THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2021-001019

G. Allen Rutter, ... Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION BY COUNSEL

Pursuant to Rule 242, SCACR, the undersigned attorney certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals. Specifically, the Court of Appeