

RECEIVED

Oct 28 2020

S.C. SUPREME COURT

IN 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. 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.

REPLY BRIEF OF PETITIONERS

W. Andrew Gowder, Jr.
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, SC 29405
(843) 727-2229

Michael T. Rose
Mike Rose Law Firm, PC
409 Central Ave.
Summerville, SC 29483
(843) 871-1821
Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

Conclusion..... 20

TABLE OF AUTHORITIES

CASES

Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991)11

Britt v. County of Niagara, 82 AD 65 (N.Y. Sup. Ct. 1981)8

City of Gary v. McCrady, 851 N.E.2d 359 (Ind. Ct. App. 2006)6

Croft v. Town of Summerville, 428 S.C. 576, 537 S.E.2d 219 (Ct. App. 2019)14,17,19

Hispanic Educ. Comm. V. Houston Indep. Sch. Dist., 866 F. Supp. 606 (S.D. Tex. 1995)
.....6,7

Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983)7

Piedmont Pub. Serv. Dist. V. Coward, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995)10,11

Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (S.C. 2001)8,9

Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998)17

STATUTES

S.C. Code Ann. §30-4-90(a)3

S.C. Code Ann. §30-4-90(b)3

S.C. Code Ann. §30-4-80(a)3

S.C. Code Ann. § 30-4-70(c)3,12

S.C. Code Ann. §30-4-60.....3

S.C. Code Ann. §30-4-30(a)16

S.C. Code Ann. § 30-4-20(a)1,2,6

S.C. Code Ann. § 30-4-20(d).....1,6

S.C. Code Ann. § 30-4-20(e)1,6

S.C. Code Ann. § 6-29-920(A)4

S.C. Code Ann. § 6-29-870(D).....4

OTHER AUTHORITIES

Summerville, S.C. Code of Ordinances §32-182(b).....4,5,7,17,18
Summerville, S.C. Code of Ordinances §32-181(c)(6).....15
Summerville, S.C. Code of Ordinances §32-176(i).....15
Summerville, S.C. Code of Ordinances §32-176(e)4,5
Summerville, S.C. Code of Ordinances §32-176(d).....4,5

ARGUMENT¹

I. The meetings arranged and conducted by the BAR secretly on December 12, 2014, and on July 21, 23, and 29, 2014, were meetings of public bodies attended by a quorum of those public bodies that discussed and took action on BAR business within the meaning of the Freedom of Information Act (“FOIA”).

S.C. Code Ann.§ 30-4-20(a) defines a public body as including "any ... public or governmental body or political subdivision of the State, including . . . municipalities . . . committees, subcommittees, advisory committees, and the like of any such body by whatever name known...." (Id.)

S.C. Code Ann.§ 30-4-20(d) defines a meeting as " 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." (Id.)

S.C. Code Ann.§ 30-4-20(e) defines a quorum as “a simple majority of the constituent membership of a public body.” (Id.)

As explained in Section I (A) on pages 4-7 of Petitioners’ Brief, an official of the BAR, its Secretary, officially arranged the date, the time, the location, the amount of time and the purpose of the following meetings which BAR members, the Developer, the Town Planner and the Mayor named by her attended:

- Two back-to-back meetings on Town property on December 12, 2014, with the Developer, the Mayor and the Town Planner to discuss and to take action regarding design changes for the Project, (Petitioners’ Brief pp. 4-9); and

¹ Petitioners incorporate by reference and will reference rather than restate herein appropriate portions of Petitioners’ Brief.

- Three meetings at the home of the Mayor on July 21, 23 and 29, 2014, with the Mayor and the Developer, to discuss and take action regarding the Project (Petitioners' Brief pp. 6-9).

By officially designating the exact membership of each of these groups of BAR members and other attendees and the purpose, the date, the time, the duration, and the location of these meetings, the BAR Secretary created *de facto* "committees" or "the like . . . by whatever name known" of the BAR within the meaning of S.C. Code Ann. § 30-4-20(a), even though the BAR did not specifically call them "committees."

At the two sequential meetings on December 12, 2014, BAR members, the Developer and the Town Planner reviewed the Developer's plans and negotiated and reached understandings and agreements, explicit or tacit, among themselves about what was acceptable to the BAR and what changes the Developer would be required to make to the design the Developer had proposed at the October 6, 2014, BAR meeting in order to obtain conceptual and preliminary approval of the Project and approval of demolition for the Project by the BAR scheduled to be heard at the January 5, 2015, BAR meeting. (Petitioners' Brief pp. 7-9). All of this was out of the public eye.

