

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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

BRIEF OF *AMICUS CURIAE*
SOUTH CAROLINA PRESS ASSOCIATION

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STATEMENT OF ISSUES ON APPEAL

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE OPEN MEETINGS REQUIRMENTS OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT WERE NOT VIOLATED WHEN THE SUMMERVILLE BOARD OF ARCHITECTURAL REVIEW WAS INTENTIONALLY DIVIDED INTO GROUPS, EACH OF WHICH HAD FEWER MEMBERS THAN WOULD CONSTITUTE A QUORUM OF THE MEMBERSHIP OF THE BOARD AS A WHOLE, TO MEET TO DISCUSS A DEVELOPMENT PROJECT OVER WHICH THE BOARD HAD SUPERVISION, CONTROL, JURISDICTION OR ADVISORY POWER?

STATEMENT OF THE CASE

The South Carolina Press Association, as *amicus curiae*, will focus its brief on meetings attended by members of the Summerville Board of Architectural Review (Board) on July 21, 23, 29, and December 12, 2014 at which members of the Board who had been designated to meet at specific times met in groups with fewer members present than would constitute a quorum of the Board as a whole to discuss a development project over which the Board had supervision, control, jurisdiction or advisory power.

STANDARD OF REVIEW

This brief addresses the application of the South Carolina Freedom of Information Act (FOIA) to prearranged meetings attended by members of the Board, and whether the groups of Board members attending those meetings constituted committees under the FOIA. The interpretation of a statute is a question of law to be reviewed *de novo* by this Court. *Neumayer v. Philadelphia Indemnity Insurance Co.*, 427 S.C. 261, 831 S.E.2d 406 (2019); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 662 S.E.2d 49 (2008).

FACTS

The Record reveals at pages 945 through 947 that a member of the staff of the Board arranged a division of the Board into groups, each of which had fewer members than would constitute a quorum of the Board as a whole, to meet with the Mayor of Summerville at his home

on July 21, 23, and 29 to discuss “a commercial project involving a new hotel, parking garage, conference center and condos.” (R. p. 947) The same staff member arranged a division of the Board into groups, each of which had fewer members than would constitute a quorum of the Board as a whole, to meet with the developer of the project at two different sessions on December 12, 2014. (R. pp. 944, 945) In each instance in conjunction with arranging the division of the Board and establishing the times for the meetings the staff member stated that the division was to avoid the gathering of a quorum of the Board. (R. p. 945, 947) With respect to the December 12 meetings the staff member wrote, “Please remember this is a workshop to give you an opportunity to review plans and discuss concerns from prior meetings.”

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE OPEN MEETINGS REQUIRMENTS OF THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT WERE NOT VIOLATED WHEN THE SUMMERVILLE BOARD OF ARCHITECTURAL REVIEW WAS INTENTIONALLY DIVIDED INTO GROUPS, EACH OF WHICH HAD FEWER MEMBERS THAN WOULD CONSTITUTE A QUORUM OF THE MEMBERSHIP OF THE BOARD AS A WHOLE, TO MEET TO DISCUSS A DEVELOPMENT PROJECT OVER WHICH THE BOARD HAD SUPERVISION, CONTROL, JURISDICTION OR ADVISORY POWER.

The clear and unequivocal strategy of the Board was to divide and hide from public view. This Court has stated forcefully that the essential purpose of the Freedom of Information Act (FOIA), (S.C. Code Ann. §§ 30-4-10, *et seq.*, Rev. 2007)) is to protect the public from secret government activity. *Lambries v. Saluda County Council*, 409 S.C. 1, 760 S.E.2d 785 (2014); *Disabato v. South Carolina Ass’n of School Adm’rs*, 404 S.C. 433, 746 S.E.2d 329 (2013); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001); *South Carolina Tax Comm’n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). This statement of purpose is entirely consistent with the General Assembly’s finding that “it is

vital in a democratic society that public business be performed in an open and public manner....”
S.C. Code Ann. § 30-4-15 (Rev. 2007).

The Board’s overt purpose to circumvent the FOIA open meetings requirements by dividing into groups with membership less than a quorum of the membership of the Board as a whole is exposed in the staff member emails establishing the meetings. The purpose of the division for the meetings with the Mayor in his home was clearly stated, “two board members at a time for approximately 30 minutes (no possibility of it looking like a quorum). (R. p. 947) The division of the membership of the Board was even more explicit for the December 12, 2014 meetings when two separate sessions were established, and members were directed to the specific meeting they were to attend. Again, the staff member stated that the purpose of the division was “To avoid any possibility of a quorum (as this is not a public meeting), please stay within your agreed time frame.” (R. p. 945)

The Court of Appeals discussed the portion of the FOIA that provides that chance meetings, social meetings, or electronic communication may not be utilized by a public body to circumvent the spirit of the FOIA, or “act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” S.C. Code Ann. § 30-4-70(c) (Rev. 2007). This provision has no application to this dispute as there was no chance meeting. The Board intentionally and consciously divided itself into groups to meet to discuss, if not act, in secret with respect to matters within their supervision, control, jurisdiction, or advisory power.

The Court of Appeals described the staff member’s emails dividing the Board and arranging meetings as “problematic,” but embraced the Board’s strategy to conduct public business in secret. With its embrace of the divide and hide strategy the Court of Appeals has eviscerated the open meetings requirements of the FOIA. Public bodies wishing to conduct

public business in secret, and they are legion as revealed by the number of cases reaching this Court on this issue, now have a roadmap courtesy of the Court of Appeals to act outside public view. All that is required to enable a public body to conduct public business in secret is for the body to divide into groups, the membership of each of being less than a quorum of the body as a whole, to meet to discuss and act on a public matter.

