THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson

Appellate Case No. 2019-001910
Common Pleas Case No. 2019-CP-10-1434

David Abdo, ... Appellant,

v.

City of Charleston and Board of Zoning Appeals-Zoning, ... Respondents.

PETITION FOR REHEARING

John A. Massalon, Esquire (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

Attorneys for Appellant

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INTRODUCTION

The denial of this appeal warrants a rehearing under Rule 221, SCACR, because the opinion affirming the decision of the Circuit Court overlooked or misapprehended the legals below. Specifically, the Court of Appeals erred in finding that any error by the Circuit Court in applying the incorrect standard of review was harmless, and in finding no error was committed by the zoning administrator, BZA, or Circuit Court in interpreting the term "monument" in the ordinance to exclude the 60-foot flagpole Appellant Abdo placed in his yard.

The position of the BZA-Z is that a flagpole is not a monument, that a "monument" under Section 54-505 connotes some public or semi-public element, and that the Appellant's property does not qualify as public or semi-public. However, as articulated below, this interpretation is inconsistent with the ordinance's plain language, which supports Appellant's position that his flagpole is in fact a monument within the height exception in Section 54-505(a). For this reason and those articulated below, the Appellant respectfully requests a rehearing pursuant to Rule 221, SCACR.

STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals err in affirming the decision of the Circuit Court, specifically in finding that any error by the Circuit Court in applying the incorrect standard of review was harmless, and in finding no error was committed by the zoning administrator, BZA, or Circuit Court in interpreting the term "monument" in the ordinance to exclude the 60-foot flagpole Appellant Abdo placed in his yard?

STATEMENT OF THE CASE

This case arises out of an appeal to the City of Charleston Board of Zoning Appeals-Zoning ("BZA-Z") which denied Appellant David Abdo a permit to build a flagpole monument on the property that he and his wife, Ilonka Sonja Taylor, own at 29 Broughton Road in Charleston, South Carolina (the "Property"). The Respondent City of Charleston is a municipal subdivision of the State of South Carolina. Respondent BZA-Z is a board of zoning appeals established pursuant to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. § 6-29-710 *et seq*.

In the summer of 2018, Appellant contacted the City of Charleston Zoning Administrator (the "Zoning Administrator") to inquire as to whether a permit was needed to erect a flagpole on the Property. After being informed that no height restrictions applied to flagpoles and that the City of Charleston did not issue permits for flagpoles, Appellant then installed a flagpole on the Property as a monument to honor the military service of his father, his wife's father, their brother in law, and all who served in the United States armed forces.

On or about July 2, 2018, an inspector from the City of Charleston visited the Property and issued a citation to Appellant for installing a structure without a permit. Thereafter on September 7, 2018 Appellant submitted the Building Plan Review and Permit Application to the City of Charleston to approve the installation of the monument. (R. pp. 302-308). On October 17, 2018, the Zoning Administrator denied the Application on the grounds that the flagpole exceeded the thirty-five foot maximum height allowed for structures under the zoning ordinance. (R. p. 001).

Section 54-505 of the CZO creates an exception to the thirty-five foot height limitations and states in relevant part:

> The height limitations of this Chapter shall not apply to church spires, belfries,

> cupolas, and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone.

The Zoning Administrator determined that the installation did not qualify for the exception to the height limitations provided for monuments based on his interpretation that the monuments exception contained in Section 54-505 applied only to "a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event." (R. p. 001). On October 31, 2018, Appellant submitted an appeal for reconsideration of the Zoning Administrator's decision to the BZA-Z. (R. pp. 309-323). The BZA-Z denied the appeal on December 4, 2018. (R. pp. 225-253; R. p. 002). On December 11, 2018, Appellant submitted an application for reconsideration of the BZA-Z's December 4, 2018 Order. (R. pp. 338-362). The BZA-Z denied the application for reconsideration on February 19, 2019. (R. pp. 254-274; R. p. 003).

On March 20, 2019, Appellant filed a petition for appeal to the Court of Common Pleas for the Ninth Judicial Circuit pursuant to S.C. Code Ann. § 6-29-820 appealing the February 19, 2019 final decision of the BZA-Z and the decision of the BZA-Z on December 4, 2018 that denied Appellant's permit application to construct a monument on his property. (R. pp. 015-082). On July 24, 2019, Respondent filed a memorandum opposing the appeal which largely focused on its argument that a flagpole is not a monument. (R. pp. 201-210). On July 30, 2019, Appellant and Respondents appeared before the Honorable Deadra L. Jefferson for a hearing on Appellant's Petition during which Judge Jefferson heard oral arguments on the briefs submitted. (R. pp. 275-301). On October 10, 2019, Appellant's Petition for Appeal of the BZA-Z decision on February 19, 2019 was denied by the Court and the decision of the BZA-Z denying Appellant's building permit was affirmed. (R. p. 004-014). Appellant received the Order on Appeal on October 18,

2019. In response, Appellant filed a Notice of Appeal on November 13, 2019 appealing the Order and the BZA-Z decision denying his permit application to construct a monument on his property. Appellant filed a notice of appeal with the Court of Appeals on November 13, 2019. The Court of Appeals decided this matter without oral argument pursuant to Rule 215, SCACR. On January 4, 2023, the Court of Appeals issued an order affirming the decision of the lower court.

STANDARD OF REVIEW

The applicable standard of review is one of the issues to be determined in this appeal. The Circuit Court decided that the decision of the BZA-Z was entitled to deference and should only be overturned if it was arbitrary, capricious or contrary to law. (R. pp. 006-007). However, as articulated more fully below it is Appellant's position that the BZA-Z's decision involved the construction of an ordinance, and thus should be subjected to a broader standard of review on appeal. Determining the proper interpretation of a statute is a question of law, and the appellate court reviews questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008); *Oulla v. Velazques*, 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019).

ARGUMENT

I. The Circuit Court did not apply the correct standard in reviewing the decisions of the BZA-Z and the Court of Appeals erroneously found that any error by the Circuit Court in applying an incorrect standard of review was harmless.

The appeal of the BZA-Z decision to the circuit court involved construction of an ordinance which, as a question of law, should have been reviewed de novo. An appeal from a final order of the circuit court following its review of a zoning board decision is to the court of appeals. *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct.App.2011) ((citing S.C. Code Ann. § 6–29–850 (2004); Rule 203(d), SCACR)). On appeal, questions of law may be decided with no particular deference to the trial court. *Doe ex rel. Legal Guardian v.*

Barnwell School Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App. 2006) citing *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000); *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (2009).

"[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (S.C. App. 2015), citing *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) (citing *Eagle Container, LLC v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008)). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* (citing *Eagle Container*, 379 S.C. at 568, 666 S.E.2d at 894).

As is evident from the decision of the Zoning Administrator and transcripts of the hearings before the BZA-Z, the Respondents' decision to deny Appellant's permit and application for reconsideration was premised upon a legal construction of the scope of Section 54-505. In its order, the circuit court rejected application of a broader standard of review that applies where the issue concerns construction of an ordinance. (R. p. 008). Instead, the circuit court applied a discretionary standard of review to the BZA-Z decision. (R. pp. 006-008). Because the issue of interpretation is a question of law, the circuit court should have reviewed the issues on appeal de novo rather than apply a discretionary standard as to whether the BZA-Z decisions were arbitrary, capricious, or an abuse of discretion.

The present appeal is very similar to the issues decided in the *Helicopter Solutions* case. *See Helicopter Sols.*, 414 S.C. 1, 776 S.E.2d 753. In that case, Helicopter Solutions received a building permit to construct a helicopter sight-seeing business in Myrtle Beach and Mr. Hinde

filed an appeal on the grounds that the helicopter business was not allowed in the Amusement/Commercial (hereafter "A/C") zoning districted where the property was located. *Id*. Much like the present case, the ordinance at issue in the Helicopter Solutions case permitted a variety of amusement activities in the A/C zone including "sight-seeing depots" but included no specific reference to helicopter amusements. *Id.* 414 S.C. at 5, 776 S.E. 2d at 755. The Zoning Board reversed the decision of the Zoning Administrator on the basis that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses allowed in the A/C zoning district". *Id.* 414 S.C. at 7, 776 S.E. 2d at 756.

On appeal, the Circuit Court reversed the Zoning Board decision and the Court of Appeals upheld the Circuit Court decision that the helicopter business was allowed in the A/C district. Significantly, the Court of Appeals held that "in construing the County Ordinance the Zoning Administrator, and subsequently the Zoning Board, made a legal conclusion." *Id.* 414 S.C. at 10, 776 S.E. 2d at 758. In reaching that decision the Court of Appeals undertook a broader and more independent review of the Zoning Board's decision. The Circuit Court should have done the same in reviewing the BZA-Z decision that is the subject of this appeal.

