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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price
The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (TOSI),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

Amended Rule 221, SCACR, Petition for Rehearing With Suggestion for Rehearing En Banc With Abeyance

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C. Holmes
P.O. Box 187
Sullivans Isd.,
SC 29482-0187
(843)883-3010
For Appellant

Without being disagreeable, there is disagreement. It is respectfully requested that the attached copy of the clerk's correspondence confirms that the clerk is not authorized to interpret the law as she has not been nominated, vetted, and voted by the Legislature for judicial nomination. Her ministerial duties require that she comply with the South Carolina Rules of Court which mandate that she not misconstrue or misinterpret the law or parties' filings and that she comply with Rule 221, SCACR. The clerk overlooks or misapprehends the material fact that the record reflects no prior Rule 221, SCACR, petition. The current petition includes, but is not limited to, challenge to misconstruing Rule 240, SCACR. To the extent there is ambiguity, the rule of lenity supports this Amended Rule 221, SCACR, Petition for Rehearing en Banc and supports appellant's position. The required filing fee is timely paid and we are requesting that the Amended Rule 221, SCACR, Petition for Rehearing en Banc be forwarded to the Court for the Court's considered disposition and interpretation of the law regarding important public matters.

Pursuant to our cherished Constitutions, Clerks of Court, by and through the people, are tasked with upholding the South Carolina Rules of Court and with providing even-handedness, fundamental fairness, transparency, and due process in facilitating filings for resolution through the judicial system. In the oncoming storm of Covid-19 affiliated economic emergencies, there is nothing fair, equitable, or legal about a clerk arbitrarily and capriciously refusing to perform her ministerial duties. See the South Carolina Rules of Court. See Clerk of Court Manual. Moreover, the *Miller* case provides as follows:

> The Clerk of Court's duty is not discretionary. The Clerk of Court should not construe a *filing*.... it is not within the Clerk of Court's authority to refuse to perform her duty based on her opinion that a filing lacks legal merit or is untimely. 21 C.J.S. Courts § 338 (2006) ("[A] clerk of court cannot ordinarily determine questions of law [or] render judgments."). *Miller v. State*, 659 S.E.2d 492, 377 S.C. 99 (S.C. 2008) (emphasis supplied).

In this case, refusal to file effectively determines questions of law and/or impermissibly renders judgment by denying meaningful opportunity to be heard at a meaningful time for full and fair record

and meaningful JUDICIAL review, thereby arbitrarily and capriciously denying substantial rights and meaningful appellate review. Accordingly, the Amended Rule 221, SCACR, Petition for Rehearing en Banc is respectfully submitted for the Court's interpretation of the law. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

INTRODUCTION

Before he passed, the Great Statesman, Rep. Elijah Cummings, may he rest in peace, observed, "When we're dancing with the angels, the question will be asked, in *2022*, what did we do to make sure we kept our democracy intact?" (Emphasis supplied.) Along with Rep. John Lewis, may God rest his soul, it is fitting to remember these lifetimes of unremitting bravery and courage. It is fitting, as well, to remember the beginnings of that democracy. The framers of our State and Federal Constitutions risked life, limb, and liberty to escape abuses by the British government. They deliberately crafted both State and Federal Constitutions to foreclose those abuses here. The framers did not need computers, tablets, or cell phones to discern the basic tenets of fundamental fairness and due process. An impartial decision-maker was seen as a non-negotiable requirement for preventing such abuses.

The letter and spirit of our cherished Constitution categorically prohibit deprivation of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws. The right of trial by jury shall be preserved inviolate. **As a corollary, another requirement, deemed mandatory and prohibitory, is that no single individual, whether British monarch or government official, shall have absolute authority over a citizen's life, liberty, or property without being subject to the right of appeal with meaningful judicial review.** The inscription over the Charleston County Judicial Center reads, "Where the rule of law ends, tyranny begins." Judge J. Waties Waring, the renowned crafter of divine dissents lying in repose in Charleston, must be turning over in his grave at the historically persistent lawlessness. It is respectfully submitted our democracy depends on the basic tenets of fundamental fairness and due process just as much, if not more so, in this age of cell phones, tablets, computers, and extraordinary, unprecedented public health and affiliated economic emergencies surrounding us and still unfolding.

