THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 2015-000514

Hugh Allen Palmer.....Appellant,

v.

Richland County Assessor .....Respondent.

RETURN TO MOTION TO DISMISS

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ISSUE BEFORE THE COURT

Appellant Hugh Allen Palmer hereby submits this Return to Respondent Richland County Assessor's Motion to Dismiss the present appeal. The crux of Respondent's argument is that Appellant had no right to request a motion for rehearing of an adverse ruling of the South Carolina Administrative Law Court (ALC), and that, in the absence of such right, Appellant's deadline to appeal that adverse ruling has automatically expired pursuant to Rule 29(D) of the South Carolina Rules of Procedure for the Administrative Law Court (SCRALC) and Rule 203(b)(6) of the South Carolina Appellate Court Rules (SCACR). As discussed herein, this argument is flawed for numerous reasons.

BACKGROUND

This matter begins with Appellant's successful appeal of Respondent's valuation of six commercial rental properties (the Properties) owned by Appellant during the 2009 tax year. In 2012, the ALC found in favor of Appellant and ordered that Respondent's assessed value for the Properties be reduced by approximately 44% retroactive to the 2009 tax year.

Meanwhile, in 2011, Appellant had re-platted the Properties in order to facilitate individual sales of some of the commercial buildings, though the remaining buildings otherwise remained unchanged in terms of their use, physical condition, and ownership. Accordingly, the Respondent rightfully reappraised the buildings actually sold as assessable transfers of interest for the 2012 tax year, which was not otherwise a reassessment year for Richland County.

In addition, however, Respondent also reappraised the Appellant's remaining properties under the common law "changed conditions" doctrine that South Carolina

courts have imputed to an assessor's general authority to appraise property under S.C. Code Ann. § 12-37-90(c) (2014). *See, e.g., Long Cove Home Owners' Assoc., Inc. v. Beaufort Cnty. Tax Equalization Bd.*, 327 S.C. 135, 488 S.E.2d 857 (1997). Appellant therefore filed a separate administrative action simply to preserve the benefit of the prior order with regard to Appellant's remaining buildings.

Although a standing order of the ALC in the new action required the parties to provide specific authority for their positions,[1] and although Appellant repeatedly asked for Respondent's basis for the reappraisal before filing a contested case hearing, Respondent did not offer any case law to the ALC or Appellant indicating that the changed conditions doctrine might apply to a new survey until the actual hearing held on May 13, 2015.[2] At that time, however, Respondent did not also provide several contrary decisions dealing with the same issue,[3] despite an ethical obligation to report any contrary authority known to the counsel under Rule 3.3(a)(2) of the South Carolina Rules of Professional Conduct.

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[1] The ALC's Order for Pre-hearing Statements asked each party to provide "a detailed statement of the law which supports the requested action, including statutory and/or case citations." A footnote to this statement further clarified that "[g]eneric references to the general common statutory or regulatory law will not be deemed an adequate response."

[2] *See James Townsend Wells v. Charleston County Assessor*, Docket No. 00-ALJ-17-0107-CC, 2001 WL 1744498 (S.C. Admin. Law Judge Div., Dec. 18, 2001).

[3] *See Lindsey v S.C. Tax Comm'n*, 302 S.C. 274, 395 S.E.2d 184 (1990); *S.C. Tax Comm'n Decision No. 90-44*, 1990 WL 512033 at *2 (November 01, 1990); *S.C. Tax Comm'n Decision No. 93-40*, 1993 WL 460574 at * 3 (April 14, 1993); *S.C. Tax Comm'n Decision No. 93-61*, 1993 WL 460634 at *2 (May 21, 1993); *Robert L. Clement, Jr. v. Charleston County Assessor, et al.*, Docket No. 95-ALJ-17-0092-CC, 1995 WL 929685 at * 4 (S.C. Admin. Law Judge Div., June 08, 1995). *See also* S.C. Dept. of Rev. Advisory Bulletin No. 02-7, 2002 WL 34165685 at * 4 (Oct. 31, 2002).