Specifically, at these two secret December 12, 2014 meetings of the six BAR members who three weeks later voted to approve the Project's redesign and to approve demolition at the BAR's next meeting, January 5, 2015, the BAR members, the Developer, and the Town Planner reviewed the height, the size and the 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

alley; and other characteristics of the “revised plan” for design of the Project. (Petitioners’ Brief pp. 7-9; R. pp. 447-453, 956; App. pp. 1274-1280).

Further, the purpose of the earlier July 21, 23 and 29, 2014 meetings of BAR members with the Mayor was for the applicant to introduce his project to the BAR members and to discuss and take action by reaching understandings and agreements, explicit or tacit, among themselves regarding the Project. (Petitioners’ Brief p. 6).

Since a majority - indeed, one hundred per cent - of the individuals assigned to each of these committees by the BAR Secretary attended each meeting they were assigned to attend, a quorum was present at each of these meetings of each of these committees.

Thus, because each of these BAR committees were public bodies and a quorum of the members of each of these BAR committees attended each of these BAR meetings where the Project was discussed and acted upon, the Town and the BAR violated the requirements of the FOIA regarding those meetings, 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.); S.C. Code Ann. § 30-4-80(a), requiring public notice of all regular meetings and agendas of “[a]ll public bodies,” (Id.); 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.); 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.); (Petitioners’ Brief pp. 9-14).

That conclusion is especially compelling as the S.C. Legislature intended that public bodies adhere to the spirit of the FOIA as articulated by 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.” (Id.)

Thus, the fact that the meetings of the BAR committees appointed by the BAR Secretary met at the home of the Mayor in a social setting on July 21, 23 and 29, 2020, does not negate the applicability to those meetings of the requirements of the FOIA (Petitioners’ Brief pp. 12-14).

II. The BAR did not take minutes or keep a record of the proceedings of the secret BAR meetings on December 12, 2014, and on July 21, 23, and 29, 2014, violating the state enabling act.

The Legislature passed both S.C. Code Ann. §§ 6-29-870(D) and 6-29-920(A) as special safeguards in addition to the FOIA to ensure that BARs operate with transparency and accountability. The December 12, 2014, meetings of the two groups of appointed BAR members violated S.C. Code Ann. § 6-29-870(D) by not keeping “a record of its examinations,” (Id.), of the Developer’s new designs in the secret “workshop” meetings and by not 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.)

III. The secret BAR meetings on December 12, 2014, and on July 21, 23, and 29, 2014, also violated Town open meetings ordinances.

The Town of Summerville passed Town Ordinances 32-176(d), 32-176(e) and 32-182(b) as special safeguards in addition to the FOIA to ensure that BARs operate with transparency and accountability.

The December 12, 2014, meetings of the two groups of appointed BAR members violated 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.) BAR business

was transacted at these meetings, (Petitioners' Brief pp. 7-9, 15-16), but without a "quorum, consisting of a majority of the total members of the" BAR, in violation of Town Ordinance 32-176(e). (Petitioners' Brief pp. 14-16). The Respondents argue in a circular fashion that because there was no quorum at the above-referenced meetings, no BAR business was transacted. (Respondents' Brief pp. 5-6). However, the opposite is true: because BAR business was conducted at the above-referenced committee meetings, Town Ordinance 32-176(e) was violated because those meetings were held without a quorum of the total members of the BAR.

The December 12, 2014 meetings of the two groups of appointed BAR members also violated Town Ordinance 32-176(d), which states 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.); [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.); (Brief pp. 14-16).

The December 12, 2014 meetings of the two groups of appointed BAR members also violated 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.); (Brief pp. 14-16).

IV. The cases cited by Respondents do not support the legitimacy of the BAR's secret meetings.

The cases cited by the Respondents, (Respondents' Brief pp. 6-10), were not decided by a South Carolina court and therefore are not precedent in South Carolina. Moreover, they do not

support Respondents' claims that the above-referenced secret meetings of BAR members do not violate the state and Town laws cited above, but in some cases, they support Petitioners' contentions that those meetings do violate those laws.