In the present case, the City argued that construction of the CZO involves a factual determination (R. p. 203). However, this position is contrary to the holding of *Helicopter Solutions* which provides a direct answer as to whether construction of the ordinance in this case is legal or factual in nature. The circuit court in the present case reasoned that Section 54-505(a) is plain and unambiguous and conveys a clear and definite meaning that requires no construction. (R. p. 008). As the following arguments will show, both the Zoning Administrator and the BZA-Z used reasoning outside the plain and unambiguous language of the ordinance and based their decisions as to Appellant's permit application on factors not found in any language of the CZO. In other

words, just like in *Helicopter Solutions*, the Zoning Administrator and BZA-Z did in fact construe the ordinance and, in doing so, reached their own legal conclusions about the scope of the ordinance through justifications outside of the clear language of the Ordinance. Moreover, as in *Helicopter* Solutions, this case involves construction of the CZO ordinance. Sitting as an appellate court, the circuit court should have reviewed the construction and interpretation of Section 54-505(a) de novo. Therefore, the Circuit Court erred by failing to apply a de novo standard of review and, subsequently, the Court of Appeals erred in affirming the decision of the lower court. Any error in applying an incorrect standard of review was not harmless.

II. The Court of Appeals erred in affirming the Circuit Court as the proper construction of the ordinance does not support the decision of the zoning administrator or of the BZA-Z.

a. The Zoning Administrator's interpretation of Section 54-505(a) was not necessary or justified according to the terms of the ordinance.

The decision by the Zoning Administrator is unsupported by the plain language of the ordinance as a matter of law and should be reversed.

Section 54-505(a) provides in relevant part:

> The height limitations of this Chapter shall not apply to church spires, belfries, cupolas, and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone.

This subsection provides a list of exceptions to the 35-foot height limitation without further limitation or qualification. Nevertheless, when he denied the Appellant's application for a building permit the Zoning Administrator attempted to qualify the word "monument" so that Appellant's flagpole monument did not qualify for the above exception. In his view, a flagpole could not be a "monument" because a "monument" requires some public or semi-public element. In denying the Application on this basis, the Zoning Administrator asserted that a monument could only be "a statue, building, or other structure erected in a public or semi-public space to commemorate a

famous or notable person or event." Section 54-505(a) does not mention any such requirement or qualification. The Zoning Administrator's attempt to insert these criteria into the ordinance's plain language was improper and the decision should be reversed.

Not only is this inquiry subjective, it is inconsistent with the plain language of the ordinance. A "zoning ordinance [should be construed] to give it a 'practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" *Vulcan Materials Co. v. City of Greenville Board of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 897 (Ct. App. 2000) (quoting *City of Myrtle Beach v. Juel P. Corp.*, 337 S.C. 157, 177, 522 S.E.2d 153, 164 (Ct. App. 1999), rev'd, 344 S.C. 43, 543 S.E.2d 538 (2001)). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Id*. at 490, 536 S.E.2d at 897 (quoting *Charleston Cty. Parks & Recreation Comm'n Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Eagle Const. Co. v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008) (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Id*. 379 S.C. at 570-71, 666 S.E.2d at 896 (quoting *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

The plain language of the ordinance clearly and unambiguously exempts monuments from the height requirements without qualification. The Zoning Administrator was correct when he originally informed Appellant that the height limitations do not apply to his monument. The

criteria later relied on by the Zoning Administrator in denying Appellant's Application is found nowhere in the ordinance, and there is no indication that the legislators who enacted the ordinance intended any such qualification. Likewise, there is no requirement that a monument be located on public property or that commemorate a famous or notable person or event. Moreover, the City offered no support to the position that the word "monument" is commonly known or understood to encompass such limited and subjective qualifications. The interpretation adopted by the City injects uncertainty and ambiguity into an otherwise clear ordinance, and certainly does not reflect legislative intent as evidenced by the plain language of the ordinance.

The ordinance does not contain any definition of the term "monument." When confronted with an undefined term, the court must interpret it in accordance with its usual and customary meaning; in doing so, the court will consider the language of the particular clause in which the term appears and also its meaning in conjunction with the purpose of the whole statute. *Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 791 S.E.2d 321 (Ct. App. 2016). A common definition of a "monument" as it appears in the on-line version of the Merriam Webster dictionary includes a "memorial stone or a building erected in remembrance of a person or event." https://www.merriamwebster.com/dictionary/. The Zoning Administrator's presentation defined a "monument" as "an outstanding, enduring and memorable example of something." Under either definition, the structure at issue in the appeal qualifies as a monument.