ARGUMENT

The appellant timely submits Rule 221, SCACR, petition for rehearing with abeyance request and suggestion for rehearing en banc for the June 23, 2022, opinion. For the reasons stated and for substantial justice affecting substantial rights, appellant respectfully requests this Honorable Court grant Rule 221, SCACR, Petition for Rehearing En Banc regarding matters of great public importance including but not limited to, the June 23, 2022, opinion misconstrues and/or misapplies improper legal standard. Moreover, there is no affidavit, factual basis, or ROA supporting the June 23, 2022, opinion. In addition, the case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019), and others establish governing precedent which controls and which ruled that the Legislature intended to and did statutorily vest jurisdiction in the DRB for the

hearing on the merits and pre-litigation mediation. The Circuit Court has no jurisdiction to summarily dismiss unless and until **pre-litigation** mediation, timely requested herein, is unsuccessful and mediation "must be granted." S.C. Code § 6-29-900 et seq. Public policy and Legislative intent mandate ADR (alternative dispute resolution) and pre-litigation mediation herein.

I. The June 23, 2022, opinion misconstrues the Rule 240(j), SCACR, Motion for De Novo Panel Review.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The opinion is reversible as a matter of law because it conflates appellant's Rule 240(j), SCACR, Motion for De Novo Panel Review with Rule 221, SCACR, Petition for Rehearing. "***Subject to the statutory law***, the Supreme Court shall make rules governing the practice and procedure" in all courts of the state. S.C Const. art. V § 4 (emphasis supplied). In this case, Rule 240(j) ,SCACR, Motion for De Novo Panel Review is subject to the underlying statutory law in S.C. Code § 14-8-220. That statute, S.C. Code § 14-8-220, provides for de novo panel appeal of the order by a single government employee dismissing meritorious appeal after appellant's initial brief is filed but before filing of the Record on Appeal (ROA). That statute provides as follows:

S.C. Code § 14-8-220

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; **appeal**.

The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. **An appeal shall be allowed from decision of any one judge to a panel of the Court.** S.C. Code § 14-8-220 (emphasis supplied).

That statute forms the basis for and statutory authority of Rule 240(j), SCACR, *De Novo* Panel Appeal which is respectfully requested. Significantly and materially, there is no record on appeal (ROA), no affidavit, and no factual basis or adequate record herein. Appellant respectfully requests deferral for

ROA, including but not limited to, full, fair, and adequate record for meaningful review. Moreover and by analogy, the Federal Rules of Court, on which the State Rules of Court are based, are loud and clear on this issue in Rule 27(c), FRAP:

(c) Power of a Single Judge to Entertain a Motion.

A *court of appeals* judge may act alone on any motion, but **may not dismiss** or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. **The court may review the action of a single judge.** Rule 27(c), FRAP (emphasis supplied).

Further, even assuming mootness which is denied, respondents' motion is untimely because the Rules require motion to dismiss based on mootness must be filed as soon as allegedly moot, not at the eleventh hour on the eve of the due date for defendants' initial brief, suggesting defendants lack a meritorious response to appellant's brief and/or lack of diligence. Accordingly, the dismissal by a single government employee overlooks or misapprehends material facts and law, it is internally inconsistent, it fails to comply with the statutory authority and with Rule 240(j), SCACR, it violates the letter and spirit of the underlying statutory authority in S.C. Code § 14-8-220 as well as Legislative intent, and it is unsustainable without ROA and/or full, fair, and adequate record for meaningful review. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). Accordingly, the petition for rehearing en banc should be granted.

II. The improper legal standard was applied.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. S.C. Code § 14-8-220, and Rule 240(j), SCACR, expressly provide for appeal of an order by a single judge as follows:

S.C. Code § 14-8-220

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; **appeal.**

The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. **An appeal shall be allowed from decision of any one judge to a panel of the Court.** S.C. Code § 14-8-220 (emphasis supplied).