A. City of Gary v. McCrady, 851 N.E.2d 359 (Ind. Ct. App. 2006).

City of Gary is not applicable to this appeal because the ruling in that case turned on a definition of "meeting" invoking the State of Indiana's Open-Door Law that is much more restrictive than the definition of "meeting" as defined by the South Carolina FOIA. Specifically, in City of Gary a meeting invoking Indiana's Open Door Law is defined narrowly as "a gathering of a majority of the **governing body** of a public agency for the **purpose of taking official action** [i.e., not discussing] upon public business," (City of Gary, 851 N.E.2d at 367)(emphasis added), whereas a meeting invoking the South Carolina FOIA is defined much more broadly as the "convening of a quorum"² (defined as "a simple majority of the constituent membership of a **public body**" (emphasis added))³ which is defined to include "committees, subcommittees, advisory committees, and the like ... by whatever name known"⁴ "to discuss or act upon a matter"⁵

B. Hispanic Educ. Comm. V. Houston Indep. Sch. Dist., 866 F. Supp. 606 (S.D. Tex 1995).

This case was also based on a state law more restrictive than the FOIA in South Carolina. Specifically, Texas defined meetings at which its open meetings provisions apply to occur only when "actions" were taken. However, the South Carolina FOIA law requires open meetings "to **discuss** or act upon a matter . . ." S.C. Code Ann. § 30-4-20(d) (emphasis added). Further, in

² S.C. Code Ann. § 30-4-20(d)

³ S.C. Code Ann. § 30-4-20(e)

⁴ S.C. Code Ann. § 30-4-20(a)

⁵ S.C. Code Ann. § 30-4-20(d)

Hispanic Educ. Comm. the public was allowed to speak at a public meeting where public officials formally voted to take an action. However, the BAR did not allow the public to speak at its critical January 5, 2015, meeting where the BAR made the crucially 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, (Brief pp. 9, 22, 24, 27; BAR Meeting Minutes, January 5, 2015, at 2, R. p. 922), even though the public should have had a right to speak at that January 5, 2015 BAR meeting according to Summerville Town Ordinance Sec. 32-182(b) (Id.); (Petitioners’ Brief p. 22; R. pp. 957-958, 757, 760-761).

C. Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983).

The Moberg court ruled as follows:

Intra-agency persuasion and discussion become improper when designed to avoid public discussion altogether, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.

We therefore hold that "meetings" subject to the requirements of the Open Meeting Law are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body. Moberg at 336 N.W.2d at 517-518.

All of the criteria in Moberg stated above are grounds for finding that the secret BAR meetings referenced above violate the FOIA. Specifically, those secret meetings:

- (1) Were designed to help avoid and had the effect of avoiding public discussion altogether before the BAR voted at its January 5, 2015 meeting to allow demolition of buildings and to give preliminary and conceptual approval of the Project, (Petitioners’ Brief pp. 7-9); no public input was allowed at or after the secret December 12, 2014 BAR meetings, including at the January 5, 2015 BAR meeting before the BAR voted at its January 5, 2015, meeting to approve demolition and

to give conceptual and preliminary approval of the Project (Petitioners' Brief pp. 4-14);

- (2) The purpose and effect of the secret meetings were to give the Developer advance approval, expressly or tacitly, of design changes (Petitioners' Brief pp. 4-14);
- (3) The purpose and the effect of the secret meetings were to discuss and to hide conflicts of interest, improper influences and potential pecuniary gain by at least two BAR members who voted for the Project (Petitioners' Brief pp. 9,17); and
- (4) The BAR members who met secretly discussed and received information as a group about the Project from the Developer and the Town Planner, (Petitioners' Brief pp. 4-14).

D. Britt v. Cty. of Niagara, 82 A.D.2d 65, 440 N.Y.S.2d 790 (App. Div. 4th Dept. 1981) (*superseded by subsequent legislation*).

A court in this case found there was no violation of the New York Open Meetings Law solely because, as a matter of fact, no quorum (i.e., majority of the membership) of the full Legislature, a Legislative caucus, or an *ad hoc* committee attended any relevant meeting. (Britt, 440 N.Y.S.2d at 793). That has no applicability to this case being appealed, because every member of each BAR committee was present during each of the above-referenced secret BAR meetings. However, the Britt court made clear that if there had been a quorum, "it is of no significance that formal action is not taken or that such gatherings are denominated "work sessions" or "agenda sessions". (Id.) Those same principles should be applied to the secret meetings of the BAR that are the subject of this appeal.

E. Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001).

The Respondents concede in their Brief that at the secret BAR meetings "[l]ess than a quorum of the BAR was given an opportunity to review drawings, ask questions and make their own individual comments." (Respondents' Brief p. 8). The Respondents also concede that the

FOIA might apply if “a public body asks two or more members to hold hearings and report to the larger group with a recommendation.” (Id.) However, Respondents claim that under Quality Towing the secret BAR meetings did not violate the FOIA because the secret BAR meetings were not “advisory” committees.

