THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas, Sitting in Its Appellate Capacity

Jocelyn Newman, Circuit Court Judge

Case No. 2018-001194

G. Allen Rutter ..... Respondent,

v.

City of Columbia Design/Development Review Commission .....Appellant.

INITIAL BRIEF OF APPELLANT

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2. DID THE CIRCUIT COURT ERR IN HOLDING THE STANDARDS USED BY THE ARCHITECTRUAL REVIEW BOARD WERE VAGUE AND INDEFINITE?

STATEMENT OF THE CASE/FACTS

The City of Columbia appeals from the circuit court's order reversing the decision of the City's architectural review board (the "Design/Development Review Commission" or the "Commission" or the "DDRC") which denied Respondent Rutter's application for a Certificate of Design Approval. Rutter is in the business of flipping houses, and he is both the owner of and contractor for the property at issue, which is located at 1500 Gladden/2801 Webster Street, Columbia, South Carolina (TMS # 11414-09-03) (the "Property"). The Property, a Tudor Revival brick home built in 1935, is part of the Melrose Heights/Oak Lawn Architectural Conservation District, which is included in the National Register of Historic Places.

The Property makes up part of the Melrose Heights/Oak Lawn Architectural Conservation District. City of Columbia Municipal Code Ordinance §17-681(b)(3). The Ordinances and Guidelines, implemented at the request of the neighborhood, are codified in Article V of the City of Columbia's Code of Ordinances. The ordinances prohibited the construction, reconstruction, addition, alteration, repair or replacement of any exterior architectural feature within an architectural conservation unless a Certificate of Design Approval has been issued. City of Columbia Municipal Code § 17-655(a)(1). Moreover,

City Code §17-653 establishes the Design and Development Review Commission and tasks the Commission with administering the design guidelines for each of the historic preservation classifications. City of Columbia Municipal Code § 17-653. Specifically, the Code provides that

> [T]he commission shall examine the architectural design, the exterior surface treatment, the arrangement and location of buildings and structures . . . and other pertinent factors affecting the appearance and efficient functioning of the district. The commission shall endeavor to ensure that the exterior appearance and arrangement of buildings, structures and premises in these districts will (1) enhance the attractiveness and functioning of each district in keeping with its purpose and intent; (2) encourage the orderly and harmonious development of each district; and (3) enhance and protect the public and private investment and general value of lands and improvements within the district.

City of Columbia Municipal Code §17-674(c). In addition, the Code enumerates the Commission's review process, lists criteria for review, and states that the "issuance of a certificate of design approval shall be based upon the requirements set forth in the ... design guidelines..." City of Columbia Municipal Code §17-674(d)(1). The Guidelines were "approved by City Council in 2003 as a document by which decisions for the district could be made in a consistent manner with the common goal of preserving the historic integrity of the buildings in the district." (DDRC Design Review District Historic Agenda Evaluation Sheet, 2). The Guidelines described in the City's Ordinances are accessible through the City's Planning and Preservation Department and the City's website. https://www.columbiasc.net/planning-preservation/historic-districts.

On September 30, 2016, prior to purchasing the Property, Rutter contacted the City of Columbia Planning and Preservation Department (the "Department"), identified himself as a contractor, and asked about whether he could make exterior changes to the

Property. Specifically, Rutter inquired about his ability to paint the exterior brick. The Department informed Rutter that he could not make changes to the exterior of the Property unless the changes complied with the City of Columbia's Historic Preservation and Architectural Review Ordinances (the "Ordinances") as well as the Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines (the "Guidelines").

On October 28, 2016, almost a month after learning the Property was in an architectural conservation district, Rutter purchased the Property. Approximately two weeks later, on November 11, 2016, the Department received complaints from residents of the Melrose Heights/Oak Lawn Architectural Conservation District that Rutter painted the exterior of the property in violation of the neighborhood's architectural conservation district designation and the Guidelines. The Department immediately issued a Stop Work Order and reminded Rutter about the Guidelines and the review process for exterior changes to homes in the Melrose Heights/Oak Lawn Architectural Conservation District. At that time, Rutter questioned whether he could remove a door and fill in the opening with brick. The Department again instructed him of the review process for exterior changes and told him that he could **not** complete any further exterior work until he submitted an application for a Certificate of Design Approval **and** the Commission approved the application.

