THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2018-001194

G. Allen Rutter, ... Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal concerns an order by Judge Jocelyn Newman overturning a decision of the City of Columbia Design/Development Review Commission ("Appellant" or "the DDRC").[1] This matter originated in late 2016 with an application by G. Allen Rutter ("Respondent" or "Rutter") for DDRC approval to paint the exterior brick of a home he owns at 1500 Gladden Street in Melrose Heights. (Appl.) The DDRC denied that application following its January 12, 2017 meeting. (Letter from Richey.)

On appeal to the Circuit Court, Judge Jocelyn Newman reversed the decision of the DDRC. (Form 4; Final Order p. 10.) The DDRC filed no motion to alter or amend following the May 30, 2018 final order, nor did it request a stay. Rather, it appealed the decision on June 25, 2018. (Ct. App. Notice of Appeal.) The Circuit Court has held in abeyance Rutter's motion for attorney's fees and costs pursuant to S.C. Code Ann. §§ 6-29-930(A), 15-77-300, and Rule 54, SCRCP, pending the outcome of this appeal. (Mot. for Fees.)

[1] The DDRC consists of members appointed by the Columba City Counsel for three-year terms. *See* City of Columbia Ord. Sec. 17-653(c)(2).

STATEMENT OF FACTS[2]

This case is about the imperious reign of a local administrative body that routinely refuses property owners the right to make reasonable home repairs and improvements.

The City of Columbia Design/Development Review Commission, or DDRC, is a board of architectural review that administers the Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines ("the Guidelines"). The Guidelines 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 the Guidelines place on property. While City Council enacted an ordinance in 2003 creating the Melrose Heights/Oak Lawn Architectural Conservation District and designating the Melrose Heights neighborhood as an architectural conservation district, City Council never passed an ordinance enacting or codifying the Guidelines. *See* City of Columbia Ord. No. 2003-054. The ordinary, reasonable, and prudent homebuyer in Melrose Heights has no reason to suspect a local architectural review board broadly interprets the Guidelines to ban reasonable home repairs and improvements that have been made to many other homes in the neighborhood.

Rutter purchased the home located at the corner of Gladden Street and Webster Street in the Melrose Heights neighborhood of Columbia, South Carolina. The two-story Tudor Revival home was a vacant duplex that had fallen into disrepair. *See* YouTube, *Design/Development*

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[2] Respondent notes that Appellant almost entirely failed to cite any of the assertions made in its combined statement of the case and facts in its initial brief in contravention of Rule 208(b)(4), SCACR. The combined statement includes assertions that are contested by Respondent, in contravention of Rule 208(b)(1)(E), SCACR. Moreover, it would be nearly impossible for Appellant to cite its factual assertions, given that no findings of fact have been made by the DDRC. *See* Richey Letter dated Jan. 17, 2017.

Review Committee: January 12, 2017 at 53:17–53:39, *available at* https://youtu.be/tM_qKxeZRGc.[3] The house is not a historic landmark, has not been designated as a landmark by the DDRC, and is not listed on the National Register of Historic Places. The first story is clad in brick that showed signs of wear and poor maintenance, including cracked and different colored grout. The second story is clad in painted stucco, where the roof line allows, with wood accents while the remainder of the second level is covered by a shingle roof. (Staff Report p. 9.) Rutter, whose business is primarily renovation work for homeowners in Columbia, bought the house to convert the duplex to a single-family home. As part of that effort he planned work to both the interior and exterior, including painting the damaged exterior brick. Video at 53:39–53:58. Rutter believed these improvements would increase the value of the property and thereby benefit the neighborhood. *Id.*

Prior to closing on the house, Rutter inquired to DDRC staff about the improvement he planned. The DDRC told him he could not make any changes to the exterior unless the changes complied with the Guidelines. (DDRC Staff Report.) The Guidelines are written to apply only to portions of the house visible from the public right-of-way. With that information and some instruction from the DDRC on where to find them, Rutter consulted the Guidelines. The Guidelines "are criteria and standards that the [DDRC] must consider in determining the appropriateness of proposed work within a historic district." (*See* Guidelines p. 1, Section I.)

The Guidelines provide that "actions that do not require review" include "Painting and Color." (*Id.* at p. 4, Section IV(B).) Based on the language in the Guidelines, the fact that the Guidelines only apply to the exterior of the home, and the existence of numerous other painted brick homes in the neighborhood (Rutter's Br. to Circuit Court, Ex. "Painted Brick Homes in

[3] This link directs to a video of the DDRC hearing on this matter, which has not been transcribed.