Statutory authority mandates, " An appeal **shall** be allowed from decision of any one judge to a panel of the Court." S.C. Code § 14-8-220 (emphasis supplied). Appellant has requested a S.C. Code § 14-8-220 de novo panel appeal of the decision of one government employee which "shall be allowed." Accordingly, the proper legal standard is de novo and the June 23, 2022, opinion is reversible as a matter of law for, including but not limited to, failure to apply the proper legal standard. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W.

4347 (1988). Accordingly, the petition for rehearing en banc should be granted.

III. Ambiguity regarding the proper legal standard is arbitrary and capricious and constitutes a denial of due process and substantial rights.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. To the extent there is ambiguity regarding the proper legal standard, the rule of lenity supports appellant's position. Ambiguity regarding, including but not limited to, the proper legal standard is arbitrary and capricious and it constitutes a denial of due process and substantial rights. Arbitrary taking of a **statutory appeal which shall be allowed** from decision of any one judge to a panel of the Court is a denial of due process. S.C. Code § 14-8-220 (emphasis supplied). The appellant is prejudiced thereby, and but for the wrongful denial of due process including but not limited to, misconstruing and misapplying the improper legal standard, the outcome should and would be different in appellant's favor. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). Accordingly, the petition for rehearing en banc should be granted.

IV. Lack of Record on Appeal to support the June 23, 2022, opinion is reversible as a matter of law.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The issue of jurisdiction can be raised at any time. A ruling regarding a jurisdictional question, as in this case, based on facts requires review of the record on appeal (ROA) which will be filed with the final briefs. When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975). Moreover, lack of Record on Appeal to support the June 23, 2022, opinion is reversible as a matter of law including but not limited to, denial of adequate record for meaningful review. Accordingly, the petition for rehearing en banc should be granted. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

V. There is no Constitutional and/or statutory authority for an individual government employee to dismiss appeal and Legislative intent as well as the letter and spirit of S.C. Code § 14-8-220 and Rule 240(j), SCACR, mandate de novo panel appeal under the facts.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The underlying statutory authority, S.C. Code § 14-8-220, and Rule 240(j), SCACR, expressly provide for appeal of an order by a single judge as follows:

S.C. Code § 14-8-220

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; **appeal.**

The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. **An appeal shall be allowed from decision of any one judge to a panel of the Court.** S.C. Code § 14-8-220 (emphasis supplied).

HISTORY: 1979 Act No. 164 Part IV-A Section 1, eff July 1, 1979; 1979 Act No. 194 Part III Section 5, apparently effective Aug. 8, 1979; 1983 Act No. 89 Section 1, eff June 2, 1983; 1983 Act No. 90 Section 2, eff. July 1, 1985.

That statute underlies Rule 240(j), SCACR, which was renumbered in 2009 from Rule 224(j), SCACR. The previous Rule 224(j), SCACR, included the provision that, "Any party aggrieved by an order of an individual judge or justice may seek review of that order by the appellate court or a panel thereof." That provision was preserved (in 2007) but reworded then re-numbered Rule 240(j), SCACR, to provide that, "Any review of an order issued by an individual judge or justice shall be by petition for rehearing." Moreover, Rule 240(j), SCACR, is independent of Rule 240(i), SCACR. "The court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Rule 240(i), SCACR. Accordingly, the legislative intent and underlying statutory authority remain the same in S.C. Code §

14-8-220 and the standard of review is *de novo* (not the same standard as a Rule 221, SCACR, petition for rehearing). See *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432–33, 716 S.E.2d 443, 445 (2011) (holding that a specific statute governing a certain issue controls over the more general language of another statute addressing the issue); *Avant v. Willowglen Academy*, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (noting "the principle that more specific rules prevail over general ones").

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re *Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed. 1992) (citations omitted). *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

This Court should not completely disregard the text of an unambiguous statute based on an alleged conflict. In the instant case, the ordinary meaning of S.C. Code § 14-8-220 will not lead to absurd results unintended by the legislature, so the plain language of the statute should not be disregarded. *Hodges v. Rainey*, 533 S.E.2d 578, 341 S.C. 79 (S.C., 2000).

