

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2020-000334  
Lower Court No.: 2015-CP-18-00991

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**Oct 08 2020**

S.C. SUPREME COURT

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.

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BRIEF OF RESPONDENTS

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

The Summerville Board of Architectural Review (sometimes hereinafter the BAR or Board) held a total of six (6) public meetings related to The Dorchester project, for which the public was duly notified and invited to attend. These meetings were held on October 6, 2014; November 3, 2014; January 5, 2015; January 12, 2015; April 6, 2015; and May 11, 2015. During all such meetings, members of the public were invited to view the presentations made by the permittee-applicant Applegate & Company and their architects. At nearly all of these meetings, members of the public were permitted to comment and express concerns openly. At the first two meetings in October and November 2014, the BAR did not approve the project and instead made suggestions to the developer to revise the project in order to address various aesthetic aspects of the project. At the third meeting during which the Board heard a presentation about the development, it gave preliminary/conceptual approval. Further, the conditions of several structures set to be demolished in connection with the Project were discussed at length. It was noted some of these structures were in extremely poor condition, with rotting wood, mold issues, plant material growing within wall cavities, and asbestos materials. Demolition was authorized subject to final approval of the project.

### **ARGUMENT**

The findings of fact by a board of architectural review shall be treated in the same manner

as findings of fact by a jury, and the court may not take additional evidence. See S.C. Code Ann. § 6-29-930; Austin v. Board of Zoning Appeals, Town of Hilton Head Island, 606 S.E.2d 209 (S.C. Ct. App. 2004); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 552 S.E.2d 42, 44 (S.C. Ct. App. 2001). In this regard, it is well-settled that “the factual findings of the jury will not be disturbed unless a review of the record discloses there is *no evidence* which reasonably supports the jury’s findings.” S.C. Code Ann. § 6-29-930, specifically provides “the findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence....In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.”

I. THE BOARD DID NOT VIOLATE FOIA OR OTHER STATUTES OR ORDINANCES

There were several gatherings of less than quorum of board members who looked at the project drawings with the developer present. These are not reflected in the record on appeal, but the Respondents have never tried to deny they happened. No decisions were made at those gatherings of less than a quorum. These gatherings were not noticed to the public or open to the public because a quorum was not present. The Petitioners contend these were violations of the South Carolina Freedom of Information Act (“FOIA”) and other statutes or ordinances. The Court of Appeals aptly and correctly dealt with this issue by holding the public meeting provisions of FOIA apply to meetings of quorums of a public body. They do not apply to meetings of less than a quorum. Nor has there been a violation of any other statutes or ordinances.

The public meeting rules of FOIA clearly do not require all public business to take

place in public meetings. If the Legislature wanted to enact such a broad rule, it would have done so. It did not, likely for the obvious reason that it would be entirely unworkable for public officials to discuss matters only at public meetings. Instead, the Legislature required meetings of quorums to be public. See S.C. Code Ann § 30-4-20 (d) (“‘Meeting’ means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” (emphasis added)). A public notice and the opportunity for public observation is not required for a meeting of less than a quorum of members of a public body. Any contrary rule would be inconsistent with the express language of FOIA, common sense and good government. If meetings of less than quorum of a public body trigger a public meeting, even two or three members of a city council, a county council, an airport authority, a public service district or a legislative committee could not meet privately or even discuss to discuss concerns, issues and ideas. Two or three members of a public body could not discuss on the phone the ideas that each member might have to address important issues.

Numerous jurisdictions throughout the country hold meetings of groups of less than a quorum do not violate FOIA or open meetings requirements. See, e.g., City of Gary v. McCrady, 851 N.E.2d 359 (Ind. Ct. App. 2006) (“The legislature has specifically defined ‘meeting’ under the Open Door Law as requiring a majority of the governing body; thus, without a majority present, no meeting occurs for purposes of the Open Door Law.”); Hispanic Educ. Comm. v. Houston Indep. Sch. Dist., 866 F. Supp. 606 (S.D. Tex. 1995)

(school district board of trustees, meeting in numbers less than quorum, did not violate Open Meetings Act; “limiting board members’ ability to discuss school district issues with one another outside formal meetings would seriously impede the board’s ability to function,” reasoning that “with fewer than a quorum present, nothing can be formally decided; without a formal decision, no act is taken. Without action, there is no illegality”); Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983) (“it is important that the rule not be so restrictive as to lose the public benefit of personal discussion between public officials”); Britt v. County of Niagara, 82 AD.2d 65 (N.Y. Sup. Ct. 1981) (the statutory requirement of a quorum is paramount; where no quorum was present at the meetings, there was no violation of the law).

