THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015-002297

John Doe,

Appellant,

v.

Board of Zoning Appeals (BZA) and
Town of Sullivans Island (S.I.),
S. I. Zoning Administrator, and
S. I. Building Dept., Individually
and In Official Capacity,

Respondents.

INTIAL BRIEF OF APPELLANT

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2. Fraud upon the court in the presence of the court led to wrongful dismissal, it materially prejudiced the Appellant, and it is not moot even after dismissal. Controlling precedent provides that failure to exercise discretion under these circumstances is an abuse of discretion reversible as a matter of law.

3. The BZA hearing on the merits at the request of the property owner vests jurisdiction in the BZA at the pre-litigation stage; statutory authority provides that party with the right to appeal and to request mediation after the hearing; pursuant to the statute, Appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-825, the request for mediation "must" be granted. The lower court erred because it has no jurisdiction at the **pre-litigation** stage until and unless mediation is unsuccessful.

4. Even assuming the lower court had jurisdiction, after BZA hearing on the merits at the request of the property owner and after timely filing of notice of appeal with request for pre-litigation mediation, statutory authority and legislative intent pursuant to S.C. Code § 6-29-825 provide that the requested mediation "must be granted"; the lower court erred in failing to grant the request for mediation.

5. Public policy supports the request for mediation after BZA hearing on the merits involving violation of impervious surface limitations and storm water runoff adversely affecting adjacent property owners.

6. The substantive rights of the Appellant have been prejudiced and the lower court order should be reversed.

FACTS OF THE CASE

Appellant is a property owner whose land is the subject of a decision of the BZA. After de novo hearing on the merits, the Appellant timely filed NOA with request for pre-litigation mediation. Thereafter, unbeknownst to Appellant, untrustworthy Respondents' counsel prejudiced the matter and the Appellant's interests by improper ex parte contact with the lower court, by seeking improper dismissal, and by making material misrepresentations/omissions of fact in order to obtain improper dismissal. On information and belief, the lower court, the lower court clerk, and the lower court clerk's conscientious staff were all misled and co-opted to perpetrate fraud upon the court in the presence of the court by untrustworthy officers of the court. Appellant timely appeals wrongful lower court order violating unambiguously expressed legislative intent pursuant to statute that pre-litigation "mediation must be granted." S.C. Code § 6-29-825.

STATEMENT OF THE CASE

Legislative intent and statutory authority provide a property owner, whose

land is the subject of a decision of the BZA, the right to a hearing and, after that hearing, the right to file notice of appeal with request for pre-litigation mediation. The lower court erred in failing to grant the property owner's request for pre-litigation mediation.

STANDARD OF REVIEW

Generally, appeal from a final order of the circuit court following its review of the zoning board's decision is to the court of appeals. S.C. Code § 6–29–850; Rule 203(d), SCACR. Appellate courts regard appeals from zoning decisions in the same manner as appeals from other circuit court judgments in law cases. *Petersen v. City of Clemson*, 312 S.C.162, 169-70, 439 S.E.2d 317, 322 (Ct.App.1993) (citing *Bishop v. Hightower*, 292 S.C. 358, 360, 356 S.E.2d 420, 421 (Ct.App.1987)). Even if a court disagrees with a zoning board's decision, the court will refrain from substituting its judgment for that of the zoning board unless the decision "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the [zoning] board has abused

its discretion." *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002). The alleged errors at issue in this case are errors of law. This Court is free to decide matters of law with no particular deference to the lower court. *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287, 648 S.E.2d 301, 303 (Ct.App.2007).

ARGUMENT

1. Respondents engaged in fraud upon the court in the presence of the court as documented in the transcript dated April 7, 2015, and the attached affidavit, which was timely served and filed; despite timely objection, the lower court erred in failing to address it thereby becoming an unwitting accomplice/enabler in wrongdoing perpetrated by untrustworthy Respondents' Counsel as officers of the court.

