STATE OF SOUTH CAROLINA COUNTY OF RICHLAND G. Allen Rutter, Appellant, v. City of Columbia Design/Development Review Commission, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017-CP-40-00850 ORDER

This matter comes before the Court for a hearing on an appeal filed by G. Allen Rutter regarding the decision of City of Columbia Design/Development Review Commission ("DDRC"), which was filed on February 10, 2017. A hearing was conducted at the Richland County Judicial Center on February 9, 2018. Appellant was present and was represented by Benjamin C. Bruner, Esquire. The DDRC was represented by Jessica Mangum, Esquire.

Having carefully considered the submissions and arguments of counsel, for the reasons set forth below, the decision of the DDRC is REVERSED.

FINDINGS OF FACT

G. Allen Rutter ("Appellant") purchased a home located on a corner lot at 1500 Gladden Street/2801 Webster Street in the Melrose Heights neighborhood in the City of Columbia, County of Richland, State of South Carolina[1] ("the Home"). It is a Tudor Revival brick home built in approximately 1935 and is part of the Melrose Heights/Oak Lawn Architectural Conservation District, which is included in the National Register of Historic Places. The Home was a vacant,

[1] Tax map number R11414-09-03

two-story duplex that had fallen into disrepair, which Appellant purchased with the intent to repair and convert to a single-family home. His plans included extensive interior renovations and painting the exterior brick. The Home's second story had already been painted.

On September 30, 2016, prior his purchase of the Home, Appellant contacted the City of Columbia Planning and Preservation Department (the "Department") with questions about whether exterior changes could be made to the property, including painting the brick exterior. At that time, the Department informed Appellant he could not make changes to the exterior unless the changes complied with the Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines (the "Guidelines"). The Guidelines, however, are not codified in the City's Code of Ordinances like zoning ordinances; they are not recorded at the Register of Deeds' Office like a master deed; and there is no sign in the neighborhood notifying homeowners and prospective buyers about the restrictions or the existence of the DDRC. While City Council enacted an ordinance in 2003 creating the Melrose Heights/Oak Lawn Architectural Conservation District, City Council never passed an ordinance enacting the Guidelines. *See* City of Columbia Ordinance No. 2003-054.

The Guidelines "are criteria and standards that the [DDRC] must consider in determining the appropriateness of proposed work within a historic district." *See* Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines. The Guidelines provide that "actions that do not require review" include "Painting and Color." *Id.* at Section IV(B). However, that section also lists "General Maintenance and Repairs that **do not** alter the exterior appearance." *Id.* (emphasis added).

On November 16, 2016, after his purchase, Appellant applied for a permit to paint the Home. This was prompted by the "stop work" order issued by DDRC staff, which was acting on

a complaint from an anonymous neighbor about Appellant painting the Home. Appellant also appointed his realtor, Russell Jones ("Jones") as the authorized agent for his application.

A hearing was held on Appellant's permit application on January 12, 2017. Stacey Richey ("Richey"), a staff member, presented the case on behalf of the DDRC staff. Richey told the DDRC that Appellant proceeded with painting the brick despite staff having told him he needed DDRC approval first. She also told the commission that staff had issued two stop work orders for the project after learning that Appellant had proceeded with painting the brick and other work. After Richey completed her presentation, Jones was allowed to respond on Appellant's behalf. He was not represented by counsel, and he had no opportunity to cross-examine Richey or other DDRC staff on their findings and conclusions.

The DDRC denied Appellant's request and declined to issue a Certificate of Design Approval. In doing so, the DDRC appeared to heavily weigh certain factors against Appellant, including the stop work orders issued for the project. One Commissioner stated, "I think the fact that this work was started without approval almost makes the rest of the argument moot, honestly." Video of proceedings 1:09:00 to 1:09:17.[2] According to the meeting minutes, "Work began without approval and without a permit being issued and it is felt that such a precedent cannot be set."

The DDRC sent a letter to Appellant informing him that his request to paint the Home had been denied. It also ordered the removal of the paint and advised Appellant that he was prohibited from removing a door opening and windows on the first floor as part of the conversion of the Home from a duplex to a single-family home.

[2] In lieu of a transcript of the proceeding, the City of Columbia provided a DVD with a video file.

