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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 Bentley Price
The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (TOSI),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

Rule 240(j), SCACR, *De Novo* Panel Appeal and Motion to Hold All Time Limits in Abeyance

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P.O. Box 187
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SC 29482-0187
(843)883-3010
For Appellant

Without being disagreeable, there is disagreement. For good cause, appellant timely enters this request for *De Novo* Panel Appeal pursuant to S.C. Code § 14-8-220 appeal of order by a single government employee dismissing meritorious appeal after the initial brief is filed but before filing of the Record on Appeal (ROA). That statute is set forth 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).

That statute forms the basis and statutory authority for Rule 240(j), SCACR, *De Novo* Panel Appeal which is respectfully requested. Moreover, the rule of lenity supports this appeal. Significantly and materially, there is no record on appeal (ROA), no affidavit, and no factual basis or adequate record for the March 31, 2020, order on appeal herein. Appellant respectfully requests deferral for ROA, including but not limited to, full, fair, and adequate record for meaningful review. Appellant's Return confirms defendants' incomplete/inaccurate exhibits without response from the other side. Appellant respectfully requests deferral for adequate record. Moreover and by analogy, the Federal Rules of Court, on which the State Rules of Court are based, are loud and clear on this issue in Rule 27(c), FRAP:

(c)Power of a Single Judge to Entertain a Motion.

A circuit judge may act alone on any motion, but **may not dismiss** or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge. Rule 27(c), FRAP (emphasis supplied).

Further, even assuming mootness which is denied, the Rules require motion to dismiss based on mootness must be filed as soon as allegedly moot, not at the eleventh hour on the eve of the due date

for defendants' initial brief, suggesting lack of meritorious response to appellant's brief and/or lack of diligence. Accordingly, the order dated March 31, 2022, by a single individual overlooks or misapprehends material facts and law, is internally inconsistent, fails to comply with the SCACR, and is unsustainable lacking factual basis with full, fair, and adequate record.

FACTS

As a threshold matter, the issue of jurisdiction has been raised. The facts pertinent to the *De Novo* Panel Appeal pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, include the following. The issue of jurisdiction can be and has been raised in this appeal. A ruling regarding a jurisdictional question, as in this case, based on facts requires review of the record on appeal (ROA) which has not been filed. When deciding a jurisdictional question based on facts, a reviewing court has the power and the **duty to review the entire record**, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975) (emphasis supplied). There is no affidavit, factual basis, or ROA supporting the order on appeal. Moreover, the case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), and others establish governing precedent which controls ruling that the Legislature intended to and did statutorily vest jurisdiction in the DRB for the hearing and pre-litigation mediation. The Circuit Court has no jurisdiction to summarily dismiss unless and until **pre-litigation** mediation, timely requested herein, is unsuccessful and mediation "must be granted." S.C. Code § 6-29-900 et seq.

DISCUSSION

I. Rule 240(j), SCACR, grants *de novo* panel appeal of an order by a single judge.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The underlying statutory authority, S.C. Code § 14-8-220, and Rule 240(j), SCACR, expressly provide 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).

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 judge 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." Moreover, Rule 240(j), SCACR, stands on its own and is independent of and not restricted by Rule 240(i), SCACR. Accordingly, the Legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220 such that, "Any party aggrieved by an order of an individual judge or judge may seek review of that order by the appellate court or a panel thereof," and the standard of review is *de novo* (not the same standard as a Rule 221, SCACR, petition for rehearing). 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). Moreover, the rule of lenity supports this appeal.

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). The Legislature intended to and expressly did provide appeal for orders by a single individual as, including but not limited to, protection of that individual and the court from exploitation, compromise, and/or targeting. "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). A discerning review reveals

that Rule 240(j), SCACR, appeal would not be needed if the only time it applied is dismissal or final decision, since Rule 221, SCACR, addresses that instance. Otherwise, Rule 240(j), SCACR, would be rendered superfluous and "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Id.* The March 31, 2022, order on appeal is internally inconsistent and based on error of material fact and law because, including but not limited to, it renders S.C. Code § 14-8-220 and Rule 240(j), SCACR, superfluous and leads to an absurd result. Rule 240(j), SCACR, *De Novo* Panel Appeal should be granted.

