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Nov 24 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

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

Appellate Case No. 2020-000334

Appeal from Dorchester County
Edgar W. Dickson, Circuit Court Judge

RESPONDENTS' BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF OF SOUTH CAROLINA PRESS ASSOCIATION

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FACTS

The sole issue raised by amicus concerns the non-public gatherings or "workshops" of less than a quorum of the Summerville Board of Architectural Review (BAR) which the amicus argues were in violation of the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. 30-4-10 et. seq. No decisions were made at these meetings. No recommendations were made to the larger group. The developer met with groups of less than a quorum of the BAR. The BAR heard the matter in October 2014 with a full quorum at its official meeting. The BAR did not vote at this official meeting in October 2014, but suggested the design needed to be changed in order to receive a favorable vote. The board discussed the matter again at its public meeting in November 2014 after the developer substantially reduced the size of the project including by reducing the structure from five stories to four. The developer again met with less than a quorum of board members in meetings in December 2014. In the January 2015 official BAR public meeting, there was ample debate and discussion and by a vote of 5-1 gave preliminary approval to the design. The BAR at its official public meeting in April 2015 gave final approval, conditional on allowing the board to inspect certain materials. The BAR in its official public meeting of May 2015 gave final approval.

ARGUMENT

The South Carolina Press Association as amicus invites this Court to use this case to make a far-reaching change in the law not warranted by the statutory language of the South Carolina Freedom of Information Act (FOIA). The amicus requests this Court take up an issue correctly decided by the Court of Appeals which followed the plain letter of FOIA. The FOIA ruling is also a ruling that is not necessary to the disposition of the case. It is an invitation for this Court to provide dictum that could have

far-reaching and unintended consequences. The amicus requests this Court entertain argument about interpreting FOIA so liberally it would effectively prohibit any two or more members of a public body from privately discussing any matters within the jurisdiction of the public body. Although this might further the South Carolina Press Association's goal of having all government activity done at a public meeting with reporter present, that is not the law.

The Respondents have admitted there were several gatherings of less than quorum of the BAR to look at the project drawings with the developer present. No decisions were made at those meetings. These gatherings were not noticed to the public or open to the public. However the Court of Appeals aptly and correctly dealt with this issue by holding: "We find these workshops between Board members and the Developer did not constitute "meetings" under the plain language of our FOIA statutes. *See* S.C. Code Ann. § 30-4-20(d). As defined, a "meeting" specifically requires the presence of a quorum. There is no evidence a quorum was present during any of the workshops." The lower court simply ruled that there was no evidence of any non-public meetings in the record, which was also true.

The public meeting provisions of FOIA apply to meetings of quorums of a public body. These same meeting provisions apply equally to the full range of public bodies---from municipal boards such as the Summerville BAR, to city councils, to county councils, to school districts, to special purpose districts, to the Legislature, to the South Carolina Ports Authority, and private organizations supported by public funds.[1] And it applies to the committees and subcommittees of those public bodies. To be clear, it is not disputed that the meetings of these public bodies or even their committees or

[1] Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006)

subcommittees are subject to the open meeting laws requiring an agenda with 24 hours' notice of the matters to be considered and a public meeting. However, because the clear language of FOIA requires a quorum to invoke the public meeting rules, the law does not apply. The Press Association's argument is that this allows an intentional circumvention of FOIA and that the meeting of less than a quorum should be considered as a committee or subcommittee in order to trigger the Act.

First, it is not necessary for the Court to reach this ruling. 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 proposal 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, which is not conceded in any way, the remedy for the violation would not be to undo the decision produced as a result of a series of public meetings where there was ample evidence of debate and genuine consideration. Case law has not declared the remedy for a meeting in violation of FOIA is barring the officials from forever 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 alleged non-quorum meetings, 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 an illegal decision in Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (rejecting public ratification of an ordinance adopted with no discussion immediately after an hour-

long executive session). That decision was affirmed on other ground by the Supreme Court in Piedmont Pub. Serv. Dist. v. Cowart, 324 S.C. 239, 478 S.E.2d 836 (S.C. 1996).

The Press Associations' argument attempts to create a new rule not consistent with the express language of FOIA or even common sense. First, FOIA plainly requires a public meeting for a discussion by a quorum of a public body. There is no language requiring a public meeting for less than a quorum. The Legislature plainly could have specified that all government business must take place in public meetings, but they did not do so. The public meeting rules of FOIA clearly do not require all public business to take place in public meetings. The language of the Act is so far from that principle that it could not have been the Legislature's intent. There are reasons to treat quorums differently than non-quorums. Public meetings for quorums are important because a quorum has the ability to make the actual decision. A quorum means there are enough votes to bind the body. And the decisions that are made by a public body should be made in a public meeting so the decision makers can be held accountable to the public and the record for their vote.