Following an adverse ruling from the ALC, received by the Petitioner on September 12, 2014, Petitioner filed a Motion To Alter Or Amend Or For A Rehearing on September 22, 2014, which included the authorities that the Respondent neglected to include. As such, Appellant's request for a rehearing was not simply a thoughtless filing, but was intended to provide the ALC with a legitimate opportunity to hear the authorities that it had been deprived of in the initial hearing.

In response to Appellant's motions, Respondent filed Respondent's Response To Petitioner's Motion To Alter Or Amend Or For A Rehearing on October 2, 2014, but at no point in the Response did Respondent mention, let alone argue, that Appellant had no right to request a rehearing. It might be noted that had Respondent done so, Appellant could have easily avoided the need to address Respondent's subsequent contentions regarding the timeliness of the appeal.

Thereafter, Appellant waited for the ALC to rule on his motion for rehearing so that he could either have an opportunity to discuss the authorities omitted by the Respondent, or appeal the entire matter should the ALC ultimately deny the motion. However, only when the Appellant finally asked Respondent if it had received any ruling on the pending motion did Respondent for the first time suggest that Rule 29(D), SCRALC may bar Appellant's motion for rehearing.

Following an exchange of correspondence on the issue between the Appellant and Respondent to the ALC, the ALC set a Notice Of Motion Hearing for March 18, 2015, but thereafter cancelled the hearing on March 6, 2015. Accordingly, and as provided in Rule 203(b)(6), SCACR, Appellant filed his Notice of Appeal of the underlying ALC ruling and the matters raised in his Motion To Alter Or Amend Or For A Rehearing.

LEGAL ARGUMENT

I. The Appellant has a right to file a motion for rehearing.

The ALC was created by the South Carolina Administrative Procedures Act (SCAPA). *See* S.C. Code § 1-23-500 (Supp. 2014). As such, the ALC may only promulgate rules of procedure that are consistent with the South Carolina Rules of Civil Procedure (SCRCP) and not already addressed by the SCAPA:

> Rules governing practice and procedure before the court which are: (1) consistent with the rules of procedure governing civil actions in courts of common pleas; and (2) not otherwise expressed in Chapter 23, Title 1; upon approval by a majority of the judges of the court must be promulgated by the court and are subject to review as are rules of procedure promulgated by the Supreme Court under Article V of the Constitution.

S.C. Code Ann. § 1-23-650(B) (Supp. 2014).

As the ALC has itself noted, "an ALC rule may not alter the provisions of a statute." *Heath Hill v. S.C. Dept. of Health & Envtl. Contr. and SCE&G*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666 *11 (Dec. 9, 2010) (citing *State v. Cottingham*, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict.") and *Marichris, LLC v. Derrick*, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009) ("A rule of civil procedure may not limit the provisions of a statute.")). Similarly, "[p]ursuant to S.C. Code Ann. § 1-23-650(B) (Supp. 2009), ALC rules may not be promulgated unless they are 'consistent with the rules of procedure governing civil actions in courts of common pleas.'" *Id.* at n.11.

With regard to the present matter, the SCAPA provides that "[p]roceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered." S.C. Code Ann. §

1-23-380(1) (Supp. 2014) (emphasis added). Note that "agency" as used in this section includes the ALC per S.C. Code Ann. § 1-23-310(2) (Supp. 2014).

As referenced above, Rule 203(b)(6), SCACR provides that "[i]f a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from the receipt of the decision granting or denying that motion." This latter rule has been cited with approval by the South Carolina Supreme Court in *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 96, 668 S.E.2d 795, 798 (2008).