At some point after the Department issued the initial Stop Work order, it received another neighborhood complaint about the improper removal of windows from the property. Upon arriving at the Property, a member of the Department noted Rutter had removed several windows and was in the process of bricking in those areas. The

Department issued a second Stop Work Order. Finally, on November 16, 2016, Rutter filed an application for design approval with the Commission. At the same time, he filed a Letter of Agency, appointing Russell Jones (his realtor) as the authorized agent for his application.

At the Commission hearing on January 12, 2017, Jones appeared on behalf of Rutter. The hearing on Respondent's application lasted approximately forty (40) minutes. In addition to testimony from the Department and Jones, three (3) residents of the Melrose Heights/Oak Lawn Architectural Conservation District neighborhood spoke in opposition to Respondent's application. The Commission received testimony and evidence from Rutter, through his authorized agent, and from the Department about how the alterations to the exterior affected the architectural preservation of the Property and the surrounding neighborhood. After considering the pertinent sections of the Ordinances and the Guidelines, the Commission denied the request for a Certificate of Design approval to paint the exterior brick and remove windows and door openings on the first floor of the Property. However, the Commission did approve the replacement of non-original windows on the second floor and the removal of a door and window from the side gable, finding those requests fell within the Guidelines.

On February 10, 2017, Respondent appealed the decision of the Commission to the Court of Common Pleas in the Fifth Judicial Circuit. The circuit court heard the matter on February 9, 2018 and subsequently reversed the Commission's denial of Rutter's request to paint the exterior brick and remove windows and door on the first floor. (Order Reversing DDRC, May 30, 2018). This appeal followed.

ARGUMENT

I. BECAUSE PROCEDURAL DUE PROCESS IS FLEXIBLE, THE APPELLATE COURT ERRED IN HOLDING THAT A HEARING BEFORE AN ARCHETECTURAL REVIEW BOARD REQUIRES A HIGHER LEVEL OF DUE PROCESS THAN RESPONDENT WAS AFFORDED.

On appeal, Rutter argued the hearing before the DDRC violated his procedural due process rights by not allowing him to be heard in a meaningful way[1] and by lack of notice. The circuit court, sitting in its appellate capacity, agreed and found Rutter 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." (Order Reversing DDRC, May 30, 2018). Additionally, the circuit court found Rutter had "no notice – actual or constructive" of the Melrose Heights/Oak Lawn Architectural Conservation District Guidelines.[2] (Order Reversing DDRC, 6).

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[1] This issue was not raised in Rutter's Notice of Appeal as required by S.C. Code Ann. §6-29-820. Furthermore, the statute makes "no provision for amendment of the grounds set forth in the petition." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 37, 606 S.E.2d 209, 213 (Ct. App. 2004).

[2] However, see S.C. Code Ann. §6-29-930 (stating the findings of fact by the board of architectural review are conclusive on the hearing of the appeal and the reviewing court must determine only whether the decision of the board is correct as a matter of law). Here, it appears the circuit court's holdings/conclusions of law may contradict the statutory authority given to appellate courts when reviewing decisions from an architectural review board because such authority does not include review of constitutional issues. Seemingly, it is unclear whether this issue is a matter of first impression in South Carolina, for no case seems to have directly addressed our appellate court's authority to review constitutional issues in such matters. However, other states have addressed this issue and found that appellate courts reviewing decisions from architectural review commissions cannot address constitutional issues. See, e.g. *Norton v. City of Danville,* 268 Va. 402, 407, 602 S.E.2d 126, 129 (2004) (holding, under similar statutory scheme, judicial review of a decision of an architectural review commission is limited to the issues defined in the statute governing the appeal to a circuit court and the certiorari process does not authorize a court to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision); *Covel v. Town of Vienna,* 280 Va. 151, 157–58, 694 S.E.2d 609, 613 (2010) (holding the appropriate method for constitutional challenges is not through appeal but instead by an action against the governing body; *Bd. of Zoning Appeals of James City Cty. v. Univ. Square Assocs.*, 246 Va. 290, 295, 435 S.E.2d 385, 388 (1993) (holding this rule is consistent with the decisions of courts in several other states that have addressed this issue): *Rubin v. Board of Directors,* 16 Cal.2d 119, 104 P.2d 1041, 1043-44 (1940); *National Transp. Co. v. Toquet,* 123 Conn. 468, 196 A. 344, 348 (1937); *River Forest State Bank & Trust Co. v. Board of Zoning*

These findings by the circuit court are reversible for several reasons. First, "issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Id.* (citing *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* (citing *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). An issue is not preserved for appeal when it is not raised to the trial court, the trial court does not address the issue in its order and the appellant does not request the trial court to rule on it. *Capital View Fire Dist. v. County of Richland,* 297 S.C. 359, 377 S.E.2d 122 (Ct.App.1989). In addition, an appellate court is not precluded from finding an issue unpreserved even when the parties do not argue error preservation because of the long-standing importance of error preservation in appellate practice in South Carolina. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

Appeals, 34 Ill.App.2d 412, 181 N.E.2d 1, 3 (1961); *Board of Zoning Appeals v. Waintrup,* 99 Ind.App. 576, 193 N.E. 701, 704 (1935); *Gamache v. Town of Acushnet,* 14 Mass.App. 215, 438 N.E.2d 82, 88 (1982); *Austin v. Older,* 278 Mich. 518, 270 N.W. 771, 772 (1936); *Sherrill v. Town of Wrightsville Beach,* 76 N.C.App. 646, 334 S.E.2d 103, 105 (1985); *Drabble v. Zoning Bd. of Review,* 52 R.I. 228, 159 A. 828, 829 (1932); *Carter v. City of Bluefield,* 132 W.Va. 881, 54 S.E.2d 747, 757-58 (1949).

In this case, Rutter cannot show he raised these issues to the DDRC, and he cannot show he asked for a ruling in order to preserve the issues for appellate review. Rather, the record plainly shows Rutter did not raise either of these procedural due process issues during the hearing before the Commission. Therefore, Rutter did not preserve these issues for review on appeal.

Secondly, the standard of review for appeals from the Commission is dictated by statute. "The 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." S.C. Code Ann. §6-29-930. The circuit court must remand a case to the board if the record is insufficient for review. *Id.* In this case, even if the circuit court believed Rutter raised these issues at the hearing before the Commission, the record shows the Commission did not rule on them. Therefore, the appropriate remedy was to remand to the Commission for a rehearing. Instead, the circuit court reversed the decision of the DDRC, in clear contravention of the statute.

Additionally, "[t]he burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). In this case, Rutter has the burden of proof as to each of his due process violation allegations. Rutter did not provide any evidence to show the Commission violated his right to counsel, nor did he present any evidence to show he was not allowed to cross-examine staff or denied the right to call his own witnesses. In fact, the record clearly contradicts his allegations. The record shows the hearing lasted approximately 40 minutes and

Rutter's agent was allowed to present evidence, provide testimony, ask questions, and was also given time for rebuttal after other parties spoke. Although Rutter could have certainly elected to be represented by counsel at the hearing, the record shows he instead selected his realtor to appear on his behalf.[3] It seems only logical that Rutter's conscious choice to send an agent instead of an attorney is not a due process violation that could be imputed against the Commission. Based on the record before the appellate court, there was nothing to substantiate any of Rutter's allegations and this is insufficient as a matter of law to establish a procedural due process violation.

The circuit court also found Rutter's procedural due process rights were violated with respect to notice. Specifically the court held

> 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.

(Order Reversing DDRC, 6).

However, the notice requirement for an appeal to a board of architectural review requires "public notice of the hearing, as well as due notice to the parties of interest." S.C. Code Ann. §6-29-890. In this case, Rutter did not challenge notice under the

[3] Parties at a hearing before a board of architectural review such as the Commission may appear in person, by agent, or by attorney (S.C. Code §6-29-890). See also *Return of City of Columbia Design/Development Review Commission*, which contains Rutter's Letter of Agency.

statutory notice provision, and it was error for the circuit court to apply a different standard.