In fact, the secret BAR meetings were more damaging to the public than if they were a mere “advisory” committee because the BAR members, the Developer, the Town Planner and the Mayor attending those meetings received information, discussed and negotiated among themselves and reached a consensus, expressed or tacit, regarding the Project upon which the Developer relied when redesigning the Project and which the BAR members adhered to when voting to approve demolition and to give conceptual and preliminary approval of the project at the next BAR meeting on January 5, 2015. (Petitioners’ Brief pp. 4-9). The Developer’s agenda item for January 5, 2015, was already decided by the time the public BAR meeting was held on that date.

Thus, the BAR members who attended these secret meetings deliberated among themselves to determine what they would decide in the next month’s public meeting, which is worse than their receiving advice from others, without public awareness or input. The negative effects of the secrecy of these organized and structured private meetings of the BAR members with the Developer, the Mayor and the Town Planner were exacerbated by their combination with other Town actions deliberately preventing effective public awareness and input before BAR approval decisions were made, e.g., the refusal of the BAR to allow members of the public to speak at the January 15, 2015, BAR meeting when they had a right to speak about demolition, (Petitioners’ Brief pp. 4-9, 28-32); the BAR’s refusal to let the public inspect or copy the BAR applications before the January 5, 2015 BAR meeting, (Petitioners’ Brief pp. 21-24); and the BAR’s

deliberately preventing large portions of the public to view, hear or participate in the proceedings at the January 5, 2015 BAR meeting. (Petitioners' Brief pp. 24-28).

V. The appropriate remedies for violations of the FOIA, of the Comprehensive Planning Enabling Act of 1994 and of Town ordinances are to invalidate the BAR approvals of the Project and to require the Project applicants to obtain new approvals following lawful procedures.

The South Carolina Supreme Court stated the following in Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995):

Upon finding a violation of the [FOIA] Act, the trial court may order equitable relief as it considers appropriate, and a violation of the statute must be considered to be an irreparable injury for which no adequate remedy at law exists. S.C. Code. Ann. § 30-4-100(a). The vote to terminate Cowart was taken in violation of the Act. We find no abuse of discretion on the part of the trial court in ordering the equitable relief of invalidation of the vote. See Business License Opposition Comm. v. Sumter County, 311 S.C. 24, 426 S.E.2d 745 (1992) (affirming master's decision to invalidate ordinance adopted by county council in violation of the Freedom of Information Act). (Piedmont Pub. Serv. Dist., 459 S.E.2d at 879).

Respondents argue that any violations by the BAR of the FOIA and the other statutes and Town ordinances were cured by the facts that the BAR subsequently considered and debated issues publicly before officially voting to approve the Project. Not so. The discussions, information considered, consensus reached and decisions agreed to, explicitly or tacitly, regarding the BAR applications at the secret BAR meetings determined the BAR members' votes to approve the Project and were never disclosed to but were hidden from the public –i.e., constituted irreparable harm -, thereby preventing the public from considering and responding to them. That is evidenced in part by the fact that at least one of the secret BAR meetings was referenced and relied upon by one or more BAR members at the BAR's critical January 15, 2015 meeting, without the public being aware of the nature of those discussions. (Petitioners' Brief p. 7, citing R. p. 447).

In addition, the BAR undermined and avoided public scrutiny by means that violated other laws, including not allowing the public to inspect and to copy the relevant BAR applications before the BAR meetings at which the applications would be considered, (Petitioners' Brief pp. 21-24); not allowing the public to speak at the January 15, 2015, meeting although required by law to do so, (Petitioners' Brief pp. 4-9, 28-32); and making it difficult for the public to be able to see and hear at the January 15, 2015 BAR meeting at which the BAR gave approvals for construction and demolition for the Project (Petitioners' Brief pp. 24-28).

The cumulative effect of these combined restrictive BAR actions that violated the FOIA and other laws was to avoid meaningful citizen input and scrutiny before the BAR made its decisions, including before the BAR gave its demolition and construction approvals at the BAR's January 5, 2015, meeting. The only effective remedy to these FOIA and other law violations is to invalidate those approvals made in violation those laws and to require the BAR to consider any future application regarding the Project correctly as required by those laws. Only actual compliance with the FOIA would effectively implement the purpose of FOIA which "is to protect the public from secret government activity." Piedmont Pub. Serv. Dist., 459 S.E.2d at 879, quoting Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

VI. The Supreme Court should clarify that the FOIA applies to *de facto* committees created by all public bodies, not just by Boards of Architectural Review.

