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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

S.C. Ct. App. No. 2019-001671

J. Doe,

Petitioner,

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.

MOTION FOR REMAND WITH ABEYANCE AND IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI

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

MOTION

Without being disagreeable, there is disagreement. As a threshold matter, pursuant to the attached copy of the Court of Appeals (COA) correspondence, the COA clerk overlooks or misapprehends the material fact that the record reflects no prior Rule 221, SCACR, petition for rehearing and the COA clerk misconstrued the South Carolina Rules of Court. The COA clerk's interpretation of law would lead to the absurd result that S.C. Code § 14-8-220 is superfluous. The plain meaning of that statute provides de novo panel review of a single judge's dismissal of appeal with no factual support, affidavit(s), or ROA (record on appeal) herein. Ambiguity regarding the Rules of Court is a matter for the Court, not a ministerial clerk. The intended beneficiaries of the South Carolina Rules of Court are the parties, not a clerk. To the extent there is ambiguity, the rule of lenity supports the Rule 221, SCACR, Petition, remand for final ruling on it, and supports petitioner's position. The required COA filing fee is timely paid and we are requesting remand to the COA for the COA's final ruling on the Rule 221, SCACR, Petition and for interpretation of the law regarding important public matters with abeyance pending resolution. In the alternative, the within petition for a writ of certiorari is respectfully submitted.

Important public matters include, but are not limited to, the following: ambiguity of the Rules of Court is a denial of due process, the resulting ambiguity in and application of the improper, less burdensome, legal standard of review is used herein to deny important civil rights including access to the courts, the ministerial duties of the clerk do not include interpretation of the law herein, the pattern and practice of the COA clerk in this and other cases is to unreasonably stall a response until pertinent deadlines thereby prejudicing the appeal, the pattern and practice of the COA clerk in this and other cases is arbitrary and capricious refusal to file and refusal to comply with the South Carolina Appellate

Court Rules, the COA clerk's pattern and practice of unlawful refusal to file in this and other cases violates State and federal constitutional, statutory, and case law, a single judge under these facts is not authorized to dismiss an appeal without factual support, affidavit(s), or ROA (record on appeal), and/or the Legislature enacted S.C. Code § 14-8-220 with the intent to protect the integrity of the Court of Appeals, to protect individual Court of Appeals judges, and to provide de novo panel appeal in the Court of Appeals for dismissal of appeals by a single individual without factual support. Documentation in other cases is available on request.

It is respectfully submitted that the attached copy of the COA 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 appeal includes, but is not limited to, challenge to the COA clerk's unlawful refusal to file. Pursuant to our cherished Constitutions, statutory law, and case law 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 by both sides 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, the clerk's refusal to file effectively determines questions of law and/or impermissibly renders judgment by including. But not limited to, denying meaningful opportunity to be heard at a meaningful time for full and fair record and meaningful JUDICIAL, not a ministerial clerk's, review, thereby arbitrarily and capriciously denying substantial rights. The petitioner is prejudiced thereby and but for the COA clerk's wrongful refusal to file, the outcome should and would be different in petitioner's favor. Accordingly, petitioner respectfully requests remand for the COA's final ruling on Rule 221, SCACR, petition for rehearing with abeyance pending resolution. In the alternative, petition for a writ of certiorari is respectfully submitted. "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).

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CERTIFICATE OF COUNSEL

Petitioner certifies that a Rule 221, SCACR, petition for rehearing was timely made. Pursuant to the attached copy of correspondence, the Court of Appeals clerk negotiated the check for that filing fee, procrastinated until the eleventh hour thereby prejudicing the case, and then wrongfully refused to file it.

ISSUES PRESENTED

I. The June 23, 2022, opinion misconstrues the Rule 240(j), SCACR, Motion for De Novo Panel Review of unauthorized dismissal of appeal by a single judge without factual support or Record on Appeal (ROA).