Melrose Heights"), Rutter reasonably concluded painting the exterior of the house did not require any review. And that was so—until the DDRC received an anonymous complaint. (*See* Staff Report p. 1.) That complaint resulted in the DDRC issuing a stop work order and demanding that Rutter apply for a certificate of design approval. Rutter acquiesced to that demand on November 16, 2016. His application sought approval to paint the brick exterior. (Appl.) Separately, on November 21, 2016, the City of Columbia ("the City") issued a building permit. (Building Permit.)

The DDRC hearing on January 12, 2017, was video recorded, but no transcript was taken.[4] At the beginning of the meeting, the Chair read from a script explaining the standard DDRC procedure for each matter. For each matter called, DDRC staff was to present their opinions and recommendations first (without any time limitation). Video at 8:58–11:15. However, applicants who wished to present were given no more than ten (10) minutes to respond. Non-applicants who wished to speak were given only two (2) minutes. *Id.* Following those instructions, the Chair performed a mass swearing-in of all persons who wish to speak. *Id.* at 11:22, *et seq.* There is no record of the individuals sworn-in for the proceeding. The individuals were not captured by the camera recording the proceeding, and there was no sign-in sheet, witness list, or other record indicating those who affirmed to tell the truth. Thus, the record contains no way for any reviewing court to determine who was in fact sworn-in.

When Rutter's case was called, DDRC staff member Staci Richey presented the staff recommendation to deny the application. She read from a report emphasizing the stop work orders and used slides and other materials as part of her presentation. *Id.* at 43:06–52:50. Prior to the

[4] Notably, on appeal to the Circuit Court, production of the record of administrative proceedings is the responsibility of the administrative body, not the appellant. *See* Rule 75, SCRCP; s*ee also* Rule 207, SCACR (requiring appellant to obtain transcript). The record filed with the Circuit Court, filed four months after the notice of appeal, included a DVD of the hearing, but not a transcript.

hearing, the DDRC had not provided Rutter any indication that his application was lacking in any way or that staff would recommend denying his application.

Russell Jones spoke on behalf of Rutter. *Id.* at 53:00–1:03:27. Mr. Jones pointed out the history of the house, which Rutter purchased from a California investment company that owned the home following a bank foreclosure. *Id.* at 53:10–53:39. The house had been abandoned and in a dilapidated state before Rutter bought it to convert it into an attractive single-family home (which it is today). *Id.* at 53:39–53:58. Noting the specific exemption for "painting and color," Mr. Jones argued the Guidelines should not be applied rigidly to the point of sacrificing the use, value, and future of a home. *Id.* at 57:18–1:00:00.[5]

Ultimately, the DDRC denied Rutter's request to paint the house. Whether the DDRC considered the merit of his application—submitted only at the specific demand of DDRC staff—is doubtful. As Judge Newman recognized, "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.' . . . 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.'" (May 30, 2018 Order p. 3.) Following the meeting, Ms. Richey notified Rutter of the DDRC's decision. (Richey letter.)

On February 10, 2017, Rutter appealed the DDRC's decision to Circuit Court. With his appeal, Rutter requested "pre-litigation mediation" pursuant to S.C. Code Ann. § 6-29-915. (Circuit Court Notice of Appeal and Demand for Pre-Litigation Mediation.) Respondent made

[5] Rutter's confusion about the application of the vague and ambiguous Guidelines was received by the DDRC and its staff as a sign of defiance. Thus, instead of working from a place of compromise, the DDRC has maintained a pugnacious and antagonistic attitude towards Rutter throughout the proceedings related to this appeal and other matters.

multiple attempts to mediate, which culminated in a single meeting where no representative of the DDRC with authority to recommend a settlement appeared. (Letter to Mangum from Bruner; Motion for Sanctions.) After a year of the DDRC refusing to negotiate in good faith, Rutter proceeded with the hearing of his appeal.

Judge Newman heard the appeal on February 9, 2018 and ultimately reversed the DDRC's decision based upon errors of law. (Form 4 Order dated Feb. 13, 2018; May 30, 2018 Order.) The DDRC filed no motion to alter or amend, nor did it request a stay from the Circuit Court.

After waiting for the Judge's order to become final, Respondent proceeded to paint the house and complete the project. At the time, Judge Newman's order reversing the decision of the DDRC was un-appealed and was final, and the DDRC had taken no steps to stay its effect. Rutter already had a building permit, and the city ordinances did not require a building permit solely to paint a house. *See* City of Columbia Ord. § 5-51 (adopting the 2015 International Building Code); and 2015 International Building Code § 105.2 ("Permits *shall not* be required for the following:...7. Painting...and similar finish work."). Therefore, no further permitting, permissions, or approval was required for Rutter to paint the house.

The DDRC served its notice of appeal on June 25, 2018. By the time Rutter received it, all work at issue in his application had been completed. The work cannot be undone by sandblasting because the Guidelines prohibit sandblasting brick, and the cost would be exhorbitant.

