Fax: 803.734.1839

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

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

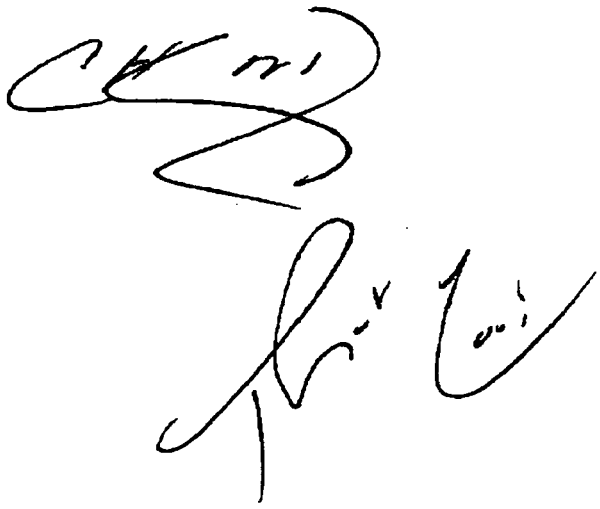
Dear Jenny:

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,



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SC Court of Appeals

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.

Petition for Rehearing

C. Holmes
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SC 29482-0187
(843)883-3010
For Appellant

The appellant respectfully enters Petition for Rehearing for both of the March 6, 2019, Orders and respectfully submits that the Court overlooked or misapprehended the following material points.

I. 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 parties to the BZA hearing with the right to appeal and to request mediation after the hearing; pursuant to the statute, Appellant timely filed notice of appeal and request for 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 except to order the requested mediation and has no further jurisdiction unless and until 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:
>
> (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 right to file notice of appeal in the circuit court resides with the property owner who is a party to the BZA hearing which is consistent with the right of the parties to file notice of appeal to the Court of Appeals after a hearing on the merits in the circuit

court. 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). *See Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). 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).

II. 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, 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 has 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). 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." Accordingly, the lower court order should be reversed.

III. Public policy supports the request for mediation by the parties to the BZA hearing on the merits. The substantive rights of the Appellant have been prejudiced and this Court should confirm the property owners' right to request mediation.

The overall letter and spirit of impervious surface limitations which are incorporated into comprehensive land use plans via zoning ordinances is entered for the benefit of, including but not limited to, adjacent property owners, i.e., the appellant herein. In *Bevivino,* 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). 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." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282, 284 (S.C. App. 2011). In *Newton*, there is a distinction between a first-level appeal in the circuit court which by statute requires a petition as opposed to a second level appeal in the circuit court after the BZA hearing, as in the instant case, which requires notice of appeal. *Id.* Accordingly, the lower court erred.

IV. The lower court erred as a matter of law and material fact because there is no evidence before the lower court for the ruling that appellant is not a property owner whose land is the subject of a decision of the BZA; further, there is no provision for the lower court to hear evidence in order to make such a ruling prior to the requested pre-litigation mediation.

As a party to the BZA hearing on the merits, appellant has a statutory right to file notice of appeal after that hearing and to request pre-litigation mediation. S.C. Code § 6-29-825. *See Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011). The transcript in the ROA confirms the absurd result is based on respondents' counsels' false representations that a mailing address at a P.O. Box proves the appellant is not a property owner. It is respectfully submitted respondents' counsels' so-called evidence is in error and is insufficient to prove the truth of the matter asserted. Accordingly, the lower court opinion is based on error of material fact 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).

V. Appellant respectfully submits issues concerning violations of the zoning code were overlooked; the record reflects the issues were raised.

Appellant respectfully submits issues concerning violations of the zoning code were overlooked. The record reflects the issues were raised including, but not limited to, on page 29 of the record on appeal. As such, the issues are preserved. Accordingly, the March 6, 2019, Orders are based on error of material fact and should be reversed.

VI. The March 6, 2019, order acknowledges the Court of Appeals Clerk of Court mishandled the appeal of the May 22, 2018, lower court order. Accordingly, it is respectfully requested that this Court issue its order for compliance by the Clerk with the SCACR and for docketing the appeal.

Appellant is grateful for acknowledgment of the Clerk of Court's mishandling of appeal for the May 22, 2018, lower court order and respectfully requests order for compliance by the Clerk with the SCACR and for docketing the appeal. Rule 203, SCACR.

VII. As per the November 4, 2016, Order herein, the record reflects multiple errors, irregularities, and mishandling of the appeal by the Court of Appeals Clerk of Court which is capable of repetition and capable of evading judicial review.

Consistent with the March 6, 2019, Order(s), 2019, Order herein, the November 4, 2016, Order herein ruled that the Clerk erroneously failed to file pertinent documents relating to appeal thereby prejudicing the Court and the appellant. Specifically, the Court of Appeals Clerk of Court has abused her position and violated her sworn oath to uphold the SCACR and to facilitate appeals with transparency, even-handedness, and fundamental fairness. Despite correction by the Court including, but not limited to, that November 4, 2016, Order, the Court of Appeals Clerk of Court willfully neglected the Court's admonition and failed and refused to facilitate appeal of the May 22, 2018, order. The record evidences the Clerk of Court abusing her position in violation of the SCACR in order to curry favor and/or garner political support at her disposal for the next opportunity to buck for promotion, which is disqualifying. Public policy abhors abuse of position and this Court should so find.

VIII. This Court is requested to confirm the standard of review for Rule 240(j), SCACR, Petition for Rehearing is *de novo* review.