II. The improper, less burdensome, legal standard was applied.

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

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

V. There is no Constitutional and/or statutory authority for an individual government employee to dismiss appeal with no ROA or other factual support 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.

STATEMENT OF THE CASE

An individual judge wrongfully dismissed the Board of Architectural Review appeal after developer filed an out-of-time motion to dismiss the appeal on or at the deadline for filing his initial brief and without factual support, affidavit(s), or Record on Appeal (ROA). Rule 240(j), SCACR, Motion for *De Novo* Panel Appeal with Motion to Hold All Time Limits in Abeyance was timely filed but was denied on June 23, 2022. Toal *et al.*, *Appellate Practice in South Carolina* (1999), p. 259 (Rule 240(j) was previously designated Rule 224(j), SCACR). Thereafter, timely Rule 221, SCACR, petition for rehearing for the June 23, 2022, opinion was filed. Pursuant to the attached copy of the Court of Appeals (COA) correspondence, the COA clerk misconstrues the South Carolina Rules of Court and the COA clerk overlooks or misapprehends the material fact that the record reflects no prior Rule 221, SCACR, petition for rehearing. The COA clerk wrongfully refused to file the timely Rule 221, SCACR, petition for rehearing. The *Miller* case controls and 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).

Petitioner respectfully requests this Honorable Court grant remand with abeyance for the COA's final ruling on the Rule 221, SCACR, Petition regarding matters of great public importance including but not limited to, the June 23, 2022, opinion misconstrues and/or misapplies the improper, less burdensome, 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 provides that the Legislature intended to and did statutorily vest jurisdiction in the Board of Architectural Review for the hearing on the merits and pre-litigation mediation. Pursuant to statutory appeal to the Circuit Court, there is no jurisdiction in the Circuit Court for a merits hearing unless and until **pre-litigation** mediation, timely requested herein, is unsuccessful and mediation "must be granted." S.C. Code § 6-29-900 et seq. The Legislature enacted mandatory ADR (alternative dispute resolution) for most, if not essentially all, civil matters including the matter herein. It is respectfully submitted the Legislature did not intend to exempt and did not exempt developer from mandatory ADR regarding some of the most desirable residential real property in the State, if not the country. Public policy and Legislative intent mandate ADR (alternative dispute resolution) and pre-litigation mediation "must be granted." S.C. Code § 6-29-900 et seq.

ARGUMENT

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.

I. Whether 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 petitioner'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 petitioner's initial brief is filed but before filing of the Record on Appeal (ROA) or other factual support. 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. Petitioner 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 petitioner'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. Whether 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). Petitioner 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. Whether ambiguity regarding the proper legal standard is arbitrary and capricious and constitutes a denial of due process and/or 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 petitioner'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. The COA clerk's arbitrary taking and deprivation 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 petitioner 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 petitioner'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. Whether lack of Record on Appeal (ROA) to support the June 23, 2022, opinion is reversible.

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 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. Whether there is Constitutional and/or statutory authority for an individual government employee to dismiss appeal without factual support under these circumstances and whether Legislative intent, the letter, the spirit, and/or the plain meaning of S.C. Code § 14-8-220 and Rule 240(j), SCACR, mandate de novo panel appeal under these 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 petitioner 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. Petitioner 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 **panel 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* and 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 petitioner respectfully requests this Honorable Court grant motion for remand to the Court of Appeals for final ruling on the timely Rule 221, SCACR, petition for rehearing with abeyance pending resolution. In the alternative, a writ of certiorari to the Court of Appeals is respectfully requested.

Respectfully submitted,

C. Holmes
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For Petitioner

The South Carolina Court of Appeals

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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

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

S.C. Ct. App. No. 2019-001671

J. Doe,

Petitioner,

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

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

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 7/25/2022

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

Hard copy available on request -

Thank You!

Sorry for the inconvenience but 803.734.1499 is out of service.

Thank You!

Fax Cover:

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