

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAY 09 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

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.

Return

The appellant respectfully opposes respondents' motion and requests abeyance for the reasons set forth below.

- I. Respondents' reliance on Rule 210(c), SCACR, is misplaced, and Respondents' motion should be denied.

Pursuant to Rule 210(c), SCACR, the item designated in respondents' motion violates Rule 210(c), SCACR, because it has not been presented to the lower court and, therefore, "shall not" be included. Rule 210(c), SCACR. Specifically, respondents induce the appellate court to rely on respondents' incomplete and misleading citation of South Carolina Appellate Court Rule 210(c) in the motion: "South Carolina Appellate Court Rule 210(c) requires that the Appellant include in the Record on Appeal 'all matter designated to be included by any party.'" Respondents, however, materially omit the very next sentence, which provides, "The Record **shall not**, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR (emphasis supplied). Respondents are well aware that the item has not been presented to the lower court

during this appeal, it has not been ruled upon by the lower court, and Rule 210(c), SCACR, prohibits inclusion. *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990). Former Chief Justice Toal states, "(T)he record cannot include matter that was not presented to the lower court or tribunal." Toal *et al.*, *Appellate Practice in South Carolina* (2002), p. 261. See attached supporting affidavit. Accordingly, respondents misapprehend Rule 210(c), SCACR, and respondents' motion should be denied.

II. The document, which respondents' counsel proposes, materially fails to comply with the SCACR, and it was prematurely printed and bound thereby denying the other side any opportunity to respond and/or add.

The document which respondents' counsel proposes materially fails to comply with the SCACR and should be stricken. By prematurely printing and binding the document in violation of Rule 212, SCACR, respondents' counsel seeks to deprive the other side of opportunity to respond and/or opportunity to designate additional material in response. Further, the proposed document violates Rule 210(c), SCACR, and should be stricken

because the item was not presented to the lower court and was not ruled upon by the lower court. Moreover, respondents' proposed document fails to comply with Rule 212(c), SCACR, as well as Rule 267, SCACR; it lacks authorized caption and title; and it deprives the other side of notice, opportunity to respond, and opportunity to designate additional material in response. Respondents' motion should be denied. 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); 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, VI, VII, and XIV.

III. Respondents' untimely motion should be stricken.

Respondents' pattern and practice of lack of diligence with willful neglect of the South Carolina Rules of Court and the South Carolina Appellate Court Rules, with out-of-time motions, and with out-of-time brief is confirmed with the instant untimely motion. The untimely motion underscores respondents' cavalier disregard in the lower court as well for fundamental fairness and basic tenets of due process including but not limited to reasonable notice and candor toward the court, colleagues, and third parties without misrepresentations or material omissions. Contrary to the usual and customary practice of attorneys in general and contrary to the past practice of respondents' counsel in particular, appellants, not respondents, compile the Record on Appeal (ROA) pursuant to Rule 210, SCACR. In contrast herein, however, respondents' counsel fawn over providing unsolicited ROA to appellant after appellant had already compiled the ROA. This fact and others, including but not limited to, the failure of respondents' counsel to make any effort to consult and seek the required consent under Rule 212(b), SCACR, suggest posturing, if not bad

faith. Respondents admit timely service of the Record on Appeal (ROA) postmarked April 7, 2016. Respondents did not even make a good faith effort to consult and seek the required consent under Rule 212(b), SCACR, likely because respondents are fully cognizant that the item has not been presented to the lower court and it is not properly included. Rule 210(c), SCACR. See *Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993). Consistent with respondents' pattern and practice of lack of diligence, no objection, no consultation, and no motion was made for weeks until after the Final Brief, Final Reply, and Record on Appeal were bound and timely filed. Respondents' untimely motion should be stricken/dismissed.

IV. Due to lack of diligence, respondents have waived objection to the ROA, and the untimely motion should be denied.

After appellant's timely service of the Record on Appeal (ROA), respondents failed to provide timely notice of objection just as they failed in the lower court to provide timely notice to the Presiding Judge. With regard to the ROA, Respondents waited weeks and failed to seek the required consent pursuant to Rule 212(b), SCACR, which could have and should

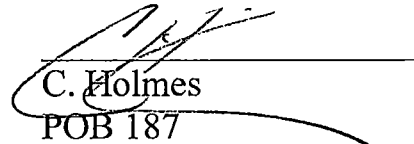
have resolved the issue. Respondents further prolonged the wait until after the Final Brief, the Reply Brief, and the Record on Appeal were bound and filed. Consistent with respondents' pattern and practice of lack of diligence in the lower court herein as well, despite prior notice, respondents waited until after the Presiding Judge signed the proposed order before notifying the lower court via email that the other side had not been copied. Due to lack of diligence, failure to consult as required under Rule 212(b), SCACR, and/or lack of timely motion, respondents have waived objection to the ROA. 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); 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, VI, VII, and XIV.

CONCLUSION

In keeping with State and federal constitutional mandates to foster and further judicial independence, the appellant respectfully requests panel consideration without retired members. For the foregoing reasons and for substantial justice affecting substantial rights, the appellant timely submits return with request for abeyance and respectfully requests respondents' untimely motion be stricken, dismissed, and/or denied. In the alternative, appellant requests leave to file amended Final Brief, Reply Brief, and Record on Appeal (ROA) at respondents' expense with opportunity to respond and designate matter to be included in the ROA.

Respectfully submitted,



C. Holmes
POB 187
SI, SC 29482-0187
843.883.3010