In addition, SCAPA states separately that "[f]or judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases ...." S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2014). To that end, Rule 59(a), SCRCP provides that rehearings may be requested in the courts of common pleas, and Rule 203(b)(1), SCACR provides that "When a timely motion for...new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

Therefore, not only does SCAPA directly reference the right to request a rehearing from the ALC, but it also mandates that the ALC's procedure be in conformity with rules of the SCACR and SCRCP that also allow the right to request a rehearing. In fact, the SCRALC itself recognizes as much by providing generally that "[t]he decision of the administrative law judge may be appealed as provided by law." Rule 31, SCRALC. Accordingly, the SCRALC by their own terms expressly incorporate the right to request a

rehearing of an ALC decision as provided in S.C. Code Ann. §§ 1-23-380(1), -610(A)(1) & -650(B), Rules 203(b)(1) & (6), SCACR, and Rule 59(a), SCRCP.

However, even if the SCRALC did not incorporate a right to request a rehearing, such right would have to be read into the SCRALC by virtue of the primacy of the SCAPA and the SCACR and SCRCP incorporated by reference therein. *See Id.*; *see also Home Medical Systems, Inc. v. S.C. Dept. of Rev.*, 382 S.C. 556, 677 S.E.2d 582 (2009) (holding that Rule 59(e), SCRCP must be read into the SCRALC where the SCRALC did not expressly provide for the same).

While no decision to Appellant's knowledge has squarely addressed the issue of whether the SCAPA establishes a right to request a rehearing, such right was clearly presumed and implied by the South Carolina Supreme Court in *McCummings v. S.C. Dept. of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995).

McCummings involved a motion for rehearing filed 45 days after a decision of the State Employee Grievance Committee (SEGC), which is subject to the SCAPA pursuant to S.C. Code Ann. § 8-17-330 (Supp. 2014) ("The provisions of the State Administrative Procedures Act apply in proceedings before the State Employee Grievance Committee."). Rather than dismiss the motion based on there being no right to file it, which would have been the threshold issue, the South Carolina Supreme Court held that a 30 day time limit for rehearing requests applied to motions for rehearing filed under S.C. Code Ann. § 1-23-380(b), which had the same language, in all material respects, as S.C. Code Ann. § 1-23-380(1) upon which Appellant now relies. *Id.* at 442, S.E.2d at 272.

Note that the SCRALC, in relevant part, were the same as they are now; that is, they contained no express prevision either purporting to allow or deny a motion for

rehearing from a contested case hearing. Therefore, *McCummings* provides a strong indication that the South Carolina Supreme Court would continue to allow motions for rehearing under the SCAPA even if such right were directly questioned.

Note also that the South Carolina legislature, apparently in response to the *McCummings* decision, in 1996 amended S.C. Code Ann. § 8-17-340 so that requests for rehearing were expressly provided for in conformity with the *McCummings* decision. S.C. Code Ann. § 8-17-340(F) (created by 1996 Act No. 284, § 5, eff October 1, 1996, and further amended by 2006 Act No. 387, § 9, eff July 1, 2006). Thus, the Legislature apparently took no issue with Supreme Court's implicit acceptance of a right to request a rehearing under the SCAPA, and if had such an issue, would have had a clear opportunity to strike that right from the SCAPA, which they of course did not do.

In conclusion, the SCAPA, the rules incorporated therein, the South Carolina legislature, the South Carolina Supreme Court, and even the SCRALC all recognize that the historic right of litigants to request a rehearing shall also apply before the ALC. Therefore, the ALC's Notice of Cancellation of Motion Hearing must be deemed a denial of Appellant's motion for rehearing, and Appellant filed a timely Notice of Appeal filed five days thereafter.

II. Respondent's arguments do not negate, and actually support, Appellant's right.

While the foregoing is enough to establish Appellant's right to request a rehearing, and for the tolling of his deadline to appeal during the pendency thereof, Appellant will also address Respondent's specific arguments. Respondent's central argument appears to be that Rule 29(D), SCRALC somehow forecloses Appellant's general right to request a rehearing.

