submit the final design to the Redevelopment Corporation for review and approval. **As the circuit court did not consider and rule upon this question, it is not properly before us.** See *Elam v. S. C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (in order for an issue to be properly preserved for appeal, it must have been

both raised to and ruled upon by the trial court).” Croft, 428 S.C. at 597, 837 S.E.2d at 230 (emphasis added).

Thus, the Court of Appeals failed to rule upon the three issues stated in the paragraph quoted immediately above because of its ruling that “[a]s the circuit court did not consider and rule upon this question, it is not properly before us.” Croft, 837 S.E.2d at 230.

However, Petitioners did not file a Rule 59(e) motion to the Circuit Court opinion 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 that, the Circuit Court plainly and clearly communicated that the Circuit Court **had ruled on** and **had rejected all** of Appellants’ grounds for appeal stated to the Circuit Court, and thereby led 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 that issue.

By ruling that “**none**” (emphasis added) of Appellants’ grounds for appeal warrants reversal of the decisions of the BAR, the **Circuit Court clearly ruled against all of Appellants’ grounds for appeal**. Based on that ruling and representation by the Circuit Court, the Circuit Court did rule on all grounds stated by the Appellants in their petitions to the Circuit Court; therefore there was no need for Appellants to file a Rule 59(e) motion to preserve any issue for appeal; and all issues stated in Appellants’ petitions to the Circuit Court are reviewable on appeal to the Court of Appeals as a matter of law without Appellants having had to file a Rule 59(e) motion.

Appellants in this case 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). As a matter of law Appellants’ issues should not have

been summarily rejected on the ground that the Circuit Court had not ruled on the issues when in fact the Circuit Court had ruled on those issues, as stated above.

CONCLUSION

BAR decisions cannot be correct as a matter of law if they were made in violation of applicable statutes, ordinances and rules governing BAR decisions. The law requires the BAR not only to reach decisions that are legally correct, but also to follow the procedures and apply the criteria required by law when making those decisions.

The BAR, like all local and state governmental bodies, must comply with applicable laws, and courts may, and should, enforce those laws. State statutes, town ordinances and BAR rules exist to ensure BAR decisions are a product of open, transparent, fair, structured, non-discriminatory, reasonable and orderly processes with the opportunity for defined public inputs. The BAR's failures to follow the procedures and criteria required by law can result, as in this case, in decisions that benefit special interest groups at the expense of the public, undermine citizens' confidence in their government and harm citizens who have a right to have BAR decisions be made in conformance with the law. There is no point for the statutes, ordinances or rules regulating BARs to exist if BARs can violate those laws with impunity because courts cannot or will not enforce them.

Appellants have objected above to numerous violations of law by the Respondents. Any one of those violations warrants, and the cumulative effect of all of those violations compel, voiding the findings and decisions of the BAR and requiring the BAR to make new findings/decisions following a new process that complies with the law. The Supreme Court must provide guidance to the local governments in South Carolina on how they must conduct the

people's business under the law so that Boards of Architectural Review and other government entities in our state will know not to repeat these errors.

Respectfully Submitted,

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