The argument has been made by Petitioners that S.C. Code § 30-4-70(c) somehow applies. That section states: “No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of the requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” This is not language preventing less than a quorum from meeting without public notice. That language prevents a quorum of members from using a chance encounter or a social gathering to have a secret discussion. This provision also addresses impermissible use of electronic means to circumvent FOIA. Thus, it would be improper to have a quorum of the public body on a conference call or video chat discussion. A quorum triggers the public meeting requirements of FOIA, so long as the members are discussing the business of the body. (Nothing prohibits all members of a council, board or commission from attending the same holiday party and discussing

grandchildren, sports, or other subjects not pertaining to the business of the public body.)

The Petitioner's reliance on Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2s 862 (2001) is misplaced. In that case, an advisory committee was formed to review tow contracts. The entire advisory committee met in secret and made decisions and recommendations in secret. The Court determined the advisory committee was a "public body" and, therefore, its meetings were subject to FOIA. This is an entirely different question from the issue of whether less than a quorum of a public body can meet to discuss important matters within their jurisdiction.

Unable to show there was a meeting of a quorum of the BAR, the Petitioner attempts to argue that somehow the gatherings of less than a quorum were committees or subcommittees. Although FOIA does apply to committees and subcommittees, it is entirely incorrect to declare that every meeting to two or more persons to discuss a matter is an instant committee or subcommittee. A group of two or more members less than a quorum is not a committee or subcommittee as it is normally understood. This could be different if, for example, a public body asks two or more members to hold hearings and report to the larger group with a recommendation. This is not what happened here. Less than a quorum of the BAR were given an opportunity to review drawings, ask questions and make their own individual comments.

Even if there was a violation of FOIA, this appeal involves the decision that came from a series of public BAR meetings which involved substantial debate among board members, public comment, thoughtful consideration, rejection of portions of the proposed project, and then approval of the project conditioned on certain additional approvals, and

then final approval. Even if there was a FOIA violation by virtue of these two sets of meetings between the developer and less than a quorum, case law has not declared the remedy for a meeting in violation of FOIA is forever barring the same officials from considering the same or related issues. The proper remedy would be a public meeting, public consideration of the proposal, and a public vote. Because that is exactly what happened after the gatherings of less than a quorum, the alleged FOIA violation is not grounds for reversing the decision the BAR. To be clear, this is not a situation where there was a mere ratification of some action taken in a non-public meeting. Simple ratification was rejected as sufficient basis to validate a decision made in private in Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (rejecting the validity of an ordinance with no discussion simply confirming a decision reached in an hour-long executive session), affirmed on other grounds, Piedmont Pub. Serv. Dist. v. Cowart, 324 S.C. 239, 478 S.E.2d 836 (S.C. 1996). In this case, there were literally hours of public meetings that happened after these private meetings of less than a quorum. Those hours of meetings included debate and discussion. In fact, the proposed design was initially not approved at all and suggestions were made to the developer to scale back the project. Those suggestions were made by the developer and the entire project was reduced by one story and other changes were made.

Nor is a meeting of less than a quorum in violation of Town ordinance § 32-176(e) which provides that a quorum shall be required for the BAR to transact business or § 32-176(d) providing all BAR meeting shall be open to the public. Meetings of less than a quorum are not meetings of the BAR. They are meetings of several members of the

Board. They were not by law or ordinance required to be public. Nor do meetings of less than a quorum violate S.C. Code Ann. § 6-29-870 or § 6-29-920(A). These statutes and ordinances also apply to meetings and actions of the BAR. Meetings of less than a quorum are not meetings of the BAR or official proceedings of the BAR.