Specifically, respondents failed to provide statutorily required notice as documented by the attached copy of the Postmaster's letter. Appellant received no notice at all prior to that letter. Appellant received no notice prior to dismissal. Moreover, respondents' certificate of service (copy attached) does not comply with the statutorily required address listed on the attached copy of the Charleston County Circuit Court's Public Index website specifying the proper address. Rule 5, SCRCP. Respondents failed and/or refused to employ the proper address, which did in fact deprive the other side of notice. The appellant did not receive timely notice and the appellant is prejudiced thereby. Materially, as per the correspondence dated April 27, 2015, respondents' actions in contacting the postmaster with the correct address only after denial of any meaningful opportunity to be heard is consistent with respondents' bad faith and/or the appearance of impropriety.

Respondents have apparently misled the lower court. Respondents' attempt to gain unfair advantage and to deprive the other side of due process is, at best, unflattering.

As documented in the attached correspondence dated April 27, 2015, respondents knew the other side had not received notice and failed to disclose this material fact, thereby wrongfully inducing the lower court to act on respondents' false representations and/or material omissions that the other side was on notice. Respondents' actions establish the fact that respondents knew appellant had not received notice and respondents thereby engaged in impermissible ex parte communications. Rule 5, SCRCP, is the specific rule with statutory authority requiring respondents to copy the other side, which respondents violated. From *Burgess v. Stern*, South Carolina case law and rule-making authorities are well synchronized on the prohibition against ex parte contacts. In *Herring v. Retail Credit Co.*, 266 S.C. 455, 224 S.E.2d 663 (1976), the judicial practice of merely signing an order prepared by counsel of one party was condemned. This Court advised the Bench and the Bar that not only do such orders deprive the reviewing Court of adequate records on appeal, but also deny to the deprived party an opportunity to be heard in matters which affect them. Id.... Canon 3(A)(4), Rule 501, Code of Judicial Conduct, SCACR, states: "A judge should ..., except as authorized by law,

neither initiate or consider ex parte or other communications concerning a pending or impending matter." While Canon 3(A)(4) guards against ex parte indiscretion, it also strives to eliminate the appearance of impropriety. This issue was discussed succinctly in the case of *In re: Wisconsin Steel*, 48 B.R. 753 (D.Ill.1985). The Court in *Wisconsin Steel* noted:

> It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against "prejudicial" ex parte communications, but against ex parte communications. *Burgess v. Stern*, 428 S.E.2d 880, 311 S.C. 326 (S.C., 1992).

From another case, the Court cautioned: "We note the Bench and Bar were cautioned to strictly observe the Canons governing judicial and attorney conduct with regard to ex parte contacts as they relate to maintaining the appearance of propriety and to comply with both the **letter and the spirit** of Opinion No. 2-1988 of the Advisory Committee on Standards of Judicial Conduct in *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993)." *Jennings*, Matter of, 468 S.E.2d 869, 321 S.C. 440, fn. 4 (S.C., 1996). In sum, respondents made misrepresentations and/or material omissions and, thereby, perpetrated fraud upon the court in the presence of the court when

they knew and failed to disclose the fact that the other side had no timely notice of the proposed order or other documents. Appellant expressly objects to respondents' ex parte contacts and is prejudiced thereby.

Further, the order is reversible based on error of law and material fact, including but not limited to, the case of *Wells Fargo Bank, NA, v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (S.C. App., 2012), which provides as follows: "A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549–50, 186 S.E.2d 523, 526 (1972)....One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor. Ordinarily a court may not grant relief beyond the limits or scope of such notice. *Ford v. Calhoun*, 53 S.C. 106, 30 S.E.2d 830; *Coogler v. California Ins. Co.*, 192 S.C. 54, 5 S.E.2d 459; *Wildhagen v. Ayers*, 225 S.C. 384, 82 S.E.2d 609." In the instant case, no statutory notice was given and no notice was sent to the proper address as posted on the Charleston County Clerk of Court's website (see attached) at a meaningful time. Any after-the-fact notice could not cure the prejudice caused by respondents' wrongdoing which is designed to, and which in fact did, deprive the other side of any meaningful opportunity to be heard at a meaningful time before dismissal. The lower court order should be reversed.