The context in which the term "monument" is used in Section 54-505 is also inconsistent with the Respondents' construction of the ordinance. In addition to monuments, the other items excepted from the height limitation are structures not intended or used for human occupation (i.e. churches, spires, belfries, cupolas, domes, monuments water towers, observation towers, transmission towers, masts and aerials). Again, the City's attempt to exclude flagpoles from the

exception allowed for monuments injects a subjective and limited view that is inconsistent with the purpose of the ordinance and with the common usage and understanding of what qualifies as a "monument."

The reasoning in the *Helicopter Solutions* case is dispositive of the issues in this case and mandates a reversal of the City's decisions. As noted above, that case involved an appeal of a zoning board decision regarding an ordinance that permitted a variety of amusement activates but that included "sight-seeing depots" but that did not specifically reference helicopter amusements *Helicopter Sols.*, 414 S.C. at 5, 776 S.E. 2d at 755. On appeal, the Circuit Court reversed the Zoning Board decision and noted that Mr. Hinde's challenge was based largely on an attempt to draw a distinction between the phrase "sight-seeing depot" used in the ordinance and "helicopter tour facility." *Id*. at 10, 776 S.E. 2d at 758. On that point the Court of Appeals observed that "[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a who considered in the light of its manifest purpose."

In applying the rule of strict construction, the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent." *Id.* 414 S.C. at 12, 776 S.E. 2d at 759, citing *City of Columbia v. Niagara Fire Ins. Co.,* 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). In rejecting Mr. Hinde's attempt to argue that the ordinance should be read to include additional limiting language that restricted the use of the property to sight-seeing tours using some form of ground transportation, the Court of Appeals cited the long-standing principle that courts may not interpret statutes and ordinances to restrict property rights to a greater degree than intended by the legislative body that enacted them. *Id.* at 12, 776 S.E. 2d at 759 (*citing City of Columbia v. Niagara Fire Ins. Co.,* 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967)).

The Zoning Administrator's reading of Section 54-505 improperly restricts the use of Appellant's property more than intended by the legislative body that adopted it. Nothing in Section 54-505 or in the City's Ordinance in general says or suggests that the exception for monuments was intended only to apply to structures in a particular location or that memorialized a particular person or event. Respondents' memorandum in opposition to the appeal did not include the content-based argument, and so that issue should not have been considered in the appeal to the circuit court. Even if the Court decided to accept the Respondents' interpretation that the Ordinance requires a monument to be located in a space visible to the public, this monument would qualify as the record indicates that it is visible from at least one neighboring property, public roads and a public waterway.

A proper review of the ordinance shows that the decision of the Zoning Administrator denying the Appellant's permit is without merit. The Zoning Administrator's decision should be reversed. The Court of Appeals erred in finding no error by the Zoning Administrator in interpreting the term "monument" in the ordinance to exclude the 60-foot flagpole Appellant placed in his yard.

b. The Court of Appeals erred in affirming the decision of the Circuit Court that denied the Appellant's application for reconsideration of the Zoning Administrator's decision and his appeal to the BZA-Z as the BZA-Z did not consider the reasons used by the Zoning Administrator and denied Appellant on different grounds.

The BZA-Z decisions denying Appellant's appeal and application for reconsideration are likewise unsupported. The BZA-Z denied Appellant's permit request on grounds other than those presented by the Zoning Administrator and which are not supported by the language of the ordinance. The purpose of the hearing on December 4, 2018 was to address the Zoning Administrator's denial of Appellant's permit application. At the hearing, however, the BZA-Z

did not address the grounds on which the Zoning Administrator denied the application. Instead, the BZA-Z essentially decided that a flagpole is not a monument after considering photographs presented of the Washington Monument, the Statue of Liberty and a few monuments, not specifically identified, that the Zoning Administrator located during an internet search.

While structures such as the Washington Monument surely meet the definition of a monument as intended by the drafters of the CZO, the photographs submitted by the Zoning Administrator and relied upon by the Board do not amount to a comprehensive list of structures that are monuments or necessarily exclude other structures from the definition of monuments. In fact, the diversity of the examples provided to the BZA-Z prove the Appellant's point that a monument is a general classification of objects that are erected or recognized as a symbol of remembrance or honor and not a limited, finite group of structures. In addition to well-known monuments like the Washington Monument, examples of other monuments presented to the BZA-Z by Appellant that appear in an internet search include natural rock formations, engraved stones, plaques and flags. Much like the Board in the *Helicopter Solutions* case, the BZA-Z in this matter adopted an overly restrictive interpretation of the term "monument" that is inconsistent with not only the letter, but also the intent of the ordinance.