Subsequent to commencement of this appeal, Judge Newman denied Rutter's motion for sanctions based on the DDRC's recalcitrance on the matter of mediation. (Form 4 Order dated July 13, 2018.) The motion for attorney's fees remains pending. (Motion for Attorney's Fees dated June 8, 2018.)

STANDARD OF REVIEW

Matters on appeal from the DDRC to the Circuit Court and the Court of Appeals are guided by the standard of review in S.C. Code Ann. § 6-29-930, which provides that the reviewing court must determine whether decision of a board of architectural review is correct as a matter of law.[6] S.C. Code Ann. § 6-29-930(A); *see also Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) ("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 . . . ."); *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (citations omitted) ("a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion"). Appeals from the Circuit Court may be taken in a manner consistent with the South Carolina Appellate Court Rules. S.C. Code Ann. § 6-29-940.

ARGUMENT

In this case, the DDRC unconstitutionally deprived a local property owner and businessman of due process under the law. Judge Newman correctly determined that the DDRC applied a vague and indefinite standard in its decision and violated Respondent's due process

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[6] In prior cases, this Court has discussed the proper evidence standard for factual findings of zoning boards. *See, e.g., Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004); *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). However, in this case, the Circuit Court's order relied on two legal grounds to reverse the DDRC's decision, making the standard for factual findings largely immaterial to this appeal. Respondent would also note that no formal findings of fact or conclusions of law that could be traditionally reviewed were ever put forth in writing by the DDRC itself. The "decision" of the DDRC was conveyed in a short letter by the DDRC staff member who drafted a 12-page report against Respondent and argued against Respondent at the hearing.

rights.[7] In accordance with Judge Newman's un-stayed and conclusive order reversing the decision of the DDRC, Respondent performed the desired repairs and improvements to his property, including painting the exterior brick. Because the actions for which Rutter sought approval have already been taken and are irreversible, this appeal should be dismissed.

I. THE DDRC'S APPEAL IS MOOT.

It is well established that this Court does not rule on "moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997)). A case "becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Id.*, 345 S.C. at 567–68, 549 S.E.2d at 596 (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief." *Id.*

In a recent case dismissed by this Court, the Board of Zoning Appeals had denied permission to Christ Central Ministries to construct a billboard. *See Christ Cent. Ministries v. City of Columbia Bd. of Zoning Appeals*, 424 S.C. 358, 360, 818 S.E.2d 30, 30–31 (Ct. App. 2018). Christ Central Ministries appealed to the Circuit Court, which reversed the board's decision. *Id.*, 424 S.C. at 360, 818 S.E.2d at 31. The board asked the Circuit Court to stay its order. *Id.*, 424 S.C. at 361, 818 S.E.2d at 31. The Circuit Court denied the request, and the board appealed without requesting a stay from the Court of Appeals. In the meantime, the City issued the contested permit, and the billboard was constructed. This Court held that the matter was moot and dismissed the

[7] Judge Newman's finding of a failure of due process at the DDRC is consistent with Judge Hood's similar conclusions in another DDRC case. *See Woodley and Woodley v. The City of Columbia, South Carolina acting through its Design/Development Review Commission*, Case No. 2017-CP-40-03084 (S.C. Circuit Ct. order filed Aug. 24, 2017) (the matter was appealed and subsequently dismissed by this Court on May 8, 2018 at the request of the parties).

appeal, relying in part on similar facts from *Seabrook v. Knox*, 369 S.C. 191, 631 S.E.2d 907 (2006). *Id.*, 424 S.C. at 361–62, 818 S.E.2d at 31–32.

Similar circumstances exist here. The DDRC could have moved for the Circuit Court to alter or amend its order, could have requested a stay, or could have served notice sooner that it intended to appeal the Circuit Court's order. It did none of those things, instead opting to sit on its rights. To date, the DDRC has not requested any stay. By the time the DDRC chose to assert its right to appeal the Circuit Court's order, Rutter had completed the work.

The DDRC's attempts to differentiate this case from *Christ Central* are flawed. First, the DDRC's distinctions are rooted in facts that have never been in the record of this case. For instance, the DDRC references statements made by a City of Columbia Panning and Preservation Department employee when the record contains no evidence of such a conversation or the substance of it. Not even the gender of the employee is provided. The DDRC cannot use this appeal as an opportunity to introduce new evidence—or for that matter new hearsay. Second, the DDRC wrongly argues Rutter is a bad actor because he painted the house without a permit. Rutter applied for, paid for, and obtained a building permit for the renovation work on the house and completed the work under that permit. (Building permit.) After the Circuit Court reversed the DDRC's denial of Rutter's application, Rutter needed no additional permit before he could lawfully paint the house—a fact distinguishing the billboard case above where a permit was required. The City's own website advises citizens, "**NOTE:** Painting, flooring, and other cosmetic work does not require a permit. See International Building Code Section 105.2 for exemptions." City of Columbia, "Residential Projects," *available at* https://www.columbiasc.net/development-inspections/residential (emphasis added). That statement accurately interprets the 2015 International Building Code, which the City of Columbia not only adopted but which by ordinance