There is only one FOIA law for South Carolina generally applicable to boards, commissions, councils, public service districts, and legislative bodies. At times it is appropriate for two or more members of a public body to meet to discuss issues, ideas and concerns. A strict rule of no communication about matters of substance except in public meetings would substantially hinder the operation of government. It is not clear how a separate rule could be crafted for a particular type of public body—the boards of architectural review. Nor should it. Although some may question the fairness or appearance of fairness by allowing an applicant the chance to discuss concerns with less than a quorum, boards of architectural review in this State have been known to meet with applicants, architects, city staff and even opponents in groups of less than a quorum to better understand a project and to raise their own individual concerns prior to a meeting.

## II. THE COURT OF APPEALS DID NOT ERR IN EXCLUDING CERTAIN MATERIAL PETITIONERS DESIRE TO INCLUDE IN THE APPEAL RECORD

Petitioners argue the Court of Appeals erred in excluding from the record on appeal materials that were first submitted to the Court of Appeals. The Respondents moved to strike this material from the Appellant's designation of matter on the grounds it was not material submitted to the Circuit Court and was particularly improper when the circuit court itself was acting as an appellate court to the decision of the BAR. The Court of Appeals properly struck this information from the record and required the Appellant to file a brief

without reference to this material. Petitioners now again try improperly inject this material into this case, even though it was not part of the record of the Circuit Court or the Court of Appeals.

Through a subpoena issued in a related case, Petitioners obtained the private notes of one board member—John Kwist—who voted against the project. These notes contained Kwist's versions of certain comments by two board members in the presence of the developer during these gatherings of less than a quorum of board members. It is worthwhile to point out that those board members have denied the accuracy of Kwist's notes under oath in the companion case. These notes were not discussions of the Board or even notes of a meeting of a quorum of the Board. It is axiomatic that the record on appeal can only contain those materials which were presented to the lower tribunal. Rule 210(c), SCACR. This is also true where the Circuit Court sits in an appellate capacity over the decision of the Board of Architectural Review. The only matters that should be included are those matters submitted to the Board. The findings of fact by a board of architectural review shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. See S.C. Code Ann. § 6-29-930; Austin v. Board of Zoning Appeals, Town of Hilton Head Island, 606 S.E.2d 209 (S.C. Ct. App. 2004) (review is strictly limited to the record and the circuit court is expressly forbidden from considering any new facts.)

Petitioner's argument is that somehow the notes should have been included with the Board's transmittal of the record to the Circuit Court. The Petitioners even go so far as to suggest this was a deception by the Board in preparing its return. However, because

these documents were simply personal notes of a single member, the notes were not part of the Board's file or otherwise in possession of the Respondents or their counsel. It is also important to note Petitioner Summerville Preservation Society has a right to make an appointment to the BAR, subject to City Council approval, and the author of the notes (Kwist) was the Petitioner Summerville Preservation Society's designated appointee to the BAR. Petitioners complain at length that they could not raise what they did not know about. But nothing prohibited any Petitioner or other person from discussing with Kwist what had happened. Nothing prohibited Kwist from raising at a public meeting the issue of what was discussed at a gathering of less than a quorum. Nothing prohibited Kwist from asking that his notes be marked as part of the official records of the Board. Any of those options 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. Thus, there was no official discussion of the notes. There was no rebuttal to the notes. They are the notes of one of the Petitioner's representatives who has a seat on the board and who voted against the project.

The basic nature of appellate practice is that materials cannot be added to the Record on Appeal at the Court of Appeals stage if they were not included to the tribunal below. Those who are challenging a BAR decision should submit all evidence and arguments to the BAR. New evidence should not be submitted to the Circuit Court or the Court of Appeals, particularly in a matter involving BAR because the statute expressly states the court should not take any new evidence. See S.C. Code Ann. § 6-29-930.

III. THE TOWN AND THE BAR DID NOT VIOLATE STATE STATUTES AND TOWN ORDINANCES RELATED TO ACCESS TO THE APPLICATIONS OR PARTICIPATING IN THE HEARINGS.

