

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 CommissionAppellant.

REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENT

I. RESPONDENT'S MOOTNESS ARGUMENT IS WITHOUT MERIT.

Rutter argues this zoning dispute is moot because he has already completed the exterior construction at issue. In support of his position, he further alleges the Design/Development Review Commission ("DDRC") failed to preserve its right to appeal because the DDRC did not move for the circuit court to alter or amend its order, request a stay, or serve notice sooner that it intended to appeal the circuit court's order. Respondent Brief p. 9. However, in addition to the reasons presented by the DDRC in response to Rutter's Motion to Dismiss filed on September 24, 2018, Rutter's mootness argument fails for several reasons.

It is undisputed that Rutter's application to the DDRC for a Certificate of Design Approval to paint the exterior of the property and remove historically significant doors and windows was an after-the-fact application. *Circuit Court Order* p. 2.; *DDRC's Supp. Return* (DDRC Design review District Historic Agenda Evaluation Sheet) p. 1; pp. 8-12. The record is clear that Rutter knew he had to apply for a Certificate of Design Approval prior to completing any work on the property. *Id.* Instead, he began work without the necessary certificate, while under two separate Stop Work orders issued by the City, and without concern for the architectural significance of the property or the neighborhood. *Id.*

A critical function of the DDRC, particularly in respect to properties located within architecturally valuable neighborhoods, is to ensure that any proposed changes or construction do not affect both an architecturally valuable house as well as an architecturally valuable neighborhood. *See, e.g.,* S.C. Code Ann. § 6-29-870 (1976) (Board of architectural review; membership; officers; rules; meeting; records); S.C. Code

Ann. § 6-29-880 (1976) (Powers of board of architectural review). The DDRC must have a mechanism to enforce applicable codes and regulations, especially when the physical character and structure of an architecturally valuable home is threatened. However, under Rutter's overly expansive theory of mootness, the DDRC would never have a remedy when a party makes significant and substantial exterior changes to a property located within an architecturally valuable neighborhood without first receiving a certificate of design approval because once the construction is complete, the issue is moot. Moreover, Rutter's position is flawed because it is necessarily premised upon a legal fallacy. Specifically, that the Court should concede and otherwise condone his bad acts prior to his application to the DDRC, even though he knowingly acted without authority and in violation of the law¹.

In support of his position, Rutter relies on *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 774 N.E.2d 193 (2002). However, the facts in *Dreikausen* are patently distinguishable. There, the Zoning Board of Appeals **granted** the property owners' request for a variance and approved the building of condominiums. *Id.* at 170, 774 N.E.2d 193 (2002). Neighboring landowners who did not want

¹ Contrary to Rutter's assertions, he had not "obtained all permitting and approvals from the government that were required of him by law before he could complete the work." Respondent Brief p. 10. As an initial matter, Rutter did not raise this issue to the DDRC and did not list this as a ground for appeal in his Notice of Appeal. Therefore, any argument Rutter now makes in reference to a building permit is not preserved and not properly before this court. However, assuming the issue is preserved, Rutter has mischaracterized the permit he received. At some point in 2016, he applied for a building permit to complete interior work on the property. His application did not indicate any exterior work would be undertaken, and the City advised Rutter that the building permit did not cover exterior work because exterior work required an application for a Certificate of Design approval from the DDRC based on the architecturally valuable designation of the neighborhood. Rutter received the building permit he requested for the limited purpose of completing interior work on the property. However, on November 11, 2016, the City received neighborhood complaints and subsequently issued the first of two Stop Work orders because Rutter began painting the exterior of the home without a Certificate of Design Approval in direct violation of applicable law. *DDRC's Supp. Return* (DDRC Design review District Historic Agenda Evaluation Sheet) p. 1

condominiums near their homes appealed the decision of the Board, claiming the granting of the variance was an error of law. *Id.* at 171, 774 N.E.2d 193 (2002). The initial reviewing court dismissed the appeal, finding the Board had acted within its discretion in granting the variance. *Id.* By this time, construction of the condominiums was substantially complete. *Id.* The subsequent reviewing court found for the Board and condominium property owners, holding the appeal was moot because the Board granted the variance and the project was complete. However, in this case, Rutter filed the appeal. Unlike the parties' posture in the *Dreikausen* case, here the board and property owner are on opposing sides. Additionally, the DDRC never approved Rutter's application and Rutter completed the exterior construction without a valid Certificate of Design Approval.

