

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 25 2013
SC 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.

**RETURN OF RESPONDENT TO APPELLANT'S MOTION TO STRIKE MATTERS
DESIGNATED BY RESPONDENT FOR INCLUSION IN THE RECORD ON APPEAL**

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STATEMENT OF THE CASE

This matter is on appeal from the decision of the Honorable Jocelyn Newman, reversing the decision of the City of Columbia Design/Development Review Commission (“DDRC” or “Appellant”). The DDRC denied an application of G. Allen Rutter (“Rutter” or “Respondent”) to complete certain exterior improvement to property he owns in Melrose Heights.

On September 24, 2018, Respondent filed a Motion to Dismiss, arguing that the instant appeal is moot. Appellant subsequently filed a return, arguing that the matter is not moot, or, if it is, that a mootness exception should be applied. On November 30, 2018, Chief Judge Lockemy denied the motion to dismiss, but stated that the Court would consider arguments related to mootness following final briefing.

Initial briefing in this matter is now complete. Respondent argued mootness in its initial brief as allowed by the Court’s order. Appellant filed an Initial Reply Brief, exclusively addressing Respondent’s mootness argument on March 13, 2019. On March 15, 2019, the DDRC filed a “Motion to Strike Matters Designated by Respondent for Inclusion in the Record on Appeal.” Respondent files the instant return in opposition of Appellant’s motion.

ARGUMENT

Appellant’s motion to strike should be denied for three primary reasons: matters filed or heard by the Circuit Court in this case are properly included in the record of this appeal, City of Columbia Ordinances and their legislative history are properly considered as law and are matters of public record, and facts supporting Respondent’s mootness argument are appropriate for the Court’s review. Appellant has moved to strike Items 1, 2, 10, 11, 12, 15, and 16 from Respondent’s Designation of sixteen total documents. Each item is addressed below.

Items 15 and 16 are the transcript of a July 13, 2018 hearing on Respondent's motion for sanctions and the Form 4 order denying that that motion. The hearing was conducted by the same judge who decided the appeal, and these two documents will help give this Court a full record to consider while deciding the issues on appeal by providing the Court arguments and representations of counsel made to the Circuit Court on the record in this matter. While the DDRC argues those documents contain facts not presented to the DDRC, that is immaterial. Quite necessarily, any filing, order, or transcript emanating from the Circuit Court case would not have been before the DDRC. Those filings are nonetheless properly part of the record of this appeal because they are part of the record before the Circuit Court. *See* Rule 210(c), SCACR (stating that the record should not include matter not before the lower court).

The fact that the DDRC is attempting to strike Item 1 is telling. That document is a copy of City of Columbia Ordinance 2003-054, which city council passed on October 15, 2003 to list the tax map numbers of properties in the Melrose Heights Neighborhood and designate them as an architectural conservation district. Not only did Respondent's counsel argue the language of the ordinance to the Circuit Court during the hearing on this appeal before Judge Newman, the ordinance is cited as authority in Respondent's initial brief.¹ The law as it exists and was passed is not a "fact" to be denied review; rather, the law and its public history is quite properly authority reviewable by the Court. *See S.C. DMV v. Dover*, 423 S.C. 153, 160 n.3, 813 S.E.2d 532, 535 (Ct. App. 2018) (stating that the Court may analyze the framework of various statutes and their interplay without reference to issues of preservation).

The ordinance shows in particular that while the DDRC repeatedly posits the Guidelines are binding law and enforceable, city council never enacted them. City council only passed an

¹ Respondent has no objection to the copy of the ordinance being certified.

ordinance designating the properties listed as within an architectural conservation district. The Circuit Court correctly found, therefore, that the decision of the DDRC should be reversed. The decision was controlled by vague and indefinite guidelines that were not subjected to multiple readings public hearings but instead were contrived by a body of unelected individuals.