"In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to

have some efficacy, or the legislature would not have enacted it into law." (citation omitted). *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

In addition, pursuant to S.C. Code § 14-8-220, the appellant respectfully submits Rule 240(j), SCACR, appeal should be *de novo* review by the court or panel which does not include the individual who signed the order that is the subject of the Rule 240(j), SCACR, appeal. Appellant filed the motion under Rule 240(j), SCACR, for appeal of an individual government employee's order, as opposed to a Rule 221, SCACR, petition for rehearing. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge. S.C. Code § 14-8-220. Meaningful review requires that a judge not participate in appeal of his or her own order. Occasionally, a recently appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing an Order that he or she authored while in the court below. In these cases, the Judge or Justice will recuse him or herself from the position of potentially reviewing an Order that he or she authored while in the court below. In these cases, the Judge or Justice will recuse him or herself from reviewing his or her own order. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR.* Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978) (emphasis supplied). In that case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's

impartiality, not whether the judge is in fact impartial. *Id.* at 1116. Granted, this is a Fourth Circuit case, but the principle from this oft-cited case is well-stated, sound, and universally accepted as logical and fair. "There is another way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper—indeed it is an express ground for recusal, see 28 U.S.C. Sec. 47--**in modern American law** for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge" to sit on the appeal panel for his own decision. *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978) (emphasis supplied). Moreover, in consideration of legislative intent and the overarching principles incorporated in the State Constitution by its framers, due process requires the appellate court judge who individually signed the order not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, appeal. Accordingly, pursuant to Rule 240(j), SCACR, the appeal and due process provide for non-participation of the individual judge who signed the order which is the subject of a Rule 240(j) appeal.

Materially, *de novo* review is the standard of review at Rule 240(j), SCACR, appeal pursuant to S.C. Code § 14-8-220, which is different than the standard of review for Rule 221, SCACR, rehearing. The Rule 240(j), SCACR, motion is an appeal of an order by an individual judge and the proper legal standard is *de novo*. S.C. Code § 14-8-220. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of decisions by a single judge. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the case stands before the appellate court as if it had never been decided. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*,

280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). Significantly and materially in that case, the denial of a transfer motion does not end or finally determine a case; the necessary element under Rule 240(j), SCACR, review is that the order is signed by a single judge. Accordingly, the legal standard of review under these circumstances for Rule 240(j), SCACR, appeal is *de novo:* The Order dated June 23, 2022, should be reversed/vacated for good cause and for the reasons stated herein. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

CONCLUSION

For substantial justice affecting substantial rights, the appellant respectfully requests this Honorable Court grant Rule 221, SCACR, petition for rehearing with abeyance request and suggestion for rehearing en banc.

Respectfully submitted,

C. Holmes
PO Box 187
SI, SC 29482
843.883.3010
For Appellant

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 15, 2022

Cynthia Holmes
Post Office Box 187
Sullivans Island SC 29482

Re: J. Doe v. Design Review Board
Appellate Case No. 2019-001671

Dear Ms. Holmes:

We received your petition for rehearing and suggestion for rehearing en banc from this Court's June 23, 2022 order. We construed your prior motion filed April 14, 2022, as a petition for rehearing of our March 31, 2022 dismissal order. Accordingly, we cannot entertain your second petition for rehearing pursuant to Rule 221(c), SCACR. No further action will be taken on your filing.

Very truly yours,

CLERK

cc: Benjamin Alexander Crute Traywick, Esquire
Alexandra Scott Williams, Esquire
John Phillips Linton, Jr., Esquire
George Trenholm Walker, Esquire

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Jul 25 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (TOSI),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

PROOF OF SERVICE

I certify that a true copy of the above was served upon the respondents by regular first class mail postage pre-paid on this date at this address: Ben Traywick, 171 Church St., Ste. 340, Chas., SC 29401; GT Walker, 66 Hasell St., Chas., SC 29401; and Kenneth Craft III, 204 Spooner Ln., Mt. Pleasant, SC 29464.

Dated 7/23/2022

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

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SC Court of Appeals

Hard copy available on request -

Thank You!

Fax Cover:

C. Holmes
P O Box 187
Sullivans Island, SC 29482-0187
843.883.3010