However, even if the standard applied by the circuit court was correct, the record contains nothing to support a finding that Rutter lacked actual or constructive notice[4]. To the contrary, the record contains **substantial** evidence that Rutter had **both** actual and constructive notice of the Property's historic designation. For example, the record contains testimony from the Department about a conversation with Rutter prior to his purchase of the Property. In that conversation, the parties discussed the Property's location within an architectural conservation district, the Guidelines, **and** the review process for exterior changes to homes within those districts. Additionally, the Department's *DDRC Design Review District Historic Agenda Evaluation Sheet* also contains evidence of the same. Furthermore, Rutter himself called the Department prior to the purchase of the property to inquire about whether he could make changes to the exterior of the Property. By his conduct alone, Rutter showed he had notice of the neighborhood's designation.

Moreover, Rutter never argued he lacked notice of the Guidelines or the neighborhood's historic designation. To the contrary, throughout the hearing before the Commission, Rutter's agent Jones testified that Rutter desired to make changes to the property that would "add to the design, character, and value of the neighborhood" and Rutter wanted the property to "keep in the character of [the neighborhood]." Additionally, during the hearing, Jones (with a copy of the Guidelines in his hand)

[4] Under the standard articulated in *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 658, 94 L. Ed. 865 (1950), it appears constructive notice would not comport with procedural due process requirements in a hearing before the Commission. However, the City argues constructive notice here based on the findings of the circuit court and for preservation purposes.

repeatedly argued the Commission should interpret the Guidelines in such a way as to grant Rutter's application. (Video of Proceedings at 56:08-22; 58:07-59:30; 1:00:13-1:0030; 1:01:00-1:01:19, Jan. 12, 2017). It seems virtually impossible to reconcile that testimony with the circuit court's finding that Rutter lacked notice of the Guidelines. Equally impossible to reconcile is the finding that Rutter **did have** actual notice of the Guidelines prior to his purchase of the home only to then find, as a matter of law, that Rutter had no actual notice of the Guidelines. (Order Reversing DDRC, 5).

In addition, Rutter also had constructive notice. The City of Columbia Municipal Code clearly designates each architectural conservation district located within the city. *See, e.g.,* City of Columbia Municipal Code § 17-681(b) (identifying each architectural conservation district by description, TMS number, and accompanying map); City of Columbia Municipal Code § 17-655 (describing the Certificate of Design Approval process); City of Columbia Municipal Code §17-674 (relating the Design/Development Review Commission process). The ordinances, both separately and read together, give sufficient notice to enable a reasonable person to understand those areas included in the City's various architectural conservation districts and the appropriate processes one must undertake in order to make exterior changes to properties located within these districts.

Lastly, the level of due process the Circuit Court requires at the Commission hearing is in directly contradiction to established law.

> Procedural due process requirements are not technical, and no particular form of procedure is necessary (citing *Sloan v. S.C. Bd. Of Physical Therapy Exam'rs,* 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. (citing *Palmetto*

> *Alliance, Inc. v. S.C. Pub. Serv. Comm'n,* 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984)).

Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 69, 663 S.E.2d 497, 503–04 (Ct. App. 2008).

In *Kurshner v. City of Camden Planning Commission*, 376 S.C. 165, 171, 656 S.E.2d 346, 349 (2008), the Kurshners appealed the City of Camden Planning Commission's denial of their application to subdivide their property into eight (8) lots. Like Rutter, the Kurshners argued they were denied their procedural due process rights "because the Commission did not inform them of the opposing evidence prior to trial, considered hearsay evidence, deprived them of the opportunity to cross-examine adverse witnesses, and failed to allow them to conduct *voir dire* questioning of the members of the Commission." *Id.* However, the Supreme Court disagreed and held:

> In our view, due process does not require the full gamut of rules and procedures to which the Kurschners claim they were entitled…
> Regarding the requested procedural safeguards in this case, the Kurschners point to no authority for excluding hearsay evidence in planning commission decisions, nor do they provide any authority holding that individuals are entitled to conduct *voir dire* in land-use planning hearings. In our view, the additional procedures that the Kurschners request would not aid the Commission in making its decision, but would greatly hinder its ability to make an informed and reasoned decision, as well as intrude upon a municipality's statutorily-granted legislative authority. Accordingly, we hold that due process does not require the Commission to employ these rules and procedural safeguards in making these types of discretionary decisions….