prevails and is controlling over any conflicting city ordinance (including the ordinances upon which the DDRC relies). City of Columbia Ord. § 5-51. Specifically, the 2015 International Building Code provides, "Permits *shall not* be required for the following: . . . 7. Painting . . and similar finish work." 2015 International Building Code, Section 105.2 (emphasis added). Therefore, while it was the Circuit Court's order that permitted Rutter to paint his house (despite the DDRC's efforts), it was the ordinance the City enacted that allowed him to do so without obtaining a second permit. The City's argument that a second building permit was required for Rutter to paint his house is untenable.

Respondent was fully cloaked in the authority of the Circuit Court's order when he completed the work on the house. Like Christ Central Ministries after it obtained its building permit, Rutter had obtained all permitting and approvals from the government that were required of him by law before he could complete the work. The Circuit Court did not need to order the issuance of a building permit because none was required for the work that remained. There was no remand in Judge Newman's decision, which was final and un-appealed at the time Rutter did the work. The DDRC filed no request that the Circuit Court stay its order as it had done in *Christ Central Ministries*, nor to this day has it requested a stay from any court. Under these circumstances, it is disappointing for the DDRC to suggest Rutter must start the whole three-year process anew, or, for that matter, for the DDRC to now claim it was waiting for Rutter to apply for a second (unnecessary) building permit before it moved for a stay. Had the DDRC truly been concerned, it could have availed itself of its rights. It chose not to, and this appeal is now moot.

A New York appellate court found an appeal moot in a similar situation. *See Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 774 N.E.2d 193 (Ct. App. 2002). In that case, a zoning board granted a variance for developers of condominiums against the wishes of adjacent

landowners. *See id.*, 98 N.Y.2d at 169–72, 774 N.E.2d at 194–96. The landowners appealed the decision but failed to seek an injunction or a stay, so work continued on the project. *Id.* The landowners did not seek injunctive relief until that matter reached the appellate courts of New York. *Id.*, 98 N.Y.2d at 171–72, 774 N.E2d at 195-96. By the time that the matter reached New York's top court, multiple units were complete and several more were in advanced stages of construction. *Id.*, 98 N.Y.2d at 172, 774 N.E.2d at 196. The Court of Appeals dismissed the appeal, relying on the fact that the appellants had failed to timely seek injunctive relief. *Id.*, 98 N.Y.2d at 174, 774 N.E.2d at 197–98; *see also Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 729, 811 N.E.2d 2, 4 (2004). In this case, the DDRC also failed to take any timely action. It cannot now unjustly demand reversal of the work, which was performed lawfully and at great expense, and further extend this litigation. This appeal is moot.

The DDRC argues that even if this appeal is held moot, this Court should find an exception. Specifically, the DDRC claims the issues in this case involving a failure of due process and vague and indefinite standards are matters of public interest that merit an exception to the doctrine of mootness. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26–27, 630 S.E.2d 474, 478 (2006). The facts of this case and the DDRC's voluntary abandonment of a similar appeal do not support that contention. *See Friends of the Hunley*, 369 S.C. at 26–27, 630 S.E.2d at 478. *See also* Woodley Consent Order (agreeing to certain proposed improvements after the Circuit Court found the DDRC's decision violated due process).) Our Supreme Court has stated that the public interest exception should only be applied when a matter if of important public interest and there is a "question of imperative and manifest urgency." *Friends of the Hunley*, 369 S.C. at 27, 630 S.E.2d at 478 (citing *Sloan v. Greenville Cty.*, 361 S.C. 568, 570, 606 S.E.2d 464, 465–66 (2004)).

Further, public interest is not an automatic exception to the mootness doctrine, but rather one an appellate court may apply in its wisdom and discretion. *S.C. Pub. Interest. Found. v. S.C. Dep't of Transp.*, 412 S.C. 18, 26–27, 770 SS.E.2d 399, 403–04 (Ct. App. 2015) (quoting *Sloan v. Greenville Cty.*, 361 S.C. 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)).

There is no great novel question before the Court in this appeal. The law of due process in this state, even in administrative contexts, is well established and generally comes down to an analysis of the circumstances of a given situation. The DDRC's refusal to accept that jurisprudence does not spawn a "question of imperative and manifest urgency" to warrant application of the public interest exception. Only academic questions remain in this case, and those questions have been answered in prior case law as demonstrated by Respondent's arguments below.