The Petitioners attempt to use this section to claim they did not have an opportunity to inspect or copy records of the Board. The Court of Appeals held this was not properly preserved by 59(d) motion, but it is also unsupported by the record. For the first time, the Petitioners state their support is a letter from the East Historic District Civic Association--not a Petitioner---which claims it was denied access without a FOIA request. The Town maintains it did provide reasonable access to the applications and related materials. If someone was available in the office who could assist, members of the public would be provided with access to the applications and supporting materials. There is no evidence in the Record on Appeal that any Petitioner was denied access. However, for the sake of argument, even if some persons were not allowed to inspect some record they wished to view, this would not be a basis to reverse a decision of the Board of Architectural Review. There has never been a case that had held a pending FOIA request or other request for information by a member of the public would be a basis for undoing or reversing action of a public body due to lack of access. Legislation and other government actions could be stopped in its tracks simply by persons making various successive requests information and could claim they still needed more information before a public body could decide a matter.

The Petitioners also try to use this section to make the case that one meeting abridged FOIA because it used the Board's regular meeting room which was not able to accommodate the number of persons who wanted to attend the meeting on that date.

Petitioners allege some persons had to stand out in the hall or potentially left. Again, this is largely unsupported by the record, but Respondents concede there was one meeting of the BAR which was standing room only and where some persons stood in the hall around the open door. This is clearly not a FOIA violation. No law including FOIA gives all citizens a right to sit or stand in the room where the decision is being made. If there was a right to universal attendance at public meetings and decisions of all public bodies, anyone opposing an action of a public body would only need to muster enough bodies to exceed the number of seats and standing room. Appellants cite Wiedmann v. Town of Hilton Head, 330 S.C. 532 (1998) which involved whether a city council could meet outside the jurisdiction. The Court refused to adopt a blanket prohibition on such meetings. This is very different from an issue of whether too many people want to attend the same meeting.

The particular meeting that resulted in overflow crowds in this case was in a reasonably large conference room, not a broom closet. Petitioners' assertion that a deliberate decision was made to have the meeting in a room too small is not supported in any way by the record. It was simply the Board's regular meeting room. Meetings after the overflow meeting were moved to the larger room.

Plaintiff makes a third argument in this section that the notices for the BAR meetings should have had a notice stating the public could speak. First, the Comprehensive Planning Act governing the operation of boards of architectural review and boards of zoning appeals do not guarantee the public a right to speak at all hearings. In this case, the record shows that there were multiple meetings with ample persons who

did in fact speak. The meeting of October 6, 2014 has public comment from Appendix page 217 to 251. The meeting of November 3, 2014 has public comment from Appendix page 340 to 369. The meeting of April 6, 2015 has public comment from page 549 to 546. The “right” to public comment under the Town ordinances only applies to demolition requests. No members of the public appear any prior or subsequent meeting to have any issue with the demolition of the non-historic gas station structure and a home with vines growing in the walls that were approved for demolition on January 5, 2015. On that same date, the project received conceptual approval, but was still the subject of multiple meetings afterwards including the April 6, 2016 meeting where the public did orally provide what was transcribed as pages of public comment, all prior to a final decision on the project. Appendix 549 to 546.

#### IV. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO CONSIDER ISSUES NOT PROPERLY PRESERVED.

The Petitioners also request this court to review the portion of the decision of the Court of Appeals which held that the Petitioners had not properly preserved an issue due to failing to ask for a specific ruling from the circuit court through Rule 59(e). The Court of Appeals generally cited uncontroversial case law in this position. Petitioners argue all issues were preserved because the trial court ruled that “none” of their remaining issues had merit.

The first issue Petitioners claim they were not heard on by the Court of Appeals is related to the question of whether Petitioners had sufficient access to the BAR documents. This issue is addressed above.

The second issue the Petitioner attempts to argue that the Court of Appeals did

not allow them to raise is the issue related to their claim that the Board of Architectural Review should have denied the application because the Petitioners claim that the developer's contract is illegal and that the developer was unqualified. Although the Petitioner argues the Court of Appeals erred, it does not advance the actual arguments. It should not be allowed to do so in reply or at this time. The argument is entirely without merit. A board of architectural review is meant to address the issue of the aesthetics of a new building and the appropriateness of demolition of existing structures. It is not the role of a board of architectural review to consider the many legalities that could arise out of a building project. It is not the role of an architectural review board to judge the qualifications of the developer or builder.

### **CONCLUSION**

The decision of the Court of Appeals and the Circuit Court should be affirmed.

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