The Court is requested to confirm *de novo* review is the standard of review at Rule 240(j), SCACR, appeal pursuant to S.C. Code § 14-8-220, which is different than the

standard of review at Rule 221, SCACR, rehearing. The Rule 240(j), SCACR, motion 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. 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 necessary element under Rule 240(j), SCACR, panel review is that the order is signed by

a single judge. Accordingly, the legal standard of review for Rule 240(j), SCACR, appeal is *de novo*.

IX. Rule 240(j), SCACR, is not limited by Rule 240(i), SCACR.

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." Significantly and materially, the legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220. Accordingly, Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR.

X. Rule 240(j), SCACR, appeal requires review by a panel which does not include the appellate court judge who individually signed the order which is the subject of the Rule 240(j), SCACR, appeal.

Pursuant to S.C. Code § 14-8-220, the appellant respectfully submits the Rule 240(j), SCACR, appeal should be *de novo* review by a panel of judges which does not include the individual judge who signed the order which is the subject of the Rule 240(j), SCACR, appeal. Appellant filed the motion under Rule 240(j), SCACR, for appeal of a single judge's order, as opposed to a Rule 221, SCACR, petition for rehearing and as opposed to a request for reconsideration by the same judge who signed the order to review his own decisions and conclusions. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge to a panel of judges. S.C. Code § 14-8-220. Meaningful review requires that a judge not participate in appeal of his or her own order. Occasionally, a recently

appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing an Order that he or she authored while in the court below. In these cases, the Judge or Justice will recuse him or herself from reviewing his or her own order. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR.* Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978) (emphasis supplied). In that case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial. *Id.* at 1116. Granted, this is a Fourth Circuit case, but the principle from this oft-cited case is well stated, sound, and universally accepted as logical and fair. "There is another way to look at the case, however: as one in which the losing litigant

appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper--indeed is an express ground for recusal, see 28 U.S.C. Sec. 47--**in modern American law** for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Accordingly, appellant respectfully submits that the Rule 240(j) appeal should be heard by a panel of judges, which does not include the individual judge who signed the order which is the subject of the Rule 240(j), SCACR, appeal.

XI. Fraud upon the court in the presence of the court led to wrongful dismissal, it materially prejudiced the Court and 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.

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

(Ct. App. 1998). The *Stone* case defines contemptuous acts as "conduct that tends to bring the authority and administration of the law into disrespect" or behavior which "interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses." *Stone v. Reddix-Smalls,* 295 S.C. 514, 516,369 S.E.2d 840, 840-41 (1988). In this case, the transcript dated April 7, 2015, in the ROA documents fraud upon the court in the presence of the court by respondents' counsel, thereby, including but not limited to, interfering with judicial proceedings, exhibiting disrespect for the court, and/or hampering the other side and the witness, Caroline Leonard. Respondents' counsel's correspondence on page 15 of the record on appeal, when compared with that transcript, establishes that respondents were less than straightforward and forthcoming with the court, i.e., lacked candor. In fact, the transcript documents respondents' counsels' material omissions, material misrepresentations, and frank falsehoods and enticed the court to rely on them to the Court's and the plaintiff's extreme prejudice. Fraud upon the court in the presence of the court by respondents' counsel required the court to rescind its order; it is a collateral issue, not mooted by dismissal of the underlying case. All courts have the inherent authority to punish for contempt. *Durlach v. Durlach,* 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004) (citing In re *Brown*, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). A willful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad

purpose either to disobey or disregard the law." Black's Law Dictionary 1434 (5th Ed. 1979). The court held that contumacious behavior which tends to bring the authority and administration of the law into disrespect may also support a finding of contempt. *Ex Parte: Stone v. Reddix-Smalls*, 369 S.E.2d 840 (1988). *See* S.C. Code Ann. § 14-5-320 (1977) ("The [trial] court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same."). In this case, the trial court's reversible error includes, but is not limited to, error as a matter of law in ruling fraud upon the court in the presence of the court is moot.

XII. Fraud upon the Court cannot be mooted; to the extent the March 6, 2019, Order claims Respondents' fraud upon the court is mooted, it renders an absurd result and should be reversed.

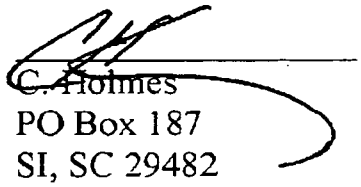
The transcript dated April 7, 2015, (contained in the Record on Appeal) evidences respondents' fraud upon the court in the presence of the court. Despite appellant's timely objection, the lower court erred in failing to address it thereby becoming an unwitting accomplice/enabler in wrongdoing perpetrated by untrustworthy respondents' counsel as officers of the court. "All courts have the inherent power to punish for contempt . . . ." *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) (citation omitted). "A willful act is one which is done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific

intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Miller v. Miller, 375 S.C. 443, 454, 652 S.E.2d 754, 759-60 (Ct. App. 2007) (internal quotation marks omitted). "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish ... defense." *Id.* (internal quotation marks omitted). Accordingly, the lower court orders should be reversed.

CONCLUSION

In support of express legislative intent for a property owner's right to request mediation and other relief, appellant respectfully enters this Petition for Rehearing.

Respectfully submitted,



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For Appellant

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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 66 Hasell St., Charleston, SC 29401.

Dated 3.21.19

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843.883.3010