Appellant now appeals the DDRC's January 17, 2017 decision pursuant to S.C. CODE ANN. § 6-29-900.

CONCLUSIONS OF LAW

On appeal from a decision of an architectural review board, the Circuit Court treats "the findings of fact by the [b]oard . . . in the same manner as findings of fact by a jury, and the court may not take additional evidence." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004); S.C. CODE ANN. § 6-29-930 (2013) ("[t]he findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence...") Accordingly, the court will only determine whether the board's decision was correct as a matter of law and will not "substitut[e] its judgment for that of the reviewing body." *Id.* "In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by the evidence." *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) (citation omitted).

I. Appellant was not Afforded Due Process

Appellant contends that the DDRC's decision should be reversed because it was the result of a violation of his due process rights. I agree.

The DDRC's interpretation and administration of the Guidelines in this case constitutes a substantial restriction on property rights that demands more under the Due Process Clause than the was afforded to Appellant.

> Due process is flexible and calls for such procedural protections as the particular situation demands. Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider. The Due Process Clause demands notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present

> their objections. It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.
>
> Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review. Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

Blanton v. Stathos, 351 S.C. 534, 541-42, 570 S.E.2d 565, 569 (Ct. App. 2002) (internal citations omitted). "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citation omitted). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* at 171, 656 S.E.2d at 350 (citation omitted).

The procedure in which the DDRC made its decision deprived Appellant of due process and the right to be heard in a meaningful way. At the hearing, a DDRC staff member presented the case and gave the staff's recommendation. Appellant was then allowed "less than ten minutes" to present his case. He had no right to counsel, no opportunity to question or cross-examine staff, no reasonable notice of what DDRC staff would present in opposition to his application, and no right to call his own witnesses. Given the substantial interests property owners have in using and maintaining their homes, due process demands more.

Property owners in Melrose Heights have no notice – actual or constructive – that the DDRC will prohibit them from making necessary repairs and improvements to their homes because the Guidelines appear nowhere in the chain of title. The Guidelines are neither recorded with the Richland County Register of Deeds nor are they noted on the deed when property is conveyed. There is no signage in the neighborhood giving prospective buyers notice of the restrictions. Even a prospective homebuyer who searches the City's Code of Ordinances, including the zoning ordinances, would not find the Guidelines because they have not been codified. Thus, the reasonable, prudent homebuyer would have no reason to discover the existence of the DDRC or the Guidelines until they apply for a permit to begin construction or renovation work.

II. Vague and Indefinite Standard.

Appellant also argues the DDRC's decision must be reversed because it was controlled by a vague and indefinite standard. I agree.

In exercising its discretion, "a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 214, 516 S.E.2d 442, 445 (1999) (citations omitted). A board is "not left free to make any determination whatever that appeals to its sense of justice." *Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 755 (1953). "It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes." *Id.* "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Id.* (citation omitted). "[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757

(Ct. App. 2015) (quoting *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)); *see also Eagle Container, LLC v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008). As our Supreme Court has stated,

> To attempt to give to any small group of individuals such as a zoning commission or appeal board the power to determine in the exercise of its unrestricted discretion what uses might be made of the properties in a community would not only be contrary to sound social policy but clearly unconstitutional.

Hodge, 223 S.C. at 348-49, 75 S.E.2d at 755 (emphasis added) (internal quotation and citation omitted).

In this case, City Council never enacted any standard because it never enacted the Guidelines. Rather, it enacted only an ordinance designating the Melrose Heights neighborhood as an architectural conservation district. Ordinance 2003-054. Moreover, the Guidelines fail to establish any ascertainable or specific standard, leaving the DDRC and its staff "free to make any determination whatever that appeals to its sense of justice."

The Guidelines state, "These goals should not be construed to restrict design creativity; instead, they should be interpreted to encourage it." *See* Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines, Section II. In addition to noting setbacks and lot size, the Guidelines state, "The predominant style is the bungalow, but there are many examples of the 1940s brick cottage with a modest stoop and the early 1950s modern ranch house with casement windows and a horizontally oriented façade in the Protection Area." *Id.* at Section III(B). Nothing in the Guidelines discusses two-story Tudor homes, such as Appellant's, as an architectural style that is contributing, or predominant in the neighborhood.