Furthermore, the DDRC's conduct in other cases belies its claim of manifest urgency. In a prior appeal by a homeowner, Judge Hood found the DDRC's decision violated a homeowner's right to due process, primarily based on the DDRC's procedures. (Woodley Order dated Aug. 24, 2017.) In response, the DDRC did not pursue review of any issue of manifest urgency, but rather engaged in reasonable negotiations with the homeowner—ultimately culminating in a consent order agreeing to many of the exterior improvements the homeowner requested and the consent dismissal of the appeal. (Woodley Consent Order dated May 7, 2018.) If the DDRC believed that the due process issues were of such urgent importance, it would not have abandoned its appeal.

For these reasons, there is no relief for this Court to provide, nor is there any reason for this Court to apply any exception to the mootness doctrine. This appeal should be dismissed as moot.

II. THE CIRCUIT COURT CORRECTLY RULED THAT THE DDRC FAILED TO PROVIDE RUTTER WITH DUE PROCESS.

If the Court reaches the merits of this appeal, Judge Newman's order should be affirmed for the reasons discussed below and any other grounds appearing in the record. *See* Rule 220(c), SCACR.

This case concerns a fundamental American property right. If the government wishes to curtail or restrict an American's right, it must do so within the confines of our state and federal constitutions and the protections they enshrine. Article I, Section 22 of the South Carolina Constitution specifically applies the protections of due process to a municipal administrative proceeding like the one in this case. This provision reads:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Art. I, § 22. This Court recently issued an opinion emphasizing the history and purpose of this specific provision, noting the prescience its adoption given the explosion of administrative regulation. *See McIntyre & Silver Oak Land Mgmt. v. Sec. Comm'r of S.C.*, S.C. Ct. App. Order dated Oct. 17, 2018 (Shearouse Adv. Sh. No. 41 at 17, 21) (petition for rehearing pending).

Many cases in South Carolina over the past few decades have expounded the due process requirements for administrative matters like the one at bar, which include notice, an opportunity to be heard in a meaningful way, an impartial adjudicator, and judicial review. *See, e.g., S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 390-91, 699 S.E.2d 146, 152–53 (2010); *Garris v. Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998); *Jones v. SC Dep't of Health & Envtl. Control*, 384 S.C. 295, 316, 682 S.E.2d 282, 293–94 (Ct. App. 2009); *S.C. Dep't of Labor v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d

490, 492 (Ct. App. 1998); *S.C. Dep't of Health & Envtl. Control v. Armstrong*, 293 S.C. 209, 215, 359 S.E.2d 302, 305 (Ct. App. 1987); *De Groot v. Emp't Sec. Comm'n.*, 285 S.C. 209, 212, 328 S.E.2d 668, 670 (Ct. App. 1985). These due process requirements apply before local planning and zoning commissions, as well as boards of architectural review like the DDRC. *See Robert K. v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008).

The application of due process rights in these contexts is consistent with the underpinning of all due process jurisdiction: the implication of a liberty or property interest. *S.C. Ambulatory Surgery Ctr. Ass'n*, 389 S.C. at 391, 699 S.E.2d at 152 (citing *Robert K.*, 376 S.C. at 171, 656 S.E.2d at 350). In this case, there can be no question that a property interest is directly in contention as found by Judge Newman. (May 30, 2018 Order at 4.) This case concerns the infringement Rutter's right to use and ornament his property in a reasonable manner and as he desires. *See, e.g.*, *Robert K.*, 376 S.C. at 171–72, 656 S.E.2d at 349–50 (applying due process requirements to a hearing on an application to subdivide property); *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 68–69, 663 S.E.2d 497, 503–04 (Ct. App. 2008) (applying due process requirements in a dock permit matter).

The DDRC argues in footnote 2 of its brief that it is questionable whether a reviewing court may hear issues based of the constitutionality of the decision of a board of architectural review because S.C. Code Ann. § 6-29-930(A) limits the court's review to whether the board's decision is correct as a matter of law. We disagree. Flouting the State Constitution equates to an error of law and is well within this Court's and the Circuit Court's jurisdiction. *Cf. State v. Buttz*, 9 S.C. 156, 175 (1877) (where there is a statutory or constitutional provision prohibiting some act, the question of their incompatibility does not necessarily arise, for in such a case the acceptance of the second is *ipso facto* the abandonment and resignation of the first). Furthermore, no board of

architectural review may regulate citizens and restrict their property rights without recourse to judicial review of due process. *See* S.C. Const. Art. I, § 22; *see also* S.C. Const. Art. I, § 3. Notably, the DDRC relies heavily on jurisprudence from other states for its argument, something which lends it no support because the application of procedural due process has been acknowledged and decided by the South Carolina Supreme Court in the context of local city planning boards. *See Robert K.*, 376 S.C. at 171, 656 S.E.2d at 350. Finally, at no time prior to filing its brief with this Court did the DDRC raise challenge this Court's jurisdiction to review the constitutionality of its actions. The issue, therefore, is not preserved for appellate review. *See State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (citations omitted) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review.").

In this case, the Circuit Court held the DDRC violated Rutter's due process right to notice and his due process right to be heard in a meaningful way. (May 30, 2018 Order at 4–6.) Under our due process precedent, the requirements for administrative hearings can be flexible, depending on the circumstances and the level of intrusion or control the government proposes. *See Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (citing *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *Brown v. Malloy*, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001)). However, there are core requirements that must be met, including notice and the opportunity to be heard. *Id.*, 351 S.C. at 542, 570 S.E.2d at 569 (citing *Murdock v. Murdock*, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) ("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.").

Compliance with the requirements of due process was particularly important in Rutter's case because there was no later *de novo* review to allow for correction of any deficiencies. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) (citation omitted) ("An adequate *de novo* review renders harmless a procedural due process violation based on the insufficiency of the lower administrative body."); S.C. Code Ann. § 6-29-930(A) (confining judicial review to whether a DDRC decision is "correct as a matter of law"); (Feb. 9, 2018 Tr. p. 20, ll. 6–7 (counsel for the DDRC stating "[we're] not here for a *de novo* review.").).

In this case, Rutter had no notice of the DDRC's assertion of authority over his actions, based on its expansive interpretation of the unenacted Guidelines. Even with a full review of the Guidelines, one would still not have notice that "painting and color" on the exterior of the house were within the DDRC's dominion because the Guidelines *specifically say that they are not.* (Guidelines p. 4.) Respondent also lacked notice of the fact that the DDRC staff intended to prepare an elaborate presentation opposing his application and condemning him for beginning work without first appearing before the DDRC.

Rather than be allowed to present his application, Rutter was left to rebut the staff member's presentation against him, as if he was being prosecuted without notice of the charge, rather than applying for permission to paint a house. Rutter was not allowed to cross-examine the DDRC staff member who opposed his application, to inquire into hearsay contained within the report she read into the record, or to conduct any investigation into the basis for her conclusions. These limitations curtailed Rutter's right to a meaningful hearing. If staff is going to recommend

denying an application in this adversarial fashion, the property owner has a right to adequate notice so he has a fair opportunity to respond.

Further casting a cloud on the DDRC's decision is the fact that there is no record that any person who spoke at the hearing did so under oath. Indeed, there are no findings of fact or conclusions of law in the decision letter, and that letter was drafted and signed by the staff member who prepared a report against Rutter and presented it at the meeting. (Richey Letter.) Nowhere as part of its decision did the DDRC even allude to the Guidelines or any provision within them that allowed for the DDRC's assertion of authority over any matter before them, including paint and color. That alone is generally sufficient for a reversal of an administrative decision. *See Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998) (citations omitted) ("An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings."). All of these defects are part of an inherent disregard for due process in the way the DDRC conducted itself in Rutter's case.

The DDRC argues in its brief that the issue of due process is unpreserved for review because it was not raised to the DDRC. However, one cannot raise the issue of a violation of due process until it occurs. Moreover, the DDRC does not itself have the authority to rule on issues of constitutionality like the Circuit Court does. *Cf. Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011) (concluding that facial constitutional challenges should be brought first on appeal, rather than before non-judicial branch bodies, such as the Administrative Law Court); *Brown v. James*, 389 S.C. 41, 54–55, 697 S.E.2d 604, 611–12 (Ct. App. 2010) (recognizing exceptions to administrative exhaustion for futility and actions outside the agency's scope of authority). Therefore, the DDRC's preservation argument is misguided.

The fundamental requirements of due process do not change, and they cannot be abridged, not even by a board of architectural review ruling over its fiefdom. Procedural due process requires notice, the opportunity to be heard in a meaningful way by an impartial adjudicator, and judicial review. *Blanton*, 351 S.C. at 542, 570 S.E.2d at 569 (citations omitted). In this case, the DDRC summarily stripped Rutter of his property rights and his due process without any reference to the rule of law. The Circuit Court recognized the substantive and procedural errors in the DDRC's decision and reversed it. For the same reasons, this Court should affirm.

