

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

MAR 28 2016

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.

---

**Motion Pursuant to Rule 240(j), SCACR**

---

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

The appellant submits Rule 240(j), SCACR, motion for panel review of the Order dated March 8, 2016, for the reasons set forth below.

#### STANDARD OF REVIEW

Questions of law are reviewed de novo. S.C. Const. art. V, § 5. Moreover, the Rule 240(j), SCACR, motion herein is an appeal of an order by an individual judge and the proper legal standard is de novo. S.C. Code § 14-8-220. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of decisions by a single judge for self-evident reasons. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the case stands before the appellate court as if it had never been decided. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys.*

*Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). Significantly and materially in that case, the denial of a transfer motion clearly does not end or finally determine a case; the only necessary element for Rule 240(j), SCACR, panel review is that the order is signed by a single judge. Accordingly, the Petitioner is aggrieved by the March 8, 2016, order of a single judge. The Petitioner respectfully appeals pursuant to S.C. Code § 14-8-220 for de novo review by a panel of judges which does not include the individual judge who issued the order.

I. The March 8, 2016, order on appeal is reversible as a matter of law pursuant to S.C. Code § 14-8-220, Rule 240(j), SCACR, Constitutional authority, and legislative intent.

The Order of March 8, 2016, errs as a matter of law in relying on the inapplicable Rule 240(i), SCACR. Rule 240(j), SCACR, motion expressly provides for panel review of order signed by a single judge. Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. S.C. Code § 14-8-220, the statutory authority underlying Rule 240(j), SCACR, expressly provides for appeal of an order by a single judge as follows:

### **S.C. Code § 14-8-220**

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

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

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

That statute underlies Rule 240(j), SCACR, which was renumbered in 2009 from Rule 224(j), SCACR. The previous Rule 224(j), SCACR, included the provision that, "Any party aggrieved by an order of an individual judge or justice may seek review of that order by the appellate court or a panel thereof." That provision was preserved (in 2007) but reworded then re-numbered Rule 240(j), SCACR, to provide that, "Any review of an order issued by an individual judge or justice shall be by petition for rehearing." This Court is respectfully requested to distinguish between Rule 240(j), SCACR, petition for rehearing with de novo legal standard as opposed to Rule 221, SCACR, petition for rehearing.

Significantly and materially, the legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220. The legal standard of review for Rule 240(j), SCACR, appeal is de novo. Moreover, questions of law are reviewed de novo. The Rule 240(j), SCACR, motion herein is an appeal of an order by a single judge. S.C. Code § 14-8-220. Accordingly, the March 8, 2016, order is reversible as a matter of law pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR.

It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for review of an order by a single judge. See Local Rule 27(e), FRAP. At Rule 240(j), SCACR, appeal, the case stands before the lower appellate court as if it had never been decided. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5 Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a

single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). ). Significantly and materially in that case, the denial of a transfer motion clearly does not end or finally determine a case; the only necessary element for Rule 240(j), SCACR, panel review is that the order is signed by a single judge. Accordingly, the March 8, 2016, order errs as a matter of law, the Petitioner is prejudiced thereby, and the 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).

- II. As a matter of public policy, providing panel review benefits the appellate court, benefits individual judges/justices, and benefits and secures the integrity of the appellate process.

As a matter of public policy, providing panel review benefits the appellate court, benefits individual judges/justices, and benefits and secures the integrity of the appellate process.

Legislative intent and express statutory authority in S.C. Code § 14-8-220 mandate it, particularly where judges are elected and are subjected to re-elections. Public policy, Federal case law, State and federal constitutional law, and the FRAP provide for review of orders by a

single judge. This Court is respectfully requested to confirm the same. Accordingly, the March 8, 2016, 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).

III. Even assuming Rule 240(i), SCACR, applies, the March 8, 2016, order is reversible due to error of material fact. Because Respondents failed to respond, no opposition was entered to the appeal or to the relief requested. As such, the appeal stands unopposed. The clerk's unauthorized order essentially affects final determination and, therefore, is reviewable under Rule 240(i), SCACR.

Even assuming Rule 240(i), SCACR, applies, the March 8, 2016, order is reversible due to error of material fact. Because Respondents failed to respond, no opposition was entered to Appellants' appeal or to the relief requested. As such, the appeal stands unopposed. The clerk's unauthorized order essentially affects that final determination and, therefore, is reviewable under Rule 240(i), SCACR. The propriety of the clerk's violation of the SCACR by denying the non-moving party any meaningful opportunity to respond is challenged. The propriety of the clerk's unauthorized sua sponte order in violation of the SCACR is challenged as well. Appellant is prejudiced thereby and respectfully requests opportunity to be heard. See *Moore v. Moore*, 376 S.C. affadequate 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).