In addition, pursuant to S.C. Code § 14-8-220, the appellant respectfully submits Rule 240(j), SCACR, appeal is *de novo* review by panel which does not include the individual judge who signed the order that is the subject of the Rule 240(j), SCACR, panel appeal. Appellant filed the appeal pursuant to Rule 240(j), SCACR, for appeal of a single judge'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 judge. 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. In these cases, the Judge or Justice will recuse him or herself from the position of potentially reviewing an Order that he or she authored. The judge 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 the *Rice* 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 it 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). Similarly, in this case, "(t)o say the least, it would be unbecoming for a judge" to sit on the Rule 240(j), SCACR, panel for appeal of his own decision. *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). Moreover, in consideration of Legislative intent and the overarching principles incorporated in the State Constitution by its framers, due process requires that the appellate court judge who individually signed the dismissal order not participate, directly or indirectly, on appeal of the decision which is the subject of the Rule 240(j), SCACR, *de novo* panel appeal. Ambiguity regarding the requirement of non-participation on Rule 240(j), SCACR, appeal is a denial of due process. Accordingly, Rule 240(j), SCACR, *de novo* panel appeal and due process require non-participation by the individual judge who signed the order which is the subject of Rule 240(j), SCACR, panel appeal.

Former Justice Sandra Day O'Connor warned the public about the importance of judicial independence. She wrote "... many Americans today do not see the need for independent judges. Many prefer a judiciary that acts merely as a reflex of popular will." *Judicial Independence and 21st Century Challenges*, Sandra Day O'Connor, The Bencher, July/August 2012. As she explained, "The reason

why judicial independence is so important is because **there has to be a safe place** where being right is more important than being popular; where fairness triumphs strength. That place, in our country, is the courtroom. It can only survive so long as we keep out political influences." *Id.* (emphasis supplied). Public policy, legislative intent, statutory authority, governing case law, State and Federal Constitutional law, the Rules of Court, the SCACR, and fundamental fairness support Rule 240(j), SCACR, *de novo* panel appeal herein.

II. The standard of review at Rule 240(j), SCACR, panel appeal is *de novo*.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Significantly and materially, *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 for Rule 221, SCACR, rehearing. Ambiguity regarding the proper legal standard pursuant to Rule 240(j), SCACR, panel appeal is a denial of due process. Rule 240(j), SCACR, is a S.C. Code § 14-8-220 panel 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 Rule 27(c), 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). Importantly 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, appeal is that the order is signed by a single judge. Accordingly, the legal standard of review under these circumstances for Rule 240(j), SCACR, panel appeal is *de novo*.

III. Denial of the request for Rule 240(j), panel appeal of then Chief Justice Lockemy's denial of motion to exceed page limits should be reversed.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. As a threshold matter, the March 31, 2022, order states the request for Rule 240(j), panel appeal of then Chief Justice Lockemy's denial of motion to exceed page limits is denied. The order overlooks or misapprehends the fact that then Chief Justice Lockemy failed to address the accompanying motion to hold all time limits in abeyance pending resolution of the motion to exceed page limits. Due to Chief Justice Lockemy's inadvertent oversight, there is no provision for the opportunity to re-file a document which complies with the page limits which is hereby requested.

Moreover, because there is no provision for the opportunity to re-file a document which complies with page limits, denial of the motion to exceed page limits essentially finally decides the case through improper default, thereby complying with Rule 240(i), SCACR, referenced in the March 31, 2022, order. Accordingly, appellant respectfully requests reversal of then Chief Justice Lockemy's denial of motion to exceed page limits or opportunity to re-file a document which complies with page

limits.

Further, as set forth above, Rule 240(j), SCACR, panel appeal is independent of and not restricted by Rule 240(i), SCACR. A discerning review reveals that Rule 240(j), SCACR, panel appeal would not be needed if the only time it applied is dismissal or final decision, since Rule 221, SCACR, addresses that instance. Otherwise, Rule 240(j), SCACR, would be rendered superfluous and "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). The March 31, 2022, order on appeal is internally inconsistent and reversible as a matter of law based on error of material fact and law because, including but not limited to, it renders S.C. Code § 14-8-220 and Rule 240(j), SCACR, superfluous and leads to an absurd result. Accordingly, Rule 240(j), SCACR, *De Novo* Panel Appeal should be granted for review of then Chief Justice Lockemy's denial of motion to exceed page limits.

IV. Defendants have failed to comply with Rule 240, SCACR.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. There is no affidavit, factual basis, or ROA supporting the dismissal order on appeal because defendants have failed to comply with Rule 240, SCACR. Rule 240(c), SCACR. The record reflects defendant failed to meet the burden pursuant to the Rules of Court of submitting sufficient factual support for the motion. Accordingly, the March 31, 2022, order is unsustainable.

V. Pursuant to the statute, S.C. Code § 6-29-900 et seq., the lower court had no jurisdiction to summarily dismiss until and unless **pre-litigation** mediation, timely requested herein, is unsuccessful.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The issue of jurisdiction can be raised on appeal. A ruling regarding a jurisdictional question, as in this case, based on facts requires review of the record on appeal (ROA) which has not been filed. When deciding a jurisdictional question based on facts, a reviewing court has the power and the **duty to review the entire record**, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*, 265 S.C. 21, 216 S.E.2d 755 (1975) (emphasis supplied). There is no affidavit, factual basis, or ROA supporting the order on appeal. Moreover, the case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), and others establish controlling precedent which provides that the Legislature intended to and did statutorily provide that the Circuit Court has no jurisdiction to summarily dismiss until and unless **pre-litigation** mediation, timely requested herein, is unsuccessful.

The DRB hearing on the merits vests jurisdiction in the DRB at the pre-litigation stage; statutory authority provides property owners in the immediate vicinity whose property is adversely affected by a decision of the DRB with the right to appeal and to request mediation after the DRB hearing; pursuant to the statute, appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-900 et seq., the request for mediation "must" be granted. The lower court erred because it only has jurisdiction to order good faith mediation at the pre-litigation stage. There is no jurisdiction to dismiss until and unless mediation is unsuccessful. In this case, the lower court opinion is reversible for failure to comply with the unambiguously expressed legislative intent pursuant to S.C. Code § 6-29-900 et seq., which provides that the requested mediation "must be granted." S.C. Code § 6-29-900 et seq.

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 6-29-900 et seq. 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 § 6-29-900 et seq. 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).

As per the case of *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011), the parallel 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, pr ior to the filing of a petition** with the circuit court." *Id.*, p. 284 (emphasis supplied). In the instant case, the lower court erred as a matter of law in summarily dismissing the case at the **pre-litigation** stage before mediation. 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).

VI. Mediation "must be granted." S.C. Code § 6-29-900 et seq.

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. *Klawah Devt. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 710 (S.C. 2014).

A. The plain language of the statute supports standing to request pre-litigation mediation under S.C. Code § 6-29-900 et seq.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. "Notably, the parties agree that Appellant had standing to appear before the *Design Review Board.* In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the petitioner herein owns property, resides in the immediate vicinity, and has a substantial interest in the Fort Moultrie Historic District where the property is located. As an example, zoning ordinances establishing impervious surface limitations are enacted for the benefit of adjacent and neighboring property owners in order to protect them from damages caused by excessive stormwater runoff. The intended beneficiaries of zoning ordinances which establish impervious surface limitations herein are surrounding property owners who could and would be adversely affected. Respondents' interpretation would render the zoning ordinances which establish impervious surface limitations superfluous because the intended beneficiaries, such as the surrounding property owners including the appellant, would be unable to obtain that benefit. Accordingly, the plain language of the statute supports pre-litigation mediation herein.

B. The statutory scheme as a whole supports standing to request pre-litigation mediation.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Specifically, S.C. Code § 6-29-900 *et seq.* provides for mediation herein as outlined in the recent case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170 with remittitur filed in the Circuit Court on June 12, 2019). LUDRA (*South Carolina Land Use Dispute Resolution Act enacted June 2, 2003*) amends the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 by allowing a property owner whose land is the subject of a decision by the board of zoning appeals, board of architectural review (DRB), or planning commission to file a notice of appeal with the circuit court, accompanied by a request for mediation. The statute could have been limited to the applicant property owner, but instead included property owners whose land is the subject of such a decision including surrounding property owners such as the appellant. Pursuant to S.C. Code § 6-29-900 *et seq.*, mediation must be granted:

> Subsection (D)(2) carves out the subclass of property owners and gives this subclass the option of seeking pre-litigation mediation in addition to an appeal....Hence, LUDRA amended existing provisions governing appeals from a board of architectural review (section 6-29-900) by adding the option for pre-litigation mediation. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019).

Accordingly, the statutory scheme as a whole supports appellant's standing to request pre-litigation mediation and to appeal.

C. The lower court's interpretation of the statute, S.C. Code § 6-29-900 et seq., erroneously limits the right to request pre-litigation mediation to the applicant property owner instead of the subclass of affected property owners in the immediate vicinity with a substantial interest who are given the option of seeking pre-litigation mediation in addition to an appeal as intended by the Legislature.

Each assertion set forth in this document that is consistent with the following is incorporated

herein by reference as if here set forth verbatim. The case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), provides:

Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citation omitted). Further, "[t]he intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994). A statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). "We therefore should not concentrate on isolated phrases within the statute." *Id.* "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* **"In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,'for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'** *Id." Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008)) (emphasis supplied)).

The Legislature could have limited pre-litigation mediation to the applicant property owner before the DRB but did not. Impervious surface limitations are an example of ZO's with neighboring property owners as the intended beneficiaries. Public policy supports the request for pre-litigation mediation after DRB decision which adversely affects the property owner appellant herein whose land is thereby the subject of a decision of the DRB. Limiting pre-litigation mediation to the applicant property owner leads to impermissible unequal treatment and/or absurd results. The statute and case law support appellant's request for pre-litigation mediation herein.

"Notably, the parties agree that Appellant had standing to appear before the *Design Review Board*. In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the appellant herein owns property and lives in the immediate vicinity within the Fort Moultrie Historic District

linking the Officer's Quarters with Fort Moultrie and Battery Logan. Moreover, that case confirms petitioner's right to request mediation as follows:

In its brief, Developer argues that in LUDRA, the legislature drew a distinction between appeals from a *DRB* and appeals from a planning commission by allowing appeals from a *DRB* decision by a "person who may have a substantial interest in" the decision (*section 6-29-900*) while declining to expressly authorize anyone other than a property owner to appeal in section 6-29-1150(D). However, the standing provision in section 6-29-820 was in place before LUDRA was enacted. Further, prior to the enactment of LUDRA in 2003, the provision in section 6-29-1150 allowing an appeal to circuit court, then located in subsection (C), did not specifically mention property owners. Following Developer's logic, even property owners did not have standing to appeal prior to LUDRA's enactment, which would render the appeal language meaningless due to the lack of standing for any class of persons wishing to appeal. Such a result is unacceptable. See *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364,610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

In fact, LUDRA also added the language found in subsection (D)(2), specifically mentioning property owners, to sections 6-29-820 and *6-29-900* (governing appeals from decisions of boards of zoning appeals and *boards of architectural review like the DRB*). See 2003 Act No. 39, §§ 3, 8(amending sections 6-29-820 and *6-29-900 to allow property owners the option of adding a request for pre-litigation mediation to the notice of appeal*). Both of these statutes included an appellate standing provision before LUDRA amended these statutes in 2003, and the **addition** of LUDRA's pre-litigation mediation option for property owners did not result in a corresponding reduction in the class of possible appellants in these statutes—the appellate standing provisions in both statutes remained intact.

Therefore, it is unlikely that in enacting LUDRA, the legislature intended to diminish the class of potential appellants seeking review of a planning commission *(or DRB)* decision when it added the pre-litigation mediation option for property owners to section 6-29-1150 *(and S.C. Code § 6-29-900 et seq.)*. Rather, it left the existing provisions in *all three statutes* intact. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), p. 11 (emphasis supplied) (bold in original).

Accordingly, the legislature intended to provide the appellant, a property owner who lives in the immediate vicinity in the Fort Moultrie Historic District with a substantial interest who is adversely affected, standing and the statutory right to timely request pre-litigation mediation and to appeal.

D. The statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader interpretation of property owner as a party with standing to request pre-litigation mediation.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. A parallel statutory scheme, also under the Comprehensive Planning Enabling Act (CPEA), may be found at S.C. Code Ann. § 6-29-820 regarding appeals from the zoning board. The statutory scheme there has undergone parallel changes. The original § 6-29-820 under the 1994 Act read as follows:

Section 6-29-820, A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(Compare the original § 6-29-900 et seq. appeal provision at South Carolina Local Government Comprehensive Planning Enabling Act of 1994, Act 355, 1994 Acts). Amendments in 2003 changed the section parallel to the section at issue regarding the DRB (S.C. Code § 6-29-900 et seq. (2019)), as follows:

Section 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(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 and 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.

It is noted appellant timely filed a petition and notice of appeal with mediation request within the 30 days herein.

The Legislature went on to provide similar mediation guidelines, in a similar form to the section at issue herein, in a new subsection S.C. Code § 6-29-900 et seq. At least two cases have been filed with this Court under this statutory language, and neither challenged the appeal on the basis that the appellants were not property owners. This Court has noted that under this scheme, non-property owner appellants (as opposed to property owner appellants herein) who challenged whether the decision was correct as a matter of law had standing, even though their positions had not been presented at the public hearing or communicated to the Board prior to filing the appeal petition with the circuit court; non-property owner appellants (as opposed to the appellant property owner herein) had standing merely by filing their issues on appeal in a written petition before the thirty-day filing period had expired. *Newton v. Zoning Board of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011), reh'g denied; *Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013). Appellant who is a property owner timely filed the petition and has standing to appeal.

In a similar situation under the prior statutory scheme, this Court found that a community group, Spanish Wells Property Owners Association (POA), had standing to appeal a planning commission's grant of a development permit under the "any person who may have a substantial interest" standard in the old S.C. Code § 6-7-750: "Spanish Wells and its members, **as the owners of property adjacent to and in the near vicinity** of the Calibogue development, are persons with a substantial interest in the Board's decision. The statute, therefore, gives Spanish Wells standing to appeal." *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island*, 292 542, 357 487 (Ct. App. 1987) (emphasis supplied), (overruled on other grounds, *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island, 295 67, 367 160 (1988). See also Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863, 867 (Ct. App. 2013) (finding standing under the S.C. Code § 6-29-820 language "any person who may have a

substantial interest in the zoning board decision" for individuals who lived in proximity to the approved project in order to appeal a Board of Zoning Appeals decision even when they never attended a Board hearing.) It is respectfully submitted the statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader interpretation of property owner as a party with standing to request pre-litigation mediation, not a narrower interpretation limited to the applicant property owner.

The Municipal Association of South Carolina (MASC) has published a guide for its constituents on the application of the Comprehensive Land Development Enabling Act (CLDEA). The MASC guide describes the parallel provisions of the enabling statute governing boards of zoning appeals, DRB's, and planning commissions, and how the 2003 amendments provided additional remedies for a property owner, but did not ameliorate any rights of non-property owners to appeal decisions impacting their communities. Municipal Association of South Carolina, *2018 Comprehensive Planning Guide for Local Governments*. Accordingly, consistent and uniform interpretation of the ZO's, Legislative intent, and express statutory language grant the property owner appellant herein, who resides in the immediate vicinity in the Fort Moultrie Historic District, who has a substantial interest, and who is specially damaged, the right to appeal and to timely request pre-litigation mediation as appellant herein did. S.C. Code § 6-29-900 et seq. (2019).

VII. There is no jurisdiction for another circuit court judge to rule on the Rule 59(e), SCRCP, motion.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Respondents have admitted that "Holmes' Rule 59(e) Motion should not be ruled upon at this time because it seeks reconsideration of an order by another circuit court judge." Defendants' Memo (1/17/20). Jurisdiction vests with the judge who signed the order which is the subject of the Rule 59(e), SCRCP, motion, and there is no jurisdiction for another circuit court judge to rule on the pending Rule 59(e), SCRCP, motion for reconsideration of the PI

order. Significantly and materially, that order ruled that the PI order is not binding on the merits of the appeal which is to be determined on the full record. Accordingly, the dismissal order on appeal is reversible as a matter of law for, including but not limited to, remand on pending Rule 59(e), SCRCP, for reconsideration by the judge who signed the order.

VIII. The appeal is not moot.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The appeal is not moot. The March 31, 2022, order on appeal is reversible based on these and other errors of material fact and law including but not limited to, the request for pre-litigation mediation which must be granted. Per the statutes, appellant filed the petition in the lower court well before the PI motion, and the petition includes arbitrary and capricious failure to comply with the Fort Moultrie Historic District regulations, guidelines, and zoning ordinances, arbitrary and capricious failure to comply with S.C. Code § 5-31-450 (roadway drainage), declaratory relief pursuant to S.C. Code §§ 15-53-130, 15-53-30, and15-53-60, and/or other. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019). *See* S.C. Code § 6-29-900 et seq. (2019). Accordingly, defendants' lack of compliance with the Rules of Court including but not limited to, lack of affidavit or ROA, supports *de novo* panel appeal of the dismissal order which is hereby requested.

CONCLUSION

For substantial justice affecting substantial rights, the appellant respectfully requests this Court grant Rule 240(j), SCACR, *de novo* panel appeal with abeyance pending resolution. Due to then Chief Justice Lockemy's inadvertent oversight, motion for abeyance and opportunity to re-file the document so that it complies with the page limits was overlooked and is hereby requested. For the reasons stated and for good cause, motion to dismiss appeal should be denied/deferred.

Respectfully submitted,

C. Holmes
PO Box 187
SI, SC 29482
843.883.3010
For Petitioner

App. Case No. 2019-001671

RECEIVED
Apr 14 2022
SC Court of Appeals

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. I am the appellant, of legal age, and competent to state the matters herein. This affidavit is based on personal knowledge and on information and belief. It is submitted in support of the attached.

2. The appellant is a property owner who is adversely affected, who has a substantial interest in the Fort Moultrie Historic District where the property is located, who resides in the immediate vicinity, and whose property is the subject of a decision of the board of architectural review, the DRB.

3. The record reflects Defendant's Memo filed January 17, 2020, in which defendants admit that "Holmes' Rule 59(e) Motion should not be ruled upon at this time because it seeks reconsideration of an order by another circuit court judge." Defendant's Memo (1/17/20). Jurisdiction vests with the judge who signed the preliminary injunction (PI) order which is the subject of the Rule 59(e), SCRCP, motion, however, the motion was inadvertently before a different circuit court judge. See attached clerk of court's letter. There is no jurisdiction for another circuit court judge to rule and remand is requested on the pending Rule 59(e), SCRCP, motion for reconsideration of the PI order.

4. Per the statute, appellant timely filed DRB appeal in the lower court well before the PI motion. *See* S.C. Code § 6-29-900 et seq. (2019).

5. Pursuant to S.C. Code § 6-29-900 et seq. (2019), non-property owner appellants and property owner

appellants have standing to challenge and appeal whether the DRB decision is correct as a matter of law. The appellant timely filed appeal which challenges whether the DRB decision is correct as a matter of law. The appellant also timely filed mediation request.

6. Defendant filed no affidavit, factual basis, record on appeal (ROA), or sufficient factual record for the motion to dismiss and failed to meet defendant's burden pursuant to the Rules of Court of submitting sufficient factual support for the motion.

7. The March 31, 2022, order of dismissal by a single individual overlooks or misapprehends material facts and law, is internally inconsistent, fails to comply with the SCACR, and is unsustainable lacking sufficient factual basis with full, fair, and adequate record.

8. The issue of jurisdiction has been raised in this appeal which requires full ROA review.

9. The dismissal order overlooks timely appeal of multiple orders.

10. The dismissal order overlooks timely appeal which challenges whether the DRB decision is correct as a matter of law.

11. Under these facts, a reasonable factual basis exists for doubting the judge's impartiality when that judge participates in Rule 240(j), SCACR, panel appeal of his own individual dismissal order dated March 31, 2022. Appellant is prejudiced thereby. Appellant reasonably questions that judge's impartiality.

12. Accordingly, appellant respectfully requests Rule 240(j), SCACR, *de novo* panel appeal and respectfully requests defendant's motion be deferred or denied.

C. Holmes
PO Box 187
Sullivans Isd., SC 29482-0187

SWORN to before me this

8 day of April, 2022

Notary Public for South Carolina
Comm. Expires: 8/29/24

CATHERINE MAGWOOD
MY COMMISSION
EXPIRES
8/29/2024
NOTARY PUBLIC
SOUTH CAROLINA

COURT OF COMMON PLEAS
AND GENERAL SESSIONS
100 BROAD STREET, SUITE 106
CHARLESTON, S.C. 29401-2258
(843) 958-5000
(843) 958-5020 FAX
www3.charlestoncounty.org

CHARLESTON
COUNTY
SOUTH CAROLINA

FAMILY COURT OF THE
NINTH JUDICIAL CIRCUIT
CHARLESTON COUNTY
100 BROAD STREET, SUITE 143
CHARLESTON, S.C. 29401-2263
(843) 958-4400
(843) 958-4434 FAX
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JULIE J. ARMSTRONG
CLERK OF COURT
CHARLESTON COUNTY

June 25, 2015

C. Holmes, M.D.
P.O. Box 187
Sullivans Island, SC 29482

Dear Ms. Holmes,

Thank you very much for your letter of June 19, 2015 regarding Rule 59(e). In reading the rule, I believe you might be referring to 59(f) which addresses any motion filed under this rule to be heard by the judge who issued the order. My office does follow Rule 59; however, it may be that a motion is scheduled inadvertently before the incorrect judge and in those instances; the motion is removed and rescheduled with the appropriate judge.

Thank you again for your kind words and please let me know if I can be of further assistance.

Sincerely,

Julie J. Armstrong

Julie J. Armstrong
Charleston County Clerk of Court

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (TOSI),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

PROOF OF SERVICE

I certify that a true copy of the above was served upon the respondents by regular first class mail postage pre-paid on this date at this address: Ben Traywick, 171 Church St., Ste. 340, Chas., SC 29401; GT Walker, 66 Hasell St., Chas., SC 29401; and Kenneth Craft III, 204 Spooner Ln., Mt. Pleasant, SC 29464.

Dated 4/14/2022

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

RECEIVED
Apr 14 2022
SC Court of Appeals

Hard copy available on request —

Thank you!

Fax Cover:

C. Holmes, M.D.
P O Box 187
Sullivans Island, SC 29482-0187
843.883.3010