Respondents state that "[i]s not clear how a separate rule could be crafted for a particular type of public body – the boards of architectural review. Nor should it."

A separate rule should not be crafted for a board of architectural review. Rather, the FOIA applies to all committees and appointed subgroups of public bodies that discuss or take action at a

meeting attended by a quorum of the members of that subgroup, as occurred here with the secret meetings of the BAR committees.

VII. The BAR violated the FOIA when Bar member John Kwist emailed his recommendations about the Project to a quorum of the BAR members.

After BAR member John Kwist (“Kwist”) attended the secret December 12, 2014, BAR meeting with the Developer and the Town Planner, Kwist sent at least one, and possibly more, emails to all the other BAR members stating his concerns and recommendations based on what had been discussed at the secret BAR meeting he had attended. (Petitioners’ Brief pp. 17-18).

As written by Kwist regarding that BAR meeting:

“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.” (Brief pp. 17-18, quoting Kwist Notes, at 1-2, App. pp. 1274-1275).

Thus, Kwist piggybacked off of the secret discussions he and two other BAR members had with the Developer and the Town Planner at his secret December 12, 2014, BAR meeting to communicate to all of the BAR members Kwist’s recommendations based on the information presented and discussed at that secret December 12, 2014, BAR meeting. That communication of BAR business regarding the design of the Project to all BAR members violated the FOIA, including the prohibition in S.C. Code Ann. § 30-4-70(c) stating that “[n]o . . . 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.” (Id.)

VIII. The Court of Appeals incorrectly excluded from the BAR record material evidence.

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 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 met secretly 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).

Kwist provided information about the secret BAR meeting he attended on December 12, 2015, after his statement above at the January 5, 2015, BAR meeting but declined to provide his written notes about the December 12, 2015 meeting he attended unless the notes were subpoenaed. Those notes were subpoenaed in a related case. They are highly relevant to showing how and why the two secret BAR meetings on December 12, 2015 violated the FOIA, and Petitioners should be allowed to use those notes to prove those FOIA violations. Why Kwist did not provide more information about the secret BAR meetings sooner could be explained by a

variety of factors, including peer pressures as evidenced by the criticisms he experienced from other BAR members who did not like Kwist's revealing the existence of and what happened at the secret BAR meetings and that he took and provided to Petitioners notes about the meeting Kwist attended. All of this is explained and documented in Petitioners' Brief pp. 10-12.

IX. The Town and the BAR unreasonably restricted the inspection and copying of public BAR records in violation of the FOIA.

Respondents state that the Court of Appeals held that Petitioners' claims that the BAR unreasonably restricted the inspection and copying of public BAR records is "unsupported by the record," (Respondents' Brief p. 13), and that "[f]or the first time, the Petitioners state their support is a letter from the East Historic District Civic Association," (id.). Both claims are mistaken.

The Court of Appeals did not rule that the factual claims by the Petitioners regarding this issue are unsupported by the record, but ruled only that those claims did not violate the FOIA, Croft v. Town of Summerville, 428 S.C. 576, 595, 537 S.E. 2d 219, 236 (Ct. App. 2019), which Petitioners dispute as a matter of law. Moreover, the Petitioners did cite previously the East Historic District Civic Association letter as authority supporting their claims on this issue. (Petitioners Brief pp. 40-41, R. 1174, citing R. pp. 957-958; Petition Writ of Certiorari p. 12).

Respondents also state that "[t]here is no evidence in the Record on Appeal that any Petitioner was denied access," (Respondents' Brief p. 13). That claim is not relevant even if it were true, because the Petitioners are challenging the BAR approvals and the BAR's unreasonable application access process upon which the BAR approvals are based not only for themselves per se but also for others similarly situated or who are members of organizations who are Petitioners. For example, Petitioners Summerville Preservation Society, South Carolina Public Interest Foundation and Dorchester County Taxpayers Association are appealing not only on behalf of

themselves but also on behalf of their members, other taxpayers and members of the public. (Petition to Circuit Court, paras 7, 8, 9, R. pp. 64-65).

There is evidence on the BAR record, to which the Respondents never have objected, that the public was denied inspecting and copying the BAR applications regarding the Project considered at the January 5, 2015, BAR meeting. (Petitioners' Brief pp. 21-24).