Interestingly, there is another New York case almost directly on point. In *Town of N. Elba*, property owners built boathouses on a nearby lake. *Town of N. Elba v. Grimditch* 131 A.D.3d 150, 13 N.Y.S.3d 601, 607–08 (N.Y. App. Div. 2015). Like Rutter, they did so without the town's approval or the required permits. *Id.* In response, the town took immediate and repeated action to halt construction and preserve the status quo, including issuing three (3) Stop Work orders, denying permit applications, and initiating legal action. *Id.* at 153–54, 13 N.Y.S.3d 601 (N.Y. App. Div. 2015). On appeal, property owners argued the court should dismiss the appeal as moot because they had finished construction of the boathouses. *Id.* at 157, 13 N.Y.S.3d 601 (N.Y. App. Div. 2015). The court held the property owners' mootness argument was without merit based on their own unseemly actions. *Id.* For the same reasons, Rutter's mootness argument should fail.

Additionally, Rutter argues the DDRC had legal remedies available to circumvent his mootness argument but simply chose not to avail itself of those remedies. However, this argument is also without merit. When Rutter first began work on the exterior of the property, the City issued two Stop-Work orders because Rutter knowingly failed to comply with the design approval process. *Order* p. 2; *Supp. Return* (DDRC Design review District Historic Agenda Evaluation Sheet) p. 1; pp. 8-12. These Stop Work orders, discussed at the DDRC hearing and addressed in the circuit court's order granting Rutter's appeal, were the only remedy available to the City at the time and should have acted as the very stay Rutter claims the DDRC failed to request.

In this case, Rutter asks the Court to ignore the fact that he completed exterior changes in phases. A significant portion of the exterior construction at issue was done prior to Rutter's application for a Certificate of Design Approval and while under two separate Stop Work orders. ("Phase I"). *Order* p. 2; *Supp. Return* (DDRC Design review District Historic Agenda Evaluation Sheet) p. 1, pp. 8-12. By Rutter's own admission, he completed the remainder of the work in the 26 days between the circuit court's order reversing the decision of the DDRC and the DDRC's service of its notice of appeal ("Phase II"). Respondent Brief p. 6.

This delineation between Phase I and Phase II is important because Rutter's mootness argument only pertains to exterior changes made during Phase II. None of Rutter's allegations -- that the DDRC failed to preserve their right to appeal because it did not move for the circuit court to alter or amend its order, request a stay, or serve the notice sooner that it intended to appeal the circuit court order -- address the exterior work Rutter completed under Phase I, without approval or authority. He fails to address Phase

I precisely because those changes do not fit under the Phase II mootness argument he presents.

Rutter also relies on *Christ Central* to support his position. *Christ Cent. Ministries v. City of Columbia Bd. of Zoning Appeals*, 424 S.C. 358, 360, 818 S.E.2d 30 (Ct. App. 2018). However, like *Dreikausen*, this case is easily distinguishable. In *Christ Central*, the circuit court reversed the decision of the Board of Zoning Appeals **and** ordered the City to issue a zoning permit to allow the church to construct the billboard in question. *Christ Central Circuit Court Order* p. 7. On appeal, this Court held the City's appeal was moot because the "City did not request this court stay the order [issuing the zoning permit] pending the outcome of the appeal." *Id.* at 361, 818 S.E.2d 30, 31 (Ct. App. 2018). The City's decision to grant the church's request for a permit resolved the dispute, leaving "nothing more for this court to do." *Id.* at 362, 818 S.E.2d 30, 32 (Ct. App. 2018)

In this case, the circuit court's order merely reversed the decision of the DDRC. *Circuit Court Order* p. 10. There was no accompanying finding that the Certificate of Design Approval itself was unconstitutional on its face or as applied to Rutter. This is significant because the certificate is the necessary instrument a party must first acquire to perform exterior construction on any property in an architecturally valuable neighborhood.