Moreover, the statute, S.C. Code § 6–29–820(B), provides as follows:

> (B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:
>
> (1) as provided in subsection (A); or
> (2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.
> Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

Case law confirms that the timely notice of appeal is proper because appellant is a property owner whose land is the subject of a decision of the BZA. Respondents are well aware of this fact due to appellant's expert's testimony at the board meeting and due to evidence at the hearing in the form of a current land survey as well as documentation of the flooding and standing water lapping against residential dwellings occurring as a direct and proximate result of wrongdoing and violation of the zoning ordinances. The situation has since become more dire with recent flooding and pooling of contaminants in rear enclosed areas where children and pets play and live. In *Spanish Wells*, the Court of Appeals held that owners of property adjacent to and in the near vicinity of a development are persons with a substantial interest and, as a consequence, had standing to appeal. *Spanish Wells*

Property Owners Assn. v. Board of Adjustment, 292 S.C. 542, 357 S.E.2d 487 (Ct.App.1987), reversed in part on other grounds, 295 S.C. 67, 367 S.E.2d 160 (1988). Respondents have misconstrued *Bevivino*, which supports appellant's position. The Court of Appeals found that close proximity is dispositive. *Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (S.C. App., 2013).

With regard to *Newton*, respondents again have misconstrued the case. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). The statute, S.C. Code § 6–29–820(B), is designed to encourage **pre-litigation** mediation by **NOT** requiring the filing of a petition until and unless pre-litigation mediation is unsuccessful. In *Newton*, the Court made clear, "This procedure does not allow for **issue identification,-or even party identification, prior to the filing of a petition** with the circuit court." Id., p. 284 (emphasis supplied). Accordingly, the lower court erred.

Due process requires notice, meaningful opportunity to respond, and judicial review. It is fair to say that respondents themselves would want notice. For this reason alone as well as others, respondents' motion should have been dismissed and the purpose of the statute in promoting **pre-litigation** mediation should be supported. S.C. Code § 6-29-820(B). These

are matters of public importance affecting Sullivans Island, Charleston County, and our State as well as affecting precious coastal resources and water quality. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

2. Fraud upon the court in the presence of the court led to wrongful dismissal, it materially prejudiced the Appellant, and it is not moot even after dismissal. Controlling precedent provides that failure to exercise discretion under these circumstances is an abuse of discretion reversible as a matter of law.

In *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998), the Court of Appeals held the trial judge erred by dismissing the appellant's discovery abuse motion as moot even though the verdict was in favor of the defendant. *Chas. Lumber v. Miller Housing*, 525 S.C. 869, 338 S.E.2d 171, fn. 5 (SC 2000). The *Creighton* case provides in pertinent part:

The burden is on the appealing party to demonstrate that the trial court abused its discretion. *Dunn,* 298 S.C. 499, 381 S.E.2d 734. A reviewing court may find abuse of discretion where an appellant shows that the lower court's conclusion is based upon an error of law or without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987). "When a trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Id.* at 538, 354 S.E.2d at 566. If a court has discretionary authority, but rules as a matter of law, the matter should be reconsidered and passed on as a discretionary matter. *Id.*

Based upon our understanding of the record, the Creightons filed two motions for discovery protection and costs pursuant to Rules 26 and 30, SCRCP. The trial judge held a pre-trial hearing at which he denied all discovery motions except those pertaining to damages. However, the trial judge reserved ruling on these motions. After a verdict was entered in favor of the respondents in the liability phase of the trial, the trial judge dismissed the remaining discovery abuse motions as moot. We agree with the Creightons that the trial court erred in finding the remaining discovery motions were moot.