The DDRC also argues items 2, 10, 11, and 12 should be stricken because they were not presented during the hearing before the DDRC. The *Woodley* Order, however, was argued to the Circuit Court, and all of these documents relate to Respondent's mootness argument and Appellant's response to that argument. It is axiomatic that any argument for mootness must encompass new information. *See, e.g., Byrd v. Irmo High Sch.*, 321 S.C. 426, 430–32, 468 S.E.2d 861, 863–64 (1996) (entertaining a motion to dismiss for mootness based on “events occurring *after* the filing of [the] appeal” (emphasis added)). Indeed, the temporal nature of mootness is expressed in its very definition. The oft-cited definition of mootness in South Carolina provides, “A case *becomes* moot when judgment, if rendered, will have no practical legal effect upon existing controversy.” *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (emphasis added). A moot appeal results “when intervening events render a case nonjusticiable.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citing Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999)).

In this case, Respondent is arguing that intervening events occurring between the Circuit Court's final order and the filing of Appellant's Notice of Appeal render this matter moot. To so argue, Respondent must necessarily cite to new events. Moreover, Respondent must be able to cite to information that contradicts any assertions made by Appellant in support of a finding of no mootness, or in support of an exception thereto. Respondent has no objection to the matters designated being considered solely for the purpose of analyzing the mootness argument.

This matter must be included, however, to provide Respondent an opportunity to present its mootness argument. For instance, Respondent's building permit is designated in response to Appellant's argument that any work completed following the Court's order was unpermitted. That document, which is public record, shows Respondent already pulled a building permit and was not required to pull another.² Respondent agrees that Rutter's building permit should not be at issue in this appeal; it is so only because Appellant baldly—and inaccurately—argued Respondent performed unpermitted work. In light of these arguments and attempts to paint Respondent as a bad actor, Respondent has endeavored to give this Court the benefit of a full record with the facts as they truly exist in this matter, not a limited view constrained by a limited record the Appellant demands. Respondent has done nothing more than exercise his legal rights and should be allowed to demonstrate that all necessary permitting existed.

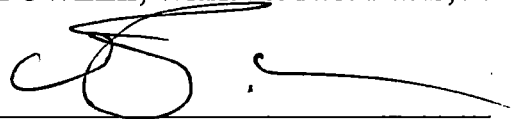
The Woodley filings designated by Respondent are again, matters of public record and were argued to the Circuit Court as persuasive authority. Moreover, those orders directly contravene Appellant's argument for this Court to apply the public interest exception to the mootness doctrine here because the DDRC faced the same adverse ruling from the Circuit Court in that case and did not appeal the decision. Instead, the DDRC engaged in negotiations with the property owners and reached a resolution of the dispute. Appellant should not be allowed to argue the Circuit Court's rulings in this case are a matter of urgency when public record demonstrates the same rulings in the *Woodley* case were not of sufficient urgency or public importance to

² Appellant's return to Respondent's Motion to Dismiss states on page 4: "Rutter began this work prior to obtaining a permit. . . . Rutter's argument should also fail because it allows him to benefit from his own misdoing. Essentially, his theory rewards a party for his/her bad behavior." Respondent should be allowed to counter these disparaging accusations by showing that his work was permitted. Alternatively, these unsupported comments should be struck from the record.

demand this Court's review of the decision.³ Respondent is not citing the *Woodley* filings as binding precedent, but rather as a demonstration of the disingenuity of Appellant's argument.

For the foregoing reasons, Appellant's Motion to Strike should be denied, and the record on appeal should include all matter Respondent designated.

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March 25, 2019
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³ Appellant's Return to Respondent's Motion to Dismiss at p. 7.

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PROOF OF SERVICE

I, the undersigned employee of Bruner, Powell, Wall & Mullins, LLC, certify that I have served the *Return of Respondent to Appellant's Motion to Strike Matters Designated by Respondent for Inclusion in the Record on Appeal* 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 March 25, 2019, addressed its attorney, Jessica Mangum, Esq., at City Attorney's Office, Columbia, PO Box 667, Columbia, SC 29202.

March 25, 2019


Bridget S. Steele

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March 25, 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

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Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the *Return of Respondent to Appellant's Motion to Strike Matters Designated by Respondent for Inclusion in the Record on Appeal* 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,



Bridget S. Steele

Legal Assistant to Benjamin C. Bruner

/bss

/Enclosures

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