Furthermore, the circuit court's order did **not** require the DDRC or the City of Columbia Planning and Preservation Department ("Department") to issue a permit (or in this case, a Certificate of Design Approval) as the *Christ Central* Court did. This is an important distinction, for without that certificate, Rutter was without legal authority to

pursue any work whatsoever. *City of Columbia Municipal Code* § 17-676 (Enforcement; Penalty for Engaging in Action When Certificate is not in Effect). Because the circuit court did not order the DDRC or the Department to issue a certificate of design approval, and because, as of this writing, Rutter has never received a certificate of design approval from the DDRC or the Department, the DDRC had no reason to request a stay. Similar to Rutter's actions while under two separate Stop Work orders, the work done during the pendency of this appeal was done without the necessary documentation and without the protection of the law.

In addition to Rutter's argument that the DDRC should have requested a stay, he also argues the DDRC should have filed a motion to alter or amend the circuit court's order. However, there is no requirement that an appealing party file such a motion. *Rule 59(e), SCRPC*. In his brief, Rutter offers no further explanation about how this motion relates to his mootness argument. See Respondent Brief p. 9.

Lastly, Rutter argues the DDRC should have served notice sooner that it intended to appeal the circuit court order. However, Rule 203(b)(1) allows an appealing party thirty (30) days to serve a notice of appeal and forty (40) days to file the notice. *Rule 203, SCACR*. "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green By & Through Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (citing *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993); *Perry v. Minit Saver Food Stores of S.C., Inc.*, 255 S.C. 42, 177 S.E.2d 4 (1970)). Therefore, the words of Rule 203(b)(1) "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Id.*

In this case, the circuit court issued an order reversing the DDRC on May 30, 2018. The DDRC timely filed and served its notice of appeal on June 25, 2018, twenty six (26) days after receipt of written notice of entry of the circuit court order, and well within the time frame allotted by Rule 203(b)(1). While the DDRC was clearly within the appellate time limits subscribed by Rule 203(b)(1), Rutter argues the DDRC should have “served notice sooner.” Respondent Brief p. 9. He also argues, “By the time the DDRC chose to assert its right to appeal the Circuit Court’s order, Rutter had completed the work.” *Id.* However, Rule 203 clearly puts all parties on notice that an appealing party has thirty (30) days to file a notice of appeal. Instead, Rutter asks this Court to penalize the DDRC for following the plain and ordinary meaning of Rule 203(b)(1) and reward him when his “race to completion ... [has] frustrated appropriate administrative review.” *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172, 774 N.E.2d 193 (2002). Rutter should not be rewarded simply because he raced to make substantial and significant changes to the exterior of the property without authority, and in bad faith, in an effort to moot the DDRC’s appeal.

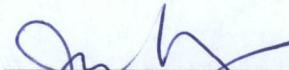
CONCLUSION

Quite simply, Rutter never intended for these modifications to enhance the architectural value of the, nor did he wish to replicate architecturally valuable features that had been destroyed or modified over time. Instead, Rutter, who purchased this house with the sole intent of flipping it, sought the quickest, easiest, and cheapest way to make a profit. He had no interest in the architecturally valuable designation of the property or the neighborhood. He had no interest in following the law. Rutter has done all of the exterior work to the property without a Certificate of Design approval, without the

authority of an appellate court order, and with total disregard for two separately-issued Stop Work orders. Rutter's mootness argument fails because of this own actions. He simply cannot be rewarded for acting in complete contravention of the law.

For the reasons stated above, as well as the reasons argued in the DDRC's Initial Brief and Response to Rutter's Motion to Dismiss, the DDRC respectfully requests that this Court reverse the previous appellate court and affirm the findings of the DDRC.

Respectfully submitted,



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