However, Respondent admits that the rule, by its own express terms, does not address motions for rehearing. (Mem. In Supp. Of Respondent's Mot. To Dismiss, p. 6.). Thus, Rule 29(D), SCRALC is irrelevant and not otherwise in conflict with Appellant's request for a rehearing.

Further, Respondent neglects to mention that "[t]he decision of the administrative law judge may be appealed as provided by law," Rule 31, SCRALC, as well as the relevant law that establishes the right to request a rehearing. *See* S.C. Code Ann. §§ 1-23-380(1), -610(A)(1) & -650(B), Rules 203(b)(1) & (6), SCACR, and Rule 59(a), SCRCP.

Finally, Respondent neglects that even if the SCRALC attempted to reject that body of law, which it does not, such rejection would be *ultra vires* as an attempted usurpation of the higher authority provided by the SCAPA. *See* S.C. Code Ann. § 1-23-650(B); *Heath Hill,* 2010 WL 5781666, at *11.

Respondent next references Rule 40, SCRALC as an indication that the ALC intentionally excluded motions for rehearing from contested case hearings. However, Rule 40, SCRALC is also irrelevant since it pertains only to "Matters Heard on Appeal From Final Decisions of Certain Agencies" under Article III of the SCRALC, whereas the present matter is a contested case hearing, appeals from which are governed by Rule 31, SCRALC and the law incorporated thereby as referenced above.

Furthermore, if anything, a contrary inference to that suggested by Respondent is warranted since the authors of the SCRALC obviously could have addressed motions for rehearing with regard to contested case hearings, but chose to leave that topic up to the general law proving for rehearing requests, again, as provided by the SCAPA and incorporated via Rule 31, SCRALC.

Finally, though not at issue here, it should be noted that Rule 40, SCRALC appears to be contrary to the SCAPA to the extent it suggests the ALC has "discretion" as to whether or not to allow a motion for rehearing. However, even this flawed rule at least gives a litigant notice that a motion for rehearing as provided in the SCAPA may not be honored by the ALC, whereas the SCRALC concerning contested case hearings give no such warning.

Respondent next cites S.C. Code Ann. § 1-23-650(C) as purportedly limiting Appellant's right to request a rehearing. It states as follows:

> All hearings before an administrative law judge must be conducted exclusively in accordance with the rules of procedure promulgated by the court pursuant to this section. All other rules of procedure for the hearing of contested cases or appeals by individual agencies, whether promulgated by statute or regulation, are of no force and effect in proceedings before an administrative law judge.

Id. To begin with, only the first sentence is relevant here since the second sentence pertains to individual agencies. Secondly, the relevant sentence refers back to the rest of section 1-23-650, which includes subsection (B). As discussed previously, subsection (B) mandates that the SCRALC be "consistent with the rules of procedure governing civil actions in courts of common pleas" and "not otherwise expressed in Chapter 23, Title 1." S.C. Code Ann. § 1-23-650(B).

Furthermore, subsection (C) by its own terms refers only to "hearings" in the ALC, and not as to appeals therefrom. To that end, as previously discussed, the SCRALC has Rule 31, which plainly states that "[t]he decision of the administrative law judge may be appealed as provided by law." Rule 31, SCRALC. This, in turn, incorporates the law also previously discussed that provides for Appellant's right to request a rehearing. *See* S.C. Code Ann. §§ 1-23-380(1), -610(A)(1) & -650(B), Rules 203(b)(1) & (6), SCACR, and Rule 59(a), SCRCP.

Finally, as Respondent notes, subsection (C) was cited by the ALC as a basis for cancelling its own Notice of Motion Hearing. (Cover letter of ALC dated March 6, 2015). However, with all due respect to the ALC, it did not consider the body of law cited above by Appellant. In fact, as Respondent acknowledged, the ALC even misapplied the very Rule 29(D) by which Appellant's right to request a rehearing is supposedly barred:

> Judge McLeod's letter did not take into account the Assessor's response to the Appellant's motion. Thus, [the ALC's] statement that the motion was deemed denied within thirty (30) days after filing was incorrect. Pursuant to ALC Rule 29(D)(2), a motion for reconsideration will be deemed denied thirty (30) days after an opposing party files a response.