During the hearing on February 19, 2019, counsel for Appellant argued that the BZA-Z should reverse its prior decision because it misapprehended the question involved and erred in its disposition of the appeal. Appendix C, Rules and Regulations of the Board of Zoning Appeals – Zoning, Article III, Section 3 provides that "[t]o grant the appeal for reconsideration, the Board must find that it misapprehended or misconceived the question or questions involved, or that it erred in its finding or disposition of the appeal, application or matter." Specifically, counsel for Appellant pointed out that during the initial hearing the BZA-Z did not address the basis of the

Zoning Administrator's decision to deny the permit, i.e. that Appellant's monument is not located in a public or semi-public space and it does not commemorate a famous or notable person or event. Additionally, for the reasons articulated above, counsel argued that the BZA-Z erred when it denied the appeal on the basis that a flagpole is not a monument and the Board was provided at that time with photographs of several examples of flag monuments. Nevertheless, the BZA-Z declined to address the substance of the Zoning Administrator's decision and denied the appeal for reconsideration based on the legal conclusion that the exception for monuments in 54-505 does not apply to flagpoles and so flagpoles cannot be monuments. As a matter of law that conclusion is unsupported and should be reversed. The Court of Appeals erred in finding no error by the BZA-Z in interpreting the term "monument" in the ordinance to exclude the 60-foot flagpole Appellant placed in his yard.

Finally, even if this Court applies the more liberal standard of review urged by the Respondents and adopted by the Circuit Court, the decision below should be reversed. Instead of basing its decision on a reasonable reading of the plain language of the ordinance itself, on a common understanding of "monument", or on otherwise available evidence, the BZA-Z denied Appellant's appeal based on a general conclusion that a monument and a flagpole are different structures and the first cannot include the second. This conclusion was unrelated to the language of the ordinance and not supported by the evidence presented to the BZA-Z and the Circuit Court. As such, the circuit court should have reversed the BZA-Z decision denying the permit as arbitrary, capricious, and an abuse of discretion. The Court of Appeals erred in affirming the decision of the lower court. Any error in applying an incorrect standard of review was not harmless.

CONCLUSION

Appellant respectfully requests a rehearing pursuant to Rule 221, SCACR. The Court of Appeals erred in finding that any error by the Circuit Court in applying an incorrect standard of review was harmless. The Circuit Court should have applied the independent standard of review used in *Helicopter Solution*s, and the construction of Section 54-505(a) should have been reviewed de novo on appeal. In addition, the Court of Appeals should reverse the decision of the Circuit Court because proper construction of the ordinance supports Appellant's position that his flagpole is a monument excepted from the CZO height limitations.

January 19, 2023

s/John A. Massalon
John A. Massalon, Esquire (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

Attorneys for Appellant

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APPEAL FROM CHARLESTON COUNTY
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The Honorable Deadra L. Jefferson

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David Abdo, ... Appellant,

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City of Charleston and Board of Zoning Appeals-Zoning, ... Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on Respondents City of Charleston and Board of Zoning Appeals-Zoning by e-mail to their attorneys of record, Russell G. Hines, Julia P. Copeland, and Wilbur E. Johnson on January 19, 2023. See S.C. Sup. Ct. Order No. 2020-05-29-02 (g)(3). A copy of the service e-mail is attached hereto and incorporated herein by reference as Exhibit 1.

January 19, 2023

s/John A. Massalon
John A. Massalon, Esquire (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net

Attorneys for Appellant

EXHIBIT “1”

Charline Barrasso

From: Charline Barrasso
Sent: Thursday, January 19, 2023 5:08 PM
To: copelandj@charleston-sc.gov; wjohnson@ycrlaw.com; rhines@ycrlaw.com
Cc: John A. Massalon; Carissa Steichen
Subject: 2019-001910; David Abdo v. City of Charleston, et al.
Attachments: 20230119 Petition for Rehearing.pdf; 20230119 Clerk of Court.pdf

Counsel,

Good afternoon. Attached for service, please find Appellant's Petition for Rehearing, along with correspondence to the Clerk of Court enclosing the filing fee. If you have any questions, please do not hesitate to contact us.

Thank you,

Charline L. Barrasso, Paralegal
Wills Massalon & Allen LLC
charline@wmalawfirm.net
Post Office Box 859 97 Broad Street
Charleston, SC 29402 Charleston, SC 29401
(843) 727-1144 Main Telephone
(843) 727-7696 Facsimile
http://www.wmalawfirm.net