Although there is no South Carolina precedent dispositive of this issue, federal case law indicates discovery abuse motions do not become moot when a case is terminated. See *Cooter & Gell v. Hartman Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("[L]ike the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's termination."); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (after case dismissed pursuant to 28 U.S.C. § 1927 and Rule 37, FRCP, Court remanded case to district court for determination of 37(b) motion for costs and attorney's fees); *Hedrick v. Comptroller of Currency, Washington, D.C.*, 68 F.3d 477 (7th Cir.1995) ("dismissal of the underlying case alone does not moot the question of Rule 11 sanctions"); *Heinrichs v. Marshall and Stevens, Inc.*, 921 F.2d 418 (2d Cir. 1990) (affirming district court award of Rule 37 sanctions subsequent to a grant of summary judgment); *Mercy v. Suffolk Cnty., New York*, 748 F.2d 52, 56 (2d Cir.1984) ("The sanctions provided in the Federal Rules of Civil Procedure are designed to prevent any litigant, whether or not he ultimately prevails, from being put to discovery expense that is unjustified."); *Penthouse International, Ltd. v. Playboy Enter., Inc.*, 663 F2d 371 (2d Cir. 1981) (case remanded to district

court for determination of Rule 37 sanctions despite complaint's dismissal); *Merritt v. International Bro. of Boilermakers*, 649 F2d 1013 (5th Cir. 1981) (interpreting *Roadway Express* as implicit recognition of district court's authority to assess attorney's fees and discovery expenses under Rule 37 post-judgment).

The record reflects the trial judge's disagreement with defense counsels' conduct during some depositions. At the hearing, the trial judge indicated he would consider ordering the respondents to pay the costs of bringing the out of state doctors in to testify concerning damages if the Creightons obtained a favorable verdict at the liability trial. Obviously, after a respondents' verdict was entered at the liability trial, this alternative was no longer available. However, the unavailability of a proposed sanction does not moot the issue of discovery abuse itself.

Additionally, the trial judge's failure to rule on all the Creightons' discovery abuse allegations contravenes the policies underlying the Rule's enactment. Discovery sanctions are imposed "to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 545, 489 S.E.2d 679, 683 (Ct.App.1997) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.C. 2778, 49 L.Ed.2d 747 (1976)). If respondents' counsel has taken action warranting sanctions, dismissing the issue without ruling on its merits allows them to go unpenalized. Such action also decreases the likelihood of others being deterred from similar misconduct. Therefore, we find the trial judge erred in failing to rule on the remaining discovery abuse motions and remand the case for disposition of these issues.

Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct.App.1998).

As an historical note and for the record, respondents' counsel listed in the *Creighton* case (*supra*) includes the self-same untrustworthy respondents' counsel herein conducting untrustworthy business as usual undeterred.

Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App.

1998). Thereafter, as a matter of public record and consistent with the pattern and practice of wrongdoing, the same hyphenated firm had another junior associate with no personal knowledge of the lower court matter sign off on and induce the appellate court to rely on a **FALSE FEE AFFIDAVIT**, even after direct evidence in the record of falsification. Chief Judge Few had to rescind that order. Copies available upon request. Respondents' counsel has taken action warranting sanctions herein and that wrongdoing is NOT moot. Public policy abhors abuse of discretion. Abuse of discretion in failing to address that wrongdoing condones, facilitates, and, as the record herein reflects with regard to Respondents' untrustworthy officers of the court, promotes future wrongdoing unphased, if not encouraged. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

3. The BZA hearing on the merits at the request of the property owner vests jurisdiction in the BZA at the pre-litigation stage; statutory authority provides that party with the right to appeal and to request mediation after the hearing; pursuant to the statute, Appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-825, the request for mediation "must" be granted. The lower court erred because it has no jurisdiction at the **pre-litigation** stage until and unless mediation is unsuccessful.