Id. The Court found "a meaningful opportunity to be heard" as required by the due process clause was satisfied when the Commission held a public hearing in which the Kurschners were allowed to submit evidence. *Id.*

In this case, Rutter does not dispute he was provided notice of the hearing. The Commission also provided him with an opportunity to present evidence. The record includes seven (7) different exhibits that Rutter provided to the DDRC. Lastly, as evidenced by this appeal, he has the opportunity for multiple levels of review. Due process simply does not require the "full gamut of rules and procedures" to which Rutter claims he is entitled. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172–73, 656 S.E.2d 346, 350–51 (2008). *See also Harbit v. City of Charleston*, 382 S.C. 383, 393–94, 675 S.E.2d 776, 781–82 (Ct. App. 2009), *as amended* (May 4, 2009) (holding Board of Zoning applicant received procedural due process when he was provided notice of public hearing and was allowed to present arguments).

II. BECAUSE THE CITY'S MUNCIPAL ORDINANCES RELATED TO HISTORIC PRESERVATION AND ARCHITECTURAL REVEW ARE CLEAR IN MEANING AND APPLICATION, THE CIRCUIT COURT ERRED IN HOLDING THE ARCHITECTRUAL REVIEW BOARD'S DECISION WAS CONTROLLED BY VAGUE AND INDEFINTE STANDARDS.

On appeal, Rutter also asserted the Commission based its decision on vague and indefinite standards. Agreeing with Rutter, the circuit court found the standards used by the Commission were vague and indefinite since "City Council never enacted any standard because it never enacted the Guidelines... Moreover, the Guidelines fail to establish an ascertainable or specific standard..." (Order Reversing DDRC, 8). Because such findings are based on unpreserved issues and exceed the scope of the circuit court's authority, this was in error (see City's Argument I, supra).[5] It is well settled that the

[5] Other errors not supported by the record include: finding of fact that Guidelines are not codified in the City's ordinances, *Order Reversing DDRC*, 2; no sign in the neighborhood notifying homeowners about the DDRC, *Id.*; City never passed ordinance codifying Guidelines, *Id.*; See also, conclusion of law that Guidelines are not recorded with Register of Deeds, *Id* at 6; no signage in neighborhood, *Id.*; Guidelines

appellate court must uphold a decision by an architectural review board unless there is no evidence to support it. *Furr v. Horry Cty. Zoning Bd. of Appeals*, 411 S.C. 178, 183–84, 767 S.E.2d 221, 224 (Ct. App. 2014) (citing *Town of Hollywood v. Floyd*, 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Id.* The decisions of those charged with interpreting and applying zoning ordinances "should be given some consideration and not overruled without cogent reason therefore." *Id.* at 236, 642 S.E.2d at 568 (internal quotation marks omitted). Furthermore,

> The 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. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

S.C. Code Ann. § 6-29-930.

Upon a proper review of the record through the narrow lens required by Section 6-29-930, it is clear there are substantial facts to support the Commission's denial of Rutter's application to paint the exterior brick of the Property. First, there was an extensive presentation by the Department. The Department also provided the Commission with a twelve page (12) written report on the Property. Additionally, there was testimony and evidence presented by Rutter's agent, Jones, and testimony from several members of the Melrose Heights/Oak Lawn Architectural Conservation District

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not codified, *Id.*; City Council never enacted the Guidelines, *Id* at 7; Guidelines fail to establish standards, *Id.*; Guidelines do not discuss Tudor homes as architectural style, *Id.*; many homes in neighborhood feature brick exteriors that have been painted, *Id.*; Guidelines are self-contradictory and vague, *Id.*; nothing in Guidelines give DDRC or staff standards to apply, *Id.*; DDRC and staff have impermissibly broad discretion, *Id* at 9.; DDRC not required to articulate reasoning behind decision because cross examination is prohibited, *Id.*; contributing structure definition is broad and uncertain, *Id.*

Neighborhood. However, the circuit court ignored the record, ignored the Commission's findings of fact, and ignored the statutory mandates of S.C. Code Ann. § 6-29-930.