S.C. Code Ann. § 30-4-30(a) 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). As a matter of fact, the BAR and the Town did not have, and do not have, “reasonable rules concerning time and place of access,” (Id.) (emphasis added), by the public to BAR applications before BAR meetings at which the BAR applications are considered and voted on by the BAR. Instead, while the BAR and the Town promulgated rules requiring that applicants submit their applications 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 BAR applications are considered, (Town Ordinances 32-176(i), 32-181(c)(6)), neither the Town nor the BAR promulgated “reasonable rules” allowing the public to inspect and/or copy those applications before the BAR meetings at which the applications would be considered and voted on. Instead, the BAR follows an ongoing policy of not allowing the public to inspect or copy BAR applications until at least fifteen days after submitting a FOIA request after the application has been submitted to the BAR as late as ten and seven days before the BAR meeting,⁶ thereby

⁶The public could not submit a FOIA request for an application before it was submitted to the BAR and its existence thereby became known to the public. Any application submitted to the BAR less than fifteen days before the BAR meeting at which the BAR application would be considered could not be inspected or copied until after that BAR meeting because of the BAR's requirement that the public wait fifteen days after submitting a FOIA request after an application was submitted to the BAR for BAR approval.

ensuring that the public cannot inspect or copy the applications until after the applications are reviewed and possibly voted on by the BAR. (Petitioners' Brief pp. 21-24).

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

Respondents' claims that the January 5, 2015, BAR meeting was held in the BAR's "regular meeting room," (Respondents' Brief p. 13), and that the Petitioners' claims are "largely unsupported by the record," (Respondents' Brief p. 13), are wrong.

The BAR's January 5, 2015, meeting was not held in the BAR's "regular meeting room" but was held in a much smaller room for the purpose and with the effect of restricting public access and participation in the January 5, 2015 meeting. Specifically, eight of the nine BAR meetings about this Project, including the two BAR meetings before the January 5, 2015, BAR meeting, 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"⁷ was the one meeting held by the BAR on January 5, 2015. (R. p. 914). The BAR deliberately chose this much smaller "Training Room" for this critical January 5, 2015, meeting where the BAR approved demolition and gave conceptual/preliminary approval of the Project to avoid and minimize public input.

These BAR actions were deliberate, unnecessary, and unconscionable burdens imposed on the public to discourage citizen awareness and participation in the BAR process in order to ram through BAR approval of politically unpopular construction and demolition for the Project. Those

⁷ The name "Training Room" itself implies it is small in comparison to the larger "Council Chambers."

actions violated the Freedom of Information Act. (See Wiedemann v. Town of Hilton Head, 330 S.C. 532 (1998); Petitioners' Brief pp. 24-28).

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

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 at which demolition was approved by the BAR. Petitioners 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 the January 12, 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).

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 Project undoubtedly were inhibited by (1) the BAR's deliberate hiding 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, and by (2) the BAR's refusal to let the public copy or inspect BAR applications before the BAR meeting at which the BAR applications were considered and voted on by the BAR.

XII. The Court of Appeals erred when ruling that the Petitioners had failed to preserve certain issues for appellate review because the Circuit Court allegedly had not ruled on those issues and Petitioners 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.

Petitioners restate and incorporate by reference here Section IV on pages 30-32 of Petitioners' Brief.

Respondents allege that Petitioners do “not advance the actual arguments” regarding their claims that the BAR should not have considered the Developer’s applications because the Developer’s contract is illegal and the Developer is not qualified. However, Petitioners do advance those arguments by restating and incorporating by reference Section VI on pages 43 - 45 of Petitioners’ Brief to the Court of Appeals. (Appendix pp. 1176-1178).

Petitioners 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].” (Order Affirming Decision of Town of Summerville Board of Architectural Review, Croft v. Town of Summerville, et. al, C.A. No. 2015-CP-18-991, at 7, R. pp. 7, 18) (emphasis added). As a matter of law Petitioners’ 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.

Petitioners 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 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 not repeat these errors.

Respectfully Submitted,

/s W. Andrew Gowder, Jr.

W. Andrew Gowder, Jr. (S.C. Bar # 7895)
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, SC 29405
Phone: (843) 727-2229
Email: andy@austengowder.com

Michael T. Rose (S.C. Bar # 4910)
Mike Rose Law Firm, PC
409 Central Ave.
Summerville, SC 29483
(843) 871-1821
Email: mike@mikeroselawfirm.com
Attorneys for Petitioners

October 28, 2020
Charleston, South Carolina