The pertinent statute, S.C. Code § 6–29–820(B), provides as follows:

> (B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:
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> (1) as provided in subsection (A); or
> (2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.
> Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

The BZA hearing on the merits at the request of the property owner vests jurisdiction in the BZA at the pre-litigation stage; statutory authority provides the party, a property owner whose land is the subject of a decision of the BZA, with the right to appeal and to request mediation; pursuant to the statute, the Appellant timely filed notice of appeal within 30 days after the BZA decision was postmarked; the lower court erred because, pursuant to S.C. Code § 6-29-825, the request for mediation "must" be granted; and the lower court has no jurisdiction at the pre-litigation stage until and unless

mediation is unsuccessful. "When interpretation of a statute is required, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon,* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Accordingly, the lower court opinion should be reversed. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

4. Even assuming the lower court had jurisdiction, after BZA hearing on the merits at the request of the property owner and after timely filing of notice of appeal with request for pre-litigation mediation, statutory authority and legislative intent pursuant to S.C. Code § 6-29-825 provide that the requested mediation "must be granted"; the lower court erred in failing to grant the request for mediation.

Our State's barrier islands and beaches are a precious public resource for the people of South Carolina. While the islands are a finite resource, a bevy

of competing environmental, economic, and social uses seek to lay claim to them. The legislative branch has made policy decisions as to how those uses should be balanced in order to maximize the benefit to the people of South Carolina and enacted statutes to fulfill those policy decisions. The task falls to the courts to ensure that those statutes and regulations are correctly applied. See *Kiawah Devt. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 710 (S.C. 2014).

By analogy, in *Chevron,* the landmark administrative law case, the United States Supreme Court summarized:

> When a court reviews a *BZA*'s construction of the *statutes and regulations*, it is confronted with two questions. First, always, is the question whether *the Legislature* has directly spoken to the precise question at issue. If the intent of *the Legislature* is clear, that is the end of the matter, for the court, as well as the *BZA*, must give effect to the unambiguously expressed intent of *the Legislature*. If, however, the court determines *the Legislature* has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of a *BZA* interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the *BZA*'s answer is based on a permissible construction of the statute.
>
> *Id.* at 842–43, 104 S.Ct. 2778 (emphasis supplied); *see also Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S.C. 1215, 89 S.E.2d 1700 (1945)* (holding that "if the meaning of the words used is in doubt," "a court must necessarily look to the *BZA's* construction of the regulation," and the *BZA's* interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation") (emphasis supplied). *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837*, 843, 104 2778, 81 694 (1984) (emphasis supplied); *see also Brown v. Bi–Lo,* 354 S.C. at 440, 581 S.E.2d at 838.

In this case, the lower court opinion is reversible for failure to comply with the unambiguously expressed legislative intent pursuant to S.C. Code § 6-29-825, which provides that the requested mediation "must be granted."

Moreover, the lower court order is reversible because it conflicts with the BZA's own determination. The BZA held a de novo hearing on the merits. The Appellant timely filed notice of appeal pursuant to the statute. S.C. Code § 6-29-820(B). At the pre-litigation stage, it is reversible error for the lower court to summarily dismiss the case.

"A property owner whose land is the subject of a decision of the board of appeals may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with section 6-29-825." S.C. Code § 6-29-820(B). "If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted...." S.C. Code § 6-29-825. When interpretation of a statute is required, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403S.E.2d 660, 662 (1991).

Respondents misconstrued the *Newton* case. *Newton v. Zoning Bd. of*

Appeals for Beaufort Cnty., 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). The statute, S.C. Code § 6–29–820(B), is designed to encourage **pre-litigation** mediation by **NOT** requiring the filing of a petition until and unless pre-litigation mediation is unsuccessful. In *Newton*, the Court made clear, "This procedure **does not allow for issue identification, or even party identification, prior to the filing of a petition** with the circuit court." *Id.*, p. 284 (emphasis supplied). In this case, the lower court erred as a matter of law in summarily dismissing the case at the **pre-litigation** stage. Accordingly, the lower court order should be reversed. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

5. Public policy supports the request for mediation after BZA hearing on the merits involving violation of impervious surface limitations and storm water runoff adversely affecting adjacent property owners.

The purpose of the statute in promoting **pre-litigation** mediation should be supported. S.C. Code § 6-29-820. These are matters of public importance affecting Sullivans Island, Charleston County, and State and Federal regulations as well as affecting precious coastal resources and water quality. Accordingly, the lower court should be reversed. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

6. The substantive rights of the Appellant have been prejudiced and the lower court order should be reversed.

The facts in this case establish the zoning administrator did not have the authority to alter or waive the zoning ordinances in question. The zoning code gives zoning administrators the power to administer and enforce the zoning code. The zoning code does not grant power to an administrator to

alter, modify, or waive provisions contained in the zoning code. Further, the zoning administrator was not authorized to grant a variance. The zoning code only grants the Zoning Board of Appeals the discretion of whether and when to grant a variance. Moreover, the zoning administrator failed to uphold the Town's prior denial of the request to alter or waive pertinent zoning ordinances. That denial was supported by petition signed by multiple owners of neighboring properties. The zoning administrator failed to provide statutory notice, deprived property owners of meaningful opportunity to be heard at a meaningful time, and exceeded his authority. The substantive rights of the Appellant have been prejudiced in violation of constitutional and statutory provisions; in excess of the statutory authority; in furtherance of unlawful procedure; by multiple other errors of law; by error based on the reliable, probative, and substantial evidence on the record as a whole; and/or by an abuse of discretion, clearly unwarranted exercise of discretion, or arbitrary or capricious actions. The zoning administrator's actions were in error and should be reversed. 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, 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. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

CONCLUSION

In support of express legislative intent for mediation and for substantial justice affecting substantial rights, Appellant respectfully requests reversal of the lower court orders.

Respectfully submitted,

Dated 12/15/13

C. Holmes
PO Box 187
SI, SC 29482
843.883.3010

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AFFIDAVIT

Personally came and appeared before me, Notary Public, C. Holmes, who upon being duly sworn did depose and say the following:

1) This affidavit is submitted in support of the attached Rule 59(e), SCRCP, Motion, and I am the plaintiff.

2) As owner of the land that is the subject of a decision of the board of appeals, I have statutory standing to appeal. S.C. Code § 6–29–820.

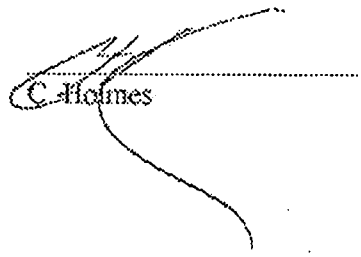
3) The attached copy of correspondence dated April 27, 2015, documents there was no required notice in Case No. 2015-CP-10-0775, *Doe v. BZA et al.* Moreover, it establishes that, on or before April 27, 2015, defendants knew or should have known they failed to provide the required notice to the other side. Defendants failed to timely disclose this material fact, thereby wrongfully inducing this Honorable Court to rely on their misrepresentations.

4) I received no required notice and no actual notice and was prejudiced thereby.

5) Defendants wrongfully induced this Honorable Court to rely on their misrepresentations and to sign ex parte order. On or before April 27, 2015, defendants failed to timely disclose the material fact that they failed their duty to provide required notice. Due in whole or in part to defendants' lack of diligence, ex parte order was signed. It has come to our attention that defendants made misrepresentations and/or material omissions to the Charleston County Clerk of Court as well.

6) It is fair to say that defendants would want notice. In what has become business as usual for defendants' counsel, they failed their professional responsibilities to this Honorable Court, to the Charleston County Clerk of Court, to their client, and to the other side. Defendants' motion should be dismissed/stricken.

FURTHER THE AFFIANT SAITH NOT.



C. Holmes

Subscribed and sworn to before me,
Notary Public, this 30th day
of June, 2015.

Susan L McLeod
NOTARY PUBLIC

My commission expires: 12/26/17

UNITED STATES
POSTAL SERVICE

April 27, 2015

PO Box 187

The enclosed mail was addressed to John Doe at the Post Office address. However, Pratt-Thomas, Walker, Attorneys At Law instructed me to place these letters into PO box 187.

If you have any questions or concerns, please call the attorney's office.

Sincerely,

Margie L. Seabrook

Margie L. Seabrook
Postmaster
2061 Middle St.
Sullivans Island, SC 29482

Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

John Doe VS Board of Zoning Appeals , defendant, et al

Case Number:	2015CP1000775	Court Agency:	Common Pleas	Filed Date:	02/09/2015
Case Type:	Common Pleas	Case Sub Type:	Zoning Board 970	File Type:	Non-Jury
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	Dennis, R. Markley Jr.
Disposition:	Ended by Non Jury	Disposition Date:	04/10/2015		
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties | Judgments | Tax Map Information | Associated Cases | Actions | Financials

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Board of Zoning Appeals					Defendant		02/09/2015
BZA					Defendant		02/10/2015
Doe, John	PO Box 187 Sullivans Island SC 294820187				Plaintiff Pro Se		04/30/2015
Doe, John					Plaintiff		04/14/2015
Linton, John Phillips Jr.	PO Drawer 22247 Charleston SC 29413				Defendant Attorney		03/09/2015
S I					Defendant		02/10/2015
S I Building Dept					Defendant		02/10/2015
S I Zoning Administrator					Defendant		02/10/2015
Sullivans Island Town of					Defendant		03/09/2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing Notice of Motion and Motion to Dismiss by first class mail to the below-listed party on March 5th, 2015:

John Doe, pro-se
2061 Middle Street
Sullivans Island, SC 29482-0187

By: _____
Chris Morrow
Paralegal to John P. Linton, Jr.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
John Doe,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 15-CP-10-0775
	)	
Board of Zoning Appeals,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on April 7, 2015, before The Honorable R. Markley Dennis, Jr., in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

John P. Linton, Esq.

Treholm Walker, Esq.

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
P O Box 901
Johns Island, South Carolina 29457
dgarrison@sccourts.org

THE COURT: Doe versus Board of Zoning Appeals. Y'all are back? Is this Sullivans Island?

MR. LINTON: Yes, Your Honor.

THE COURT: Okay. Who is ----

MR. WALKER: Jane Doe d/b/a (sic) John Doe does not appear to be here.

THE COURT: Have they proceeded always as "Doe", "the Does"?

MR. LINTON: Yes, Your Honor. All they've filed is a Notice of Appeal as John Doe, and we've filed a Motion to dismiss that appeal.

THE COURT: Did they have an address where the Does live?

MR. LINTON: Yes.

THE COURT: Now we know the Does. They were sent notice of that, Miss Caroline?

CAROLINE LEONARD: Your Honor, notice was sent to 2061 Middle Street on Sullivans Island, South Carolina.

THE COURT: Is that the address that you have?

MR. LINTON: Your Honor, it is. I believe -- was the zip code on there? 29482-

187?

CAROLINE LEONARD: That's correct.

MR. LINTON: That's the same.

THE COURT: Very well.

MR. WALKER: And that is the subject property, too.

THE COURT: Okay. Then --

MR. LINTON: Your Honor, it is not the subject property. We believe that's the United States Post Office on Sullivans Island.

THE COURT: You briefed it?

MR. LINTON: Yes, Your Honor.

THE COURT: Your Motion is granted. Thank you, sir. If you (Mr. Linton) want to prepare an Order, I will be happy to sign it. A Motion to Dismiss is what you're asking for?

MR. LINTON: Yes, Your Honor. We've briefed it. We have not filed the brief but ---

THE COURT: File the brief. For the record, I am relying on your position stated in the brief -- and the fact that they are not here, but primarily the position

stated in your brief, which I have seen.

(HEARING CONCLUDED)

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on April 7, 2015, before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison

Charleston, South Carolina
September 1, 2015

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015-002297

John Doe,

Appellant,

v.

Board of Zoning Appeals (BZA) and
Town of Sullivans Island (S.I.),
S. I. Zoning Administrator, and
S. I. Building Dept., Individually
and In Official Capacity,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents at 16 Charlotte St., Chas., SC 29403 on this date.

Dated 12/18/15

C. Holmes (843) 883-3010
POB 187, SI, SC 29482