IV. The March 8, 2016, Order is reversible as a matter of law because the underlying February 3, 2016, order violates Rule 263(b), SCACR.

Respondents filed their out-of-time motion for extension of time pursuant to Rule 263(b), SCACR, which expressly requires the motion to be decided by the appellate court or an individual judge thereof. Rule 263(b), SCACR. In contrast, Rule 260(a), SCACR, expressly provides, "the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR. There is no such provision for the clerk under the pertinent Rule 263(b), SCACR. Accordingly, the clerk's unauthorized February 3, 2016, order is void and lacks subject matter jurisdiction under Rule 263(b), SCACR, and should be stricken. See *Moore v. Moore*, 376 S.C. affadequate 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).

V. The March 8, 2016, Order denies due process and effectively sets untenable precedent allowing unauthorized orders issued by non-elected government employees without Constitutional authority and without statutory authority to violate express legislative intent and to evade appellate review.

The March 8, 2016, order essentially allows orders issued by a non-elected government employee without Constitutional authority (ie, the clerk) to evade appellate review. For this and an abundance of other reasons, the orders do not comport with mandatory due process safeguards under the State and Federal Constitutions. Moreover, the orders do not comport with Rule 240(j), SCACR, which was designed to address this precise circumstance.

The clerk exceeded her ministerial duties in granting the out-of-time motion which Rule 263(b), SCACR, expressly reserves for the Court, failed her duty to forward the motion to the Court, and violated the SCACR by unilaterally and unfairly denying one side any meaningful opportunity to be heard. The unauthorized order by a non-elected government employee raises a question of applicability of State and Federal constitutional guarantees and protections. Appellant respectfully requests reversal of the denial of any meaningful opportunity to be heard by non-elected government employee without Constitutional or statutory authority. Appellant respectfully requests opportunity to respond. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate

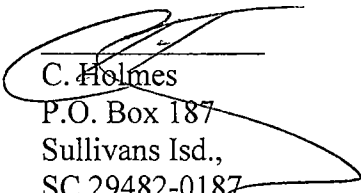
notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses).

### CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, appellant respectfully requests that this Court grant panel review with abeyance and opportunity to respond.

Respectfully submitted,

Dated 3/22/16

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

THE STATE OF SOUTH CAROLINA  
In the 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.

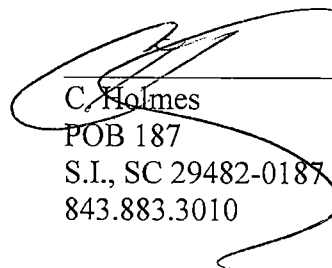
---

PROOF OF SERVICE

---

I certify that I have timely served the foregoing on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to Respondents' attorney of record at 16 Charlotte St., Charleston, SC 29403.

Dated 3/23/10



C. Holmes  
POB 187  
S.I., SC 29482-0187  
843.883.3010

THE STATE OF SOUTH CAROLINA  
In the 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.

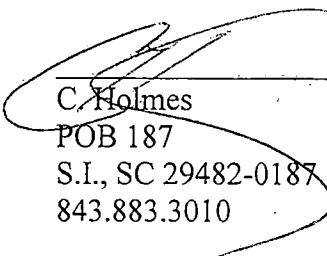
---

PROOF OF SERVICE

---

I certify that I have timely served the foregoing on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to Respondents' attorney of record at 16 Charlotte St., Charleston, SC 29403.

Dated 3/23/10



C. Holmes  
POB 187  
S.I., SC 29482-0187  
843.883.3010

Fax: 803.734.1839

Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Post Office Box 11629  
Columbia, SC 29201/29211

**RECEIVED**

MAR 28 2016

**SC Court of Appeals**

Re: Doe v BZA et al  
App. Case No. 2015-002297

Dear Jenny:

Enclosed for filing is the original with abeyance request in the above case. Also, enclosed are the following:

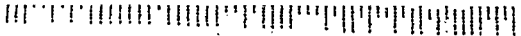
- 1) The filing fee,
- 2) Seven copies,
- 3) Proof of Service and a copy, and
- 4) SASE for return.

Thank you for your kind attention to this matter. With best personal regards, I remain

Very truly yours,

cc: Respondents' Counsel

*Diane*



CHARLESTON SC 294  
THU 24 MAR 2016 PM

**RECEIVED**  
MAR 28 2016  
SC Court of Appeals

Clerk  
SCCOA  
1220 Senate St.  
Columbia, SC  
29201