With respect to painting exterior brick, the Guidelines clearly provide that "Actions That Do Not Require Review" include "Painting and Color." *Id.* at Section IV(B). Consistent with that

language, it is undisputed that many homes in the neighborhood feature brick exteriors that have been painted. The Guidelines also state,

> Masonry features, such as brick cornices or terra cotta detailing, and surface treatments, modeling, tooling, bonding patterns, joint size and color are important to the historic character of a building. These features should be retained.
>
> While masonry is the most durable historic building material, it is also the most susceptible to damage by improper maintenance or repair techniques or abrasive cleaning methods. Sandblasting and other abrasive cleaning methods are specifically prohibited. Sandblasting not only changes the visual qualities of brick, it damages or destroys the exterior glazing, increasing the likelihood of rapid deterioration of the brick and water damage to the interior of the building.
>
> Painting historic masonry is another concern. The color of masonry, particularly brick, is often an important part of the character of a building. In addition to color, the bonding pattern, treatment of mortar joints, and texture are significant parts of brick buildings. Where brick and other masonry finishes were unpainted, they should generally remain so. Painting obscures detailing and alters the distinguishing original qualities of a building. **Under some circumstances, particularly where the brick quality is poor or abrasive cleaning methods have been used, painting brick may be appropriate as a protective measure.**

Id. at Section VII(A)(6)(a).

At best, the Guidelines are self-contradictory and vague. On the one hand, they provide that the DDRC does not regulate "Painting and Color," consistent with other homes in the neighborhood and the neighborhood character. On the other hand, the Guidelines include provisions that purport to regulate painting and color. More concerning is the fact that nothing in the Guidelines gives the DDRC or its staff a specific standard or factors by which to determine when to allow a homeowner to paint exterior brick. It had no standard to follow to determine what, if any, "original qualities" of the building would be obscured; nor did it have any standard to follow to determine whether the brick quality was poor or abrasive cleaning methods had been used to

justify painting as a protective measure. This lack of guidance sets the table for the very threat the Supreme Court recognized in *Hodge*.

DDRC staff has not been given any specific standard to follow when considering applications and what recommendations to make to the DDRC. As a result, the DDRC and its staff have impermissibly broad discretion to deny homeowners requests as they choose. More concerning is that a property owner's ability to successfully challenge an adverse finding of DDRC staff is undermined because the property owner has no standard against which to compare staff's decision, because DDRC staff is not required to articulate the reasoning behind each decision, and because the DDRC apparently prohibits cross-examination of witnesses.

Further complicating matters is the broad and uncertain the Guidelines provide for a "contributing structure." A "contributing structure" is defined as, "A building, structure or site that reinforces the visual integrity or interpretability of a historic district. A contributing building is not necessarily 'historic' (50 years old or older). A contributing building may lack individual distinction but add to the historic district's status as a significant and distinguishable entity." Far from providing any specific, objective standard for the DDRC to follow, this definition does nothing more than give the DDRC unrestrained discretion to conclude any home it chooses is contributing. The import of a structure being designated as "contributing" is more stringent regulation. Homeowners in the City should not be subjected to such a vague, subjective and indefinite standard governing their property rights.

In this case, the DDRC denied Appellant's application despite the fact that the second story of the Home was already painted, despite the existence of other painted brick homes directly surrounding Appellant's, and despite the other painted brick homes existing throughout the neighborhood. The DDRC, apparently focused on the stop work orders, failed to consider a critical

provision from the Guidelines which permits the painting of brick under certain circumstances. As a result, Appellant has been subjected to the very thing the Supreme Court warned against in *Hodge*: a small group of individuals having unrestricted discretion to determine what uses might be made of properties in a community. The result of that unfettered discretion is the possibility that ordinary, prudent, necessary repairs and improvements may be prohibited in Melrose Heights.

IT IS THEREFORE ORDERED that decision of the City of Columbia's Design/Development Review Commission is REVERSED.

AND IT IS SO ORDERED.

Jocelyn Newman
Circuit Court Judge

May 30, 2018
Columbia, South Carolina

Richland Common Pleas

Case Caption: G Allen Rutter , plaintiff, et al VS City Of Columbia Design Development Review Commission

Case Number: 2017CP4000850

Type: Order/Other

So Ordered

Jocelyn Newman