(Mem. In Supp. Of Resp.'s Mot. To Dismiss, p.3, n.1.)

In any event, the ALC's cover letter is not contain an official court ruling. In contrast, what the ALC did officially produce were the "Notice of Motion Hearing" and "Notice of Cancellation of Motion Hearing," neither of which purport anything other than that Appellant's request for a rehearing was to be taken up by the ALC on March 18, 2015, but this request was conclusively dismissed by the ALC on March 6, 2015. Accordingly, on March 11, 2015, Appellant filed his Notice of Appeal in a timely manner pursuant to Rule 203(b)(6), SCACR.

Respondent next cites as further support a patently distinguishable case regarding the South Carolina Workers' Compensation Commission (SCWCC). *Rhame v. Charleston Cnty. School Dist.*, 399 S.C. 477, 732 S.E.2d 202 (Ct. App. 2012), *cert. granted* May 8, 2014. However, the SCWCC is governed by its own statutory scheme, which includes a statute providing the specific procedure for appeals from that agency. *See Id.* at 481 n.1, 732 S.E. at 202 n.1 (citing S.C. Code Ann. § 42-17-50). Furthermore, there had

been several prior decisions specifically holding that Rule 59(e) motions were not allowed before an appeal from the SCWCC. *Id.* at 483, 732 S.E.2d at 205 (citing *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 324, 713 S.E.2d 267, 274 (2011); *Stone v. Roadway Express*, 367 S.C. 575, 582, 627 S.E.2d 695, 699 (2006); *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. 580, 588 n. 4, 535 S.E.2d 146, 150 n. 4 (Ct. App. 2000)).

In contrast, the only statutory scheme relevant to Respondent's Motion To Dismiss is the SCAPA, which does expressly provide for motions for rehearing. As discussed previously, the SCAPA's right to request a rehearing is an implicit holding of *McCummings v. S.C. Dept. of Corrections*, 329 S.C. 440, 462 S.E.2d 271 (2000), which itself is actually cited by the *Rhame* case without any disagreement as to its holding or analysis. *Rhame*, 399 S.C. at 481 n.1, 732 S.E.2d at 204 n.1. In addition, prior case law regarding SCAPA has held that there is a right to file Rule 59(e) type motions, even when the SCRALC had not expressly provided for them. *See Home Medical Systems, Inc. v. S.C. Dept. of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009). In sum, the *Rhame* decision is simply inapplicable to Appellant's request for a rehearing.

Lastly, Respondent itself relies on *Home Medical Systems, Inc.* in support of its contention that Appellant has no right to request a rehearing. This reliance is curious since, as stated previously, in that case the Supreme Court of South Carolina actually held that a motion to alter or amend as provided in Rule 59(e), SCRCP was allowed even though Rule 29(D), SCRALC at that time only provided for "reconsideration of a final decision...subject to the grounds for relief set forth in Rule 60(B) (1 through 5), SCRCP." *Id.* at 560-63, 677 S.E.2d at 584-86 (citing former Rule 29(D), SCRALC). Thus, the South Carolina Supreme Court had no hesitancy to find the existence a right to move to alter or amend a judgment of

the ALC even where Rule 29(D), SCRALC seemed to exclude such right. Moreover, this result was reached even though SCAPA does not expressly provide for a motion to alter or amend as it does with motions for a rehearing pursuant to S.C. Code Ann. § 1-23-380(1). *See also McCummings v. S.C. Dept. of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995).