III. THE CIRCUIT COURT CORRECTLY RULED THAT THE STANDARDS USED BY THE DDRC ARE VAGUE AND INDEFINITE.

Our appellate courts have recently taken a stand against unenacted guidelines being used as immutable and binding authority. *See Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016). Guidelines are supposed to be exactly that—guidance that can and should be deviated from when circumstances dictate. *See S.C. Dep't of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 664, 790 S.E.2d 792, 805 (Ct. App. 2016) (recognizing that the Department of Revenue can and does review mitigation factors other than those listed its own policy for alcohol violations). In theory, the DDRC uses the Melrose Heights Guidelines to make decisions governing property rights in that neighborhood. The Guidelines were repeatedly referenced by the Chair at the beginning of the January 2017 hearing and are repeatedly cited by DDRC staff in its presentation. It is apparent that the DDRC and its staff consider the Guidelines as conclusive, binding authority and apply them rigidly, without reference to common sense. That application is problematic for several reasons.

The Guidelines are not law. Although the DDRC argues these Guidelines were adopted by City Council on October 15, 2013, there is no evidence or documentation of that. The ordinance that *was* adopted on that date by the City Council on that date defines the boundary of the Melrose

Heights/Oak Lawn Architectural Conservation District, but it *does not* reference or adopt the Guidelines in question here. Columbia Ord. No. 2003-054; *see also* May 30, 2018 Order p. 2. Using policy guidance as a binding norm is exactly the arbitrary evil the *Joseph* Court sought to prevent. *See Joseph*, 417 S.C. at 453–54, 790 S.E.2d at 772. Our Supreme Court indicated that establishing binding norms without first taking the provisions of the norm through the process required to enact law is a constitutional violation. In this case, the record contains no evidence or indication that the Guidelines rigidly applied as a binding norm to Rutter's application ever underwent the reading and adoption required for a binding city ordinance. If the Guidelines are not binding law, then the DDRC's denial of Rutter's application is conspicuously arbitrary.

Even if the Guidelines were found in fact to be properly considered the authority by which the DDRC may make decisions, there would still be a fundamental flaw in the process—the Guidelines themselves. The Guidelines provide only a vague and indefinite standard by which to determine whether to grant or deny applications for permits, rendering the DDRC's decision arbitrary and capricious. When a rule or standard "is so vague and indefinite as to be really no rule or standard at all" no obedience to that rule or standard may be exacted by the government. *Honea Path v. Flynn*, 255 S.C. 32, 38, 176 S.E.2d 564, 566-67 (1970) (quoting 21 Am. Jur. (2d) 97 *et seq.*, Crim. L. § 17); *see also Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991) (quoting *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925)).

"The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies." *Toussaint*, 303 S.C. at 320, 400 S.E.2d at 491 (citations omitted). Indeed, a law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates

the first essential of due process of law." *Honea Path*, 255 S.C. at 39, 176 S.E.2d at 567 (quoting 16 Am. Jur. (20) 951, Const. L. § 552).

Our courts have condemned vague city ordinances and their arbitrary application in the past. *See Schloss Poster Advert. Co. v. Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939). In the *Schloss Poster* case, the City of Rock Hill passed an ordinance which required permits for billboards without giving any criteria for the granting or denial of a permit, thus allowing the city unfettered discretion. *See id.*, 190 S.C. at 93–94, 2 S.E.2d at 393. In decrying such blanket assertions of authority, the South Carolina Supreme Court stated:

> It seems to us clear upon authority and reason that if an ordinance is passed by a municipal corporation, which upon its face restricts the right or dominion which the individual might otherwise exercise over his property without question, not according to any general or uniform rule, but so as to make the due enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of city authorities who may exercise it so as to give exclusive profits or privileges to particular persons.

Id., 190 S.C. at 95, 2 S.E.2d at 394 (citations omitted). Our Supreme Court has also stated that giving "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 v. Pollock*, 223 S.C. 342, 348–49, 75 S.E.2d 752, 755 (1953) (quoting *State v. Stoddard*, 126 Conn. 623, 628, 13 A.2d 586 (1940)).

Unrestricted discretion, which undermines the rule of law, is the precise problem identified by this Court in the *McIntyre* case. *See generally*, *McIntyre* (Shearouse Adv. Sh. No. 41 at 23–26). The DDRC cannot be empowered simply by its existence to regulate every visible aspect of the exterior of property owner's house without some reference to uniform criteria. *See Rest. Row Assocs.*, 335 S.C. at 214, 516 S.E.2d at 445 (citations omitted) ("[A] local board must be guided

by standards which are specific in order to prevent the ordinance from being invalid and arbitrary."). To say otherwise would be to let the leviathan of unrestrained administrative action loose upon the property rights of the citizens of this state.