It is also important to note the Legislature could have created different rules for different types of bodies. They did not do so. The same open meeting laws govern public bodies of all types. The Press Association's position would prohibit necessary governmental activity and communication at every level of government. For example, if a mayor and two or three city council members want to sit down with the chief zoning official or a private developer to discuss a project, the position advance by the amicus would make this an ad hoc committee which would have to be a public meeting. If two members of the school board want to get together to discuss an issue about a particular

problem in the district, they would be unable to do so without a public meeting. If two members of a county council want to meet with a new business interested in locating in the county to discuss what location and incentives may be appropriate, a public meeting would be required. And FOIA applies to electronic meetings as well. So, less than a quorum could not communicate by phone, by zoom conference, by instant messenger platform, or some other means.

The amicus attempts to paint Respondents' argument about two or more members of a public body as different from the present situation due to the deliberate intent to assemble less than a quorum. But creating different rules based on intent quickly becomes an unworkable rule. It makes no sense to penalize the group of less than a quorum if one or more person appropriately points out that they should not invite any more members lest they become a quorum. Nor would it make sense to reward less than a quorum meeting who are ignorant that they may be approaching a quorum public meeting threshold. Instead, there should be a bright-line rule that the members of a public body can observe and honor.

Having to concede that FOIA public meeting rules apply to a quorum, amicus attempts to argue the smaller group of less than a quorum is a "committee" or a "subcommittee." To be clear, no one disputes that if a public body creates a standing or ad hoc subcommittee to study options and report back to the larger group with a recommendation of the subcommittee, that is clearly within the scope of FOIA and requires a public meeting. However, the definition of a committee or subcommittee cannot be as broad as suggested by the amicus—"a group of people who are asked to perform a particular function or task." Such a loose definition creates no workable definition at all. If the only criteria for a subcommittee is that it performs a function or

task, then all meetings of less than a quorum of a public body would likely meet that definition. All meetings of less than a quorum are performing or were intended to perform some function or task, or they would not be meeting. Less than a quorum of members of a public body may meet for information exchange, persuasion, idea generation or other purposes.

It is important to note that these groups of the BAR less than a quorum were not called a committee or subcommittee and did not function as one would expect a committee or subcommittee to act. They did not vote on anything. They did not make any collective recommendations to the larger group. They did not generate any collective report of the information they gathered.

Some may argue the meetings of less than a quorum of the BAR in this instance as inappropriate because they were considering a specific upcoming application regarding a specific property. Although this may distinguish the conversation from some meetings of less than a quorum of a public body gathered to address ideas about a general problem such as flooding or crime, there is no way to meaningfully distinguish been discussions about general problems and more specific problems, individuals and properties. Less than a quorum of a public body may wish to interview candidates for a new important position, or may wish to meet with a company about to enter into a large contact with the public body to understand the equipment and people who would perform the work, or may wish to discuss whether a specific new concern interested in locating a factory might be interested in certain incentives. Indeed, all of these are examples of where each member of the public body may want to have some time to meet with the prospective applicant, contractor or company. Under these circumstances, it is not uncommon or improper for the body to meet in groups of less

than a quorum. Nothing in FOIA prohibits it and the intent of the Legislature should principally be found in the words of the statute.

Numerous jurisdictions throughout the country hold that gatherings 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).

Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) is not applicable and the Petitioner and amicus attempt to read too much into that decision. Quality Towing involved a committee to decide which wrecker companies to use. A group of City employees was tasked with reviewing the proposed RFP's and making a recommendation to the City Manager who would formally decide which company to use. The employees were called the "review committee." This "review

committee" was determined to be within the scope of FOIA as it was an "advisory committee." This is very different than a situation where less than a quorum of decision-makers (or non-decision-makers) meet without the intent to render any decision or recommendations to the decision-making group. Indeed there are those who read Quality Towing to prohibit two or more employees from doing almost anything together, whether advisory or final. While it is possible to claim any two or more employees asked to do something is a "committee," that should not be the take-away from Quality Towing nor should this Court allow it to become the rule. Public employees need to collaborate. Public officials—elected and appointed--need to collaborate. It is not possible for all meetings between two or more decision-makers or non-decision-makers to be noticed as a public meetings.

The argument has been made by Petitioner that S.C. Code § 30-4-70(c) somehow applies to this situation. 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." Petitioner attempts to use this to create a rule of intent that prohibits a meeting from being structured so as to avoid the public meeting rules. As stated by the amicus, "This provision has no application to this dispute as there was no chance meeting." At least on this point, the amicus is in agreement with the Respondent.

CONCLUSION

This Court should not entertain the amicus' request to go beyond the language of the Freedom of Information Act to apply the public meeting rules to less than a quorum of a public body. If the Legislature had wanted such a rule, it could have created one.

There may be situations where some gatherings are structured such that quorum is not present. But a contrary rule would be unworkable. A rule requiring public meetings for less than a quorum or even small groups of employees would significant impair the ability of government to function.

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November 24, 2020