THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

App. Case No. 2019-001029
COA 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, Motion to Alter or Amend,
Motion for Remand, and
Motion for Abeyance of All time Limits**

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RECEIVED
JUL 12 2019
S.C. SUPREME COURT

The appellant respectfully submits Rule 240(j), SCACR, Petition for Rehearing, Motion to Alter or Amend, Motion for Remand, and Motion for Abeyance of All Time Limits regarding the June 26, 2019, Order. As set forth more fully below, judicial economy and intervening new grounds support this request. The record including, but not limited to, the attached copy of the November 4, 2016, order herein, reflects law of the case with multiple irregularities and errors by the clerk of the lower appellate court. In the same or similar fashion, that clerk of the lower appellate court is a repeat offender in failing and refusing to comply with the SCACR, which she is sworn to uphold with even-handedness, transparency, and fairness. Specifically, the clerk of the lower appellate court in violation of the SCACR erroneously failed and refused to forward to the lower appellate court for interpretation of the law the timely motion for application of new controlling law. The clerk of the lower appellate court has not been elected by the Legislature as a Judge or Justice. The Legislature has not authorized the clerk of the lower appellate court's ministerial duties to include interpretation of the law. Conflicted clerk of the lower appellate court has disqualified herself through abuse of position and breach of trust. Breach of trust by that lower appellate court clerk in violation of her solemn oath to uphold the SCACR and in violation of the rule if law is a slippery slope, as is knowingly exploiting her position as Clerk of the Court of Appeals in order to evade judicial review of her repeated misconduct. Aptly, the Charleston County Judicial Center is inscribed with the words, "Where the rule of law ends, tyranny begins." These issues of importance to the public, to the profession, and to this Court are capable of repetition and capable of evading judicial review. Accordingly, just cause and judicial economy support

granting the Petition for Rehearing, Motion to Alter or Amend, Motion for Remand, and Motion for Abeyance of All Time Limits regarding the June 26, 2019, Order.

Standard of Review

By analogy, in *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396 (4th Cir., 1998), the Fourth Circuit affirmed the district court's ruling on motion to alter or amend which resulted in reversal of the prior order. That case provides the following guidance:

> (W)e have previously recognized that there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir.1997); *Hutchinson v. Staton*, 994 1076, 1081 (4th Cir.1993). Thus, the rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of GMC*, 51 F3d 746, 749 (7th Cir.1995). From *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998).

One or more of those grounds support amendment of the June 26, 2019, Order. In this case, there is intervening change of controlling law in *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., 2019) (COA Case No. 2017-000170 with remittitur filed in the Circuit Court on June 12, 2019), there are intervening new facts, there is clear error of law and/or manifest injustice, and there are countervailing considerations including, but not limited to, judicial economy, which support remand to the lower appellate court for application of new controlling law timely raised while still pending in the lower appellate court.

I. Rule 240(j), SCACR, Petition for Rehearing is not limited by Rule 240(i), SCACR.

Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. If Rule 240(j), SCACR, were controlled by, Rule 240(i), SCACR, then Rule 240(j), SCACR, would be superfluous. The statutory authority underlying Rule 240(j), SCACR, is S.C. Code § 14-8-220. That statute 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 and the standard of review is *de novo* (not the same standard as a Rule 221, SCACR, petition for rehearing). Accordingly, Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR. See *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432–33, 716 S.E.2d 443, 445 (2011) (holding that a specific statute governing a certain issue controls over the more general language of another statute addressing the issue); *Avant v. Willowglen Academy*, 367 S.C. 315, 319, 626 S.E.2d 797, 799 (2006) (noting "the principle that more specific rules prevail over general ones").

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. In re *Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed. 1992) (citations omitted). *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C.

378, 175 S.E.2d 805 (1970).

This Court should not completely disregard the text of an unambiguous statute based on an alleged conflict. In the instant case, the ordinary meaning of S.C. Code § 14-8-220 will not lead to absurd results unintended by the legislature, so the plain language of the statute should not be disregarded. *Hodges v. Rainey*, 533 S.E.2d 578, 341 S.C. 79 (S.C., 2000).

"In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." (citation omitted). *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Petition for Rehearing herein is submitted pursuant to Rule 240(j), SCACR. Accordingly, this Court should find Rule 240(j), SCACR, is independent of, and is not controlled by, Rule 240(i), SCACR.

II. Rule 240(j), SCACR, anticipates appeal which does not include participation by the appellate court justice 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 which does not include the individual justice 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 justice's order, as opposed to a Rule 221, SCACR, petition for rehearing. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for appeal of the order

of a single justice. 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 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. [*Ríce v. McKenzíe*, 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). Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge (*or justice*)" to sit on the appeal panel for his own decision. *Ríce v. McKenzíe*, 581 F.2d 1114, 1117 (4th Cir. 1978) (emphasis supplied). Moreover, in consideration of legislative intent and the overarching principles incorporated in the State Constitution by its framers, due process requires the appellate court judge or justice who individually signed the order not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, appeal. Accordingly, Rule 240(j), SCACR, appeal and due process prohibit the individual judge or justice who signed the order on appeal from participating in that appeal.

III. 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 does not end or finally determine a case; the necessary element under Rule 240(j), SCACR, review is that the order is signed by a single judge or justice. Accordingly, the legal standard of review for Rule 240(j), SCACR, appeal is *de novo.*

IV. 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.

The record including, but not limited to, the November 4, 2016, Order herein, copy

attached, establishes the law of the case with the ruling that the Clerk erroneously failed to file pertinent documents relating to appeal thereby prejudicing the lower appellate court and the appellant. Specifically, the conflicted Court of Appeals Clerk of Court 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, the attached November 4, 2016, Order, the Court of Appeals Clerk of Court willfully neglected the Court's ruling and law of the case that she erred. As a repeat offender and in the same or similar fashion, the clerk of the lower appellate court willfully and wantonly erred in failing and refusing to follow the SCACR, failing and refusing to facilitate appeal, and failing and refusing to forward to the court the timely motion for application of new controlling law. The record establishes the clerk of the lower appellate court abused her position and violated the SCACR in order to curry favor and/or garner political support at her disposal for the next opportunity to buck for a promotion, which is disqualifying.

CONCLUSION

For judicial economy and for substantial justice affecting substantial rights, appellant respectfully requests this Court grant the Petition for Rehearing pursuant to Rule 240(j), SCACR, Motion to Alter or Amend, Motion for Remand, and Motion for Abeyance of All Time Limits regarding the June 26, 2019, Order

Respectfully submitted,

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The South Carolina Court of Appeals

John Doe, Appellant,

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

Appellate Case No. 2015-002297

ORDER

Appellant has filed a "Motion for the Court's Clarification" relating to this court's letter of July 29, 2016, returning Appellant's "Motion for Leave to File and Other Relief" to Appellant and explaining that this court would take no further action on the motion.

After consideration of the "Motion for the Court's Clarification," we find that Appellant's "Motion for Leave to File and Other Relief" was returned to Appellant in error, and we accept the motion for filing.

In the "Motion for Leave to File and Other Relief," Appellant requests that this court strike the supplemental record or allow Appellant to file a response to the supplemental record, arguing it contains matter not ruled upon by the lower court. Because the only matter contained in the supplemental record is a motion that was filed in the circuit court and designated in Respondents' designation of matter, the motion was properly included in the record on appeal pursuant to Rule 210(c), SCACR. Accordingly, "Appellant's Motion for Leave to File and Other Relief" is denied.

FOR THE COURT

FILED

November 4, 2016

Clerk, SCSC
1231 Gervais St.
Columbia SC
29201