In addition, even if the circuit court employed the proper standard of review, Rutter's assertion lacks merit. Chapter 17, Article 5 of the City of Columbia Municipal Code, entitled "Historic Preservation and Architectural Review," enumerates the purposes and duties of the Commission, the procedures for requesting a certificate of design approval, and the criteria the Commission uses when reviewing such an application. The code makes it clear that "**no construction, reconstruction, addition, alteration, relocation, repair, or demolition** of any structure ... within a designated landmark district, architectural conservation district, historic commercial district or protection area shall be permitted unless a certificate of design approval has been appropriately issued." City of Columbia Municipal Code § 17-655(a) (1) (emphasis added). The Commission's criteria for the evaluation of applications for a certificate of design approval are also codified. For example, the Code advises, "[d]istinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved." City of Columbia Municipal Code § 17-674(d)(1)(e). Code § 17-674 instructs that

> Deteriorated historic features shall be repaired rather than replaced. Where severe deterioration or complete loss requires replacement of a distinctive feature, the new feature shall match the old in design, color, finish, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence, and character-defining features that have been lost due to intentional damage, removal or neglect shall be rebuilt."

City of Columbia Municipal Code § 17-674(d)(1)(f). Additionally, "[i]n architectural conservation districts and protection areas, the historic character of a district shall be

retained and preserved through the preservation of historic materials and features which characterize the historic district." City of Columbia Municipal Code § 17-674(d)(1)(b).

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152 (1993). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Toussaint v. State Bd. of Med. Examiners*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991) (citing *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)). To raise a claim of unconstitutional vagueness, the party must show that the challenged statute is vague as applied to his own conduct, regardless of its potentially vague application to others." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014) (emphasis added).

These ordinances do not require Rutter to guess at their meaning and his own conduct defeats his argument. The record is clear that Rutter contacted the Department prior to purchasing the property to inquire about making changes to the exterior. The Department informed him about the Guidelines and the historical designation of the neighborhood and told him he could not make changes to the exterior without first obtaining a Certificate of Design Approval. Rather than comply, Rutter purchased the property and made substantial changes to the exterior without approval. He refused to comply with the Guidelines and he refused to apply for a certificate of design approval prior to making exterior changes to the property. He cannot now claim he did not understand.

CONCLUSION

For the reasons stated, it is clear from the Ordinances and the Guidelines that the issue before the Commission was whether Rutter's requests (painting of the exterior of the Property and removing windows and filling them in with brick) would alter any distinctive features, finishes, or craftsmanship related to the property. Given the plain language of the ordinances and the Guidelines, as well as the information presented to the Commission, there are clearly facts in the record to support the Commission's denial of Rutter's application to paint the exterior brick; and the Commission's decision was correct as a matter of law. Therefore, the City respectfully requests that this Court reverse the previous appellate court and affirm the findings of the Design/Development Review Commission.

Respectfully submitted,

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August 27, 2018

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Jocelyn Newman, Circuit Court Judge

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G. Allen Rutter.....Respondent,

v.

City of Columbia Design/Development Review Commission.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that she has served the *Initial Brief of Appellant* and *Designation of Matter* on the Attorney for Respondent by placing a copy in the United State mail, first class postage prepaid to him at his office as indicated below on this 27th day of August, 2018.

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August 27, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: G. Allen Rutter v. City of Columbia Design/Development Review Commission
Court of Appeals Case No.: 2018-001194

Dear Ms. Kitchings:

Enclosed for filing, please find the original and two (2) copies the *Initial Brief of Appellant* and *Designation of Matter* along with the *Proof of Service* in the above referenced case. Please return the extra copies to the courier of this letter.

By copy of this letter, I am serving same on the attorney for the Respondent.

Sincerely,

Jessica R. Mangum
Assistant City Attorney

JRM/jlh
Enclosure(s) as Stated

cc: (w/encl.): Benjamin C. Bruner, Esquire