The most telling omission in the decision of the Court of Appeals is the absence of any citation to or discussion of this Court's decision in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001). It was appropriate for the Court of Appeals to discuss quorum requirements, but the discussion went astray by not considering at the outset by which public body was the quorum to be measured? None of the secret meetings had a quorum of the Board as a whole present. That was the plan, and this is the circumvention of the FOIA endorsed by the Court of Appeals. The appropriate focus of the Court of Appeals should have been to determine that each of the designated groups was a committee of the Board. Each committee would itself be a "public body," and the quorum requirement was to be measured against the membership of the committee, not the Board as a whole. S.C. Code Ann. §30-4-20(a) (Rev. 2007). In *Quality Towing* the Myrtle Beach City Manager designated two employees to evaluate proposals submitted to the City for the award of a towing contract. The employees met in secret to review the proposals, disqualified Quality Towing from consideration, and made a recommendation to the City Manager on the towing company to select. Quality Towing sued alleging that the secret meeting at which its proposal was rejected was conducted in violation of the FOIA. This Court agreed, holding that the employees designated by the City Manager constituted a committee and as such it was a "public body" as defined in the FOIA as:

...any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State...including

committees, subcommittees, advisory committees, and the like of any such body by whatever name known....[Emphasis supplied]

S.C. Code Ann. § 30-4-20(a) (Rev. 2007).

The appropriate inquiry here is whether the designation of members of the Board to meet at specific times and places to discuss the development project constituted the creation of committees of the Board? If each group is a committee, each group is a public body subject to the requirements of the open meetings provisions of the FOIA. *Quality Towing, supra*. This Court has instructed that the remedial nature of the FOIA directs that it be “liberally construed to carry out the purpose mandated by the legislature. *South Carolina Dep’t of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978).” *Quality Towing, supra*, 547 S.E.2d at 865. In common usage “committee” means “A group of people delegated to perform a particular function or task.” Webster’s II *New College Dictionary* (1995). Each group of Board members was delegated to meet at a particular time and place to discuss a development project under review by the Board. Based on this Court’s decisions and directive that the FOIA be liberally construed to accomplish its purpose, each of these groups must be determined to constitute a separate committee, otherwise the mandate of the General Assembly that public business be performed in an open and public manner is circumvented by the simple act of dividing the public body into groups less than a quorum of the whole to conduct public business in secret. Such an interpretation does violence to the will of the legislature and the language of the FOIA that provides that committees of public bodies are themselves public bodies.

Respondents acknowledge in their brief that meetings were held without notice to the public, and the public was not allowed to attend. At these meetings Board “members...looked at the project drawings with the developer present.” Br. of Resp. p. 5 Respondents refer to these sessions as “gatherings” because fewer members than would constitute a quorum of the Board as

a whole were present at each of the meetings. In these meetings “Less than a quorum of the BAR were given an opportunity to review drawings, ask questions and make their own individual comments.” Br. of Resp. p. 8 It seems beyond dispute that public business was being conducted by Board members in these secret, unannounced meetings which the public could not attend. Respondents assert without citation to authority that “A group of two or more members less than a quorum is not a committee or subcommittee as it is normally understood.” Resp. Br. p. 8 Respondents argue that a committee would be formed if “a public body asks two or more members to hold hearings and report to the larger group with a recommendation.” Resp. Br. p. 8 No language in the FOIA or decisions of this Court suggests that a committee of a public body exists only if it is appointed to hold a hearing or make a recommendation. The plain meaning of committee is a group of people who are to perform a particular function or task. That definition is met in this matter where there was a conscious, directed decision to divide the Board into groups assigned days and times to perform the particular function or task of meeting in secret with the developer of a controversial project to consider plans and drawings outside of public view.

Respondents also argue in their brief that application of the FOIA to the meetings attended by members of the Board would disallow “even two or three members” of public bodies to “meet privately or even discuss concerns, issues and ideas.” (R. Br. p. 6) Respondent’s hyperbolic example has no application to the facts of this case where the Board made a conscious, deliberate, coordinated effort to hide the conduct of public business from public view. This case does not involve discussions among members of the Board, but instead involves a scheme agreed upon in advance by Board members to circumvent the law. The email from the staff member arranging the meetings on December 12, 2014 revealed that advance planning of

the scheme had been undertaken as she said, “please stay within your agreed time frame.” There was a division of the board into committees, each with an “agreed time frame” for meeting with the project developer “to review plans and discuss concerns from prior meetings.” (R. p. 945)

CONCLUSION

The Board devised a divide and hide strategy to avoid the open meetings requirements of the FOIA by assigning members to groups, the membership of each group being less than a quorum of the Board as a whole, to meet in secret to consider a development project over which the Board had jurisdiction and control. Unfortunately the Court of Appeals embraced the Board’s strategy and erred by failing to consider that each group was a committee of the Board, and, as such, each was itself a public body subject to the FOIA. The decision of the Court of Appeals affirming the trial court’s ruling that the FOIA was not violated by the Board’s subterfuge should be reversed, and the case remanded for appropriate relief as provided by the FOIA. S.C. Code Ann. §30-4-100(a) (Rev. 2007).

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rules 208(b) and 211, SCACR.

Respectfully submitted,

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November 3, 2020

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