After *Home Medical Systems, Inc.*, Rule 29(D), SCRALC was amended to change the "reconsideration of a final decision" from being based on Rule 60(B), SCRCP, to being "subject to the grounds for relief set forth in Rule 59, SCRCP." Therefore, the particular question regarding the propriety of motion to alter or amend (a "motion for reconsideration" in the SCRALC's vernacular) has been decided both judicially and through subsequent conformity of the SCRALC to *Home Medical Systems, Inc.* However, still left untouched by the SCRALC is the subject of motions for rehearing from a contested case hearing, other than by general reference to the SCAPA and related law through Rule 31, SCRALC.

Note here that Rule 29(D), SCRACL's reference to a "motion for reconsideration" cannot be misinterpreted to encompass "motions for rehearing," as the former has a long history of being equated specifically with "motions to alter or amend." *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004) ("A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule.")

> Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical. Neither contains any provision for a motion for "reconsideration." However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment." This view holds true even when a party mislabels a post-trial motion.

Id. at 22, 602 S.E.2d 779 (footnote omitted). No doubt the same principle would hold true with regard to the SCRALC's "motion for reconsideration." Moreover, such interpretation

is necessary if Rule 29(D), SCRALC is to be read in harmony with the SCAPA and its multiple provisions for motions for rehearing. *See* S.C. Code Ann. §§ 1-23-380(1), -610(A)(1) & -650(B), Rules 203(b)(1) & (6), SCACR, and Rule 59(a), SCRCP.

In any event, Respondent has not been heard to make the argument that Rule 29(D) also encompasses Appellant's motion for rehearing, but rather argues that by providing for motions for reconsideration, Rule 29(D), SCRALC thereby automatically excludes motions for rehearing. Similarly, in cancelling its Notice of Motion Hearing, the presiding ALC Judge has stated that Appellant's motion "was deemed improper by virtue of § 1-23-650(C)." In contrast, however, he then proceeded to state that it was yet "considered as a motion for reconsideration under ALC Rule 29(D)" and therefore deemed denied after 30 days. (Cover letter, March 6, 2015.) Although this letter is not an official decision of the ALC, Appellant would simply note the impossibility of a motion being simultaneously improper under a particular rule, but yet also automatically denied in accordance with the rule that supposedly excluded such motion from the outset.

Moreover, since Respondent's Motion to Dismiss relies on the former position, Appellant's Return has focused on the same, though it should be noted that latter position must also fail for many of the same reasons as discussed herein. First and foremost, the SCAPA provides for rehearing requests, which right cannot be subverted by the SCRALC. Second, the SCRALC do not, in fact, even address motions for rehearing other than to incorporate them generally by way of Rule 31, SCRALC. Finally, the rules of construction, discussed in section III, *infra*, weigh heavily in favor of Appellant's right to request a rehearing, particularly where the ALC itself would apparently purport that Rule 29(D),

SCRALC both bars the rehearing request yet simultaneously renders it denied after 30 days, neither effect of which is actually set forth in the rule itself.

In its closing, Respondent rightly notes that if Appellant has no right to request a rehearing, that Appellant's Notice of Appeal would be untimely. However, in making this point, it might be noted that Respondent quotes one of the bases providing for the right to request a rehearing: "If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion." Rule 203(b)(6), SCACR.

In considering Respondent's argument, it should also be noted that Respondent itself filed "Respondent's Response to Petitioner's Motion to Alter or Amend or for a Rehearing" without raising any objection to the Petitioner's right to make such motions other than "strongly object[ing] to a new hearing in this matter in that the Petitioner has already had its day in court and failed to provide sufficient evidence to prevail." Accordingly, not only did Respondent implicitly accept Appellant's request for a rehearing before the ALC, but any argument on appeal that there is not a right to request a rehearing should be deemed waived because not properly raised before the ALC.

Such waiver is appropriate because, had Respondent made that argument before the ALC at the proper time, Appellant would have been alerted as to Respondent's position in time to file an earlier appeal out of an abundance of caution and to avoid an unnecessary litigation over the issue. In contrast, it would be extremely prejudicial to Appellant if Respondent were allowed to question the validity of the motion for rehearing only after expiration of the deadline to appeal without a motion for rehearing.

III. To the extent there is any ambiguity regarding the right to request a rehearing, which there is not, rules of construction support the availability of such request.

Although Appellant has established his right to request a rehearing of the ALC's decision and has shown Respondent's arguments to be irrelevant, if not actually supportive of Appellant's position, Appellant would also provide several additional bases to construe any possible remaining ambiguity in Appellant's favor.

The first rule of statutory construction is to effect the legislature's intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In the present case, the legislature has enacted S.C. Code Ann. § 1-23-380(1), which both expressly provide for rehearing requests and incorporate by reference Rule 203(b)(6), SCACR, which does the same. Similarly, the legislature has enacted S.C. Code Ann. § 1-23-610(A)(1), which incorporates by reference Rule 203(b)(1), SCACR and Rule 59(a), SCRCP. Furthermore, the legislature has enacted S.C. Code Ann. § 1-23-650(B), which provides that the SCRALC may be enacted to the extent consistent with the SCRCP and "not otherwise expressed in Chapter 23, Title 1." Finally, the legislature has previously responded to the South Carolina Supreme Court's implicit holding that SCAPA provides a right to request a rehearing by codifying that ruling with respect to the agency at issue and not otherwise negating such general right from the SCAPA. *McCummings v. South Carolina Dept. of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995); 1996 Act No. 284, § 5, eff October 1, 1996.

Thus, even if the SCAPA is not as direct as it otherwise might be with respect to the right to request a rehearing, the legislature's intent regarding that subject is nevertheless abundantly manifest. Moreover, the courts will intervene to give effect to the legislature's intent, even where plain words of a statute might dictate otherwise. "However clear the language of a statute may be, the court will reject that meaning when it

leads to an absurd result not possibly intended by the legislature." *Hamm v. South Carolina Public Service Comm'n*, 287 S.C. 180, 182 (1985) (allowing notice of appeal from date order received, rather than issued as provided in the statute). Here there is not even a need to disregard conflicting statutes; they all speak to the same right to request a rehearing.

Second, statutes should be construed liberally in favor of the right of appeal. *Stroup v. Duke Power Co.*, 216 S.C. 79, 83, 56 S.E.2d 745, 747 (1949). *See also Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.") Accordingly, when Appellant's counsel relies in good faith on a statute and an appellate rule that each expressly provide for the right to request a rehearing, Appellant's appeal should not be subject to dismissal for reliance thereon.

Third, statutes regarding taxation must be construed in favor of the taxpayer. *Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 871 (2012). Because the present appeal involves an appeal of a property tax dispute, any question regarding the Appellant/taxpayer's statutory right to appeal should be afforded the same construction. Stated conversely, to deny Appellant with the procedure by which he seek redress of certain rights is to deny the rights themselves.

Fourth, the primary provision relied on by Respondent, Rule 29(D), SCRALC, does not even purport to otherwise limit the legislature's provision of a right to request a rehearing. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges,* 341 S.C. at 86, 533 S.E.2d at 582 (quoting Black's Law Dictionary 602 (7th ed. 1999)). Here, the authors of the SCRALC have

deemed it appropriate to address motions for reconsideration (*i.e.*, motions to alter or amend), but have not specifically addressed motions for rehearing. Accordingly, the latter are excluded from the purview of Rule 29(D), SCRALC, and otherwise incorporated into the SCRALC, generally, through Rule 31, SCRALC.

Fifth, interpreting Rule 29(D), SCRALC in the manner suggested by Respondent would render S.C. Code Ann. § 1-23-380(1), -610(A)(1) & -650(B) a nullity. "The law does not favor the implied repeal of statute." *Hodges,* 341 S.C. at 88, 533 at 583. Thus, Rule 29(D), SCRALC must be reconciled with those statutes if at all possible. Fortunately, here, such reconciliation is simple since Rule 29(D) does not even purport to address rehearing requests.

Sixth, even if such reconciliation of Rule 29(D) with the SCAPA were not possible, "an ALC rule may not alter the provisions of a statute." *Heath Hill,* 2010 WL 5781666, at *11 (citing *State v. Cottingham*, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) and *Marichris, LLC v. Derrick*, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009)). Thus, conflicting provisions of the SCRALC must disregarded if they cannot be reconciled.

Seventh, public policy favors that the underlying substantive issues be heard on appeal. Not only would this afford a citizen and taxpayer the right to address what he believes to be governmental overreaching, but it also gives the judiciary, and by extension the public, the opportunity to clarify an important question of law. Heretofore, all but one case brought by a *pro se* litigant based on distinguishing facts held that the subdivision of property and sale of part thereof without any change of conditions for the remaining property prevented the reassessment of the remaining property in a non-

reassessment year.[4] Accordingly, there is a significant public interest in determining the extent that the state's assessors may reappraise property based on "changed conditions," or for that matter if such right remains at all after the passage of 2006 S.C. Acts 388, which significantly amended the statutory framework regarding the reassessment of property.

Finally, it would raise serious due process concerns if Appellant were not allowed to appeal in these circumstances, particularly after the apparent basis of the adverse ALC ruling is a single case, *pro se* litigant or not, that was not provided to Appellant before the hearing as required by the ALC's standing order, and where Appellant has since found the great weight of precedent (not also provided to the court at the hearing) distinguishes that case. *See B & A Dev. Inc. v. Georgetown Cnty*, 372 S.C. 261, 269, 641 S.E.2d 888, 893 (2007) (acknowledging that "the United States Supreme Court held that due process requires all taxpayers to have a 'clear and certain' remedy for taxes collected in violation of law") (citing *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990)).

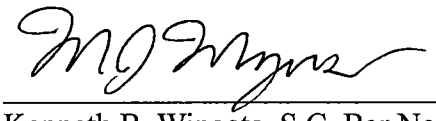
IV. Conclusion

In light of the foregoing, Appellant respectfully asks the South Carolina Court of Appeals to deny Respondent's Motion To Dismiss Appellant's appeal. Also, Appellant would also respectfully ask the Court to consider the imposition of sanctions against Respondent pursuant to Rule 269, SCACR in light of the following: (1) the great weight of the authority presented by Appellant, which the parties have previously had the opportunity to discuss at length before Respondent filed its Motion To Dismiss, (2) that Appellant is a citizen taxpayer that simply desires judicial review of an adverse

[4] *See* page 3, footnotes 2 and 3, *supra.*

governmental action without engaging in burdensome procedural litigation, and (3) that Respondent could have also avoided this side issue by raising it at the proper time before the ALC rather than waiting for the expiration of Appellant's general right to appeal without a rehearing request. Ultimately, a finding of sanctions for Respondent's behavior may even save Respondent money by disincentivizing future wasteful litigation.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No.: 2015-000514

Hugh Allen Palmer.....Appellant,

v.

Richland County Assessor .....Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Motion to Dismiss on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2015, addressed to its attorney of record, Malane S. Pike, Esquire, P.O. Box 729, White Rock, S.C. 2917.

April 1, 2015

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April 1, 2015

Reply to: Main Office

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SENT VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South

RE: Hugh Allen Palmer, Appellant v. Richland County Assessor, Respondent
Appellate Case No.: 2015-000514
Our File: 2393-4791

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Appellant's Return To Respondent's Motion To Dismiss, along with an original and one copy of a Proof of Service of the same. By copy hereof, Respondent's counsel is being served with a copy of the same.

Please return one stamped copy of each in the envelope provided, and file the remainder. Thank you for your assistance, and please do not hesitate to contact me if you have any questions.

With warm regards, I remain,

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Matthew J. Myers

Enclosures

cc: Malane S. Pike, Esquire
Hugh Allen Palmer