In this case, the Guidelines are inherently contradictory and vague. The DDRC did not apply them according to their plain and ordinary meaning. On page 4 of the Guidelines, "painting and color" are specifically listed as *not* requiring review by the DDRC. Because the Guidelines specifically apply only to exterior work, the only reasonable interpretation of that provision is the DDRC has no jurisdiction to regulate painting and color on the exterior of a house.[8] And yet, the DDRC disregarded that language, focusing only on other, contradictory provisions that enhanced its authority. Under that approach, the DDRC issued stop work orders and denied Rutter's application. On page 11, the Guidelines provide both that masonry should not be painted *and* that it should be painted, if required for protection. Respondent attempted to reconcile and comply with these conflicting and vague sentiments, by painting to protect the older brick on the subject property, which was in poor condition. The DDRC, however, only considered the stop work orders, not the condition of the brick, and now will inevitably demand that Rutter remove all of the paint even though that will further damage the brick.

Noticeably absent from the record is anything justifying the DDRC's staunch refusal, as a matter of policy, to deny an application to paint a brick home. Nor did the DDRC or its staff consider the fact that numerous homes throughout the neighborhood have painted brick, including

[8] Given this language in the Guidelines and the general principle that ambiguity should be interpreted in favor of the property owner, arguably the DDRC lacked subject-matter jurisdiction over Rutter's application and this appeal should be summarily dismissed. *See Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997) (citations omitted) ("It is well-settled that issues relating to subject matter jurisdiction may be raised at any time").

some which were painted after the introduction of the Guidelines in 2003. (Rutter's Br. to Circuit Court, Ex. "Painted Brick Homes in Melrose Heights.") With respect to the specific house at issue here, nothing in the Guidelines recognizes this house or the Tudor Revival style as historic or contributing to the historic district.[9] No homebuyer or homeowner can reasonably anticipate how the DDRC will apply these vague, confusing, and indefinite Guidelines, which the DDRC has used both as sword and shield.

Thus, Rutter was deprived of both procedural and substantive due process. *See Anco, Inc. v. State Health & Human Servs. Fin. Comm.*, 300 S.C. 432, 443, 388 S.E.2d 780, 787 (1989) ("Substantive due process protects a person from being deprived of life, liberty or property for arbitrary reasons."). While the legality and content of the Guidelines plays a large part in this deprivation, the ultimate problem is that *no standard* of any kind was applied in the DDRC's decision. The decision makes no findings of fact and gives no conclusion of law, or even reason. (Richey Letter; Meeting Minutes.) The only substantive reason given at the hearing was the DDRC's reservation about setting a bad precedent after the stop work orders had been issued. The board paid no attention to the merit of the application (*i.e.*, whether the brick was damaged and needed protection or how the house would appear after the work). Indeed, the DDRC did not even make the foundational finding that the house in question actually "contributes" to the neighborhood. (*See* May 30, 2018 Order p. 9; Guidelines p. 16.) Therefore, to this day Rutter does not know which of the conflicting Guideline provisions the DDRC hypothetically relied upon. As a result, Rutter was subject to the arbitrary whims of the DDRC and its staff.

[9] Rather, the design characteristics of the neighborhood provide, "The predominant style [in the neighborhood] 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." (Guidelines, p. 3, Section III(B).)

For these reasons, the Circuit Court correctly reversed the DDRC's decision and should be affirmed.

CONCLUSION

It bears repeating that this case centers on the issue of whether a property owner can paint the brick exterior of a home he owns. In this case, the DDRC has forbidden this activity in an arbitrary and unconstitutional manner. However, as the work for which Rutter sought permission has been completed and was done lawfully while the DDRC sat on its rights, this appeal is moot and should be dismissed. In the event the appeal is not dismissed, the Circuit Court's order should be affirmed for the reasons set forth above, as well as any other grounds existing in the record.

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February 1, 2019
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2018-001194

G. Allen Rutter, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Initial Brief of Respondent G. Allen Rutter complies with Rule 208, SCACR.

Benjamin C. Bruner, Esquire

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PROOF OF SERVICE

I, the undersigned employee of Bruner, Powerll, Wall & Mullins, LLC, certify that I have served *Respondent's Initial Brief* and *Respondent's Designation of Matter* on City of Columbia Design/Development Review Commission by e-mail and by depositing a copy of the same in the United States Mail, postage prepaid, on February 1, 2019, addressed its attorney, Jessica Mangum, Esq., at City Attorney's Office, Columbia, PO Box 667, Columbia, SC 29202.

February 1, 2019

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February 1, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***G. Allen Rutter v. City of Columbia***
Appellate Case No.: 2018-001194
BPWM File No. 11-2865.100

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the *Respondent's Initial Brief and Designation of Matter* in the above-referenced matter, as well as proof of service of the same. Please file the original, clock-in the copy and return the clocked copy to my courier.

With my warmest regards, I am

Sincerely,

Benjamin C. Bruner

BCB/gh
/Enclosures

cc: Jessica R. Mangum, Esq. (via e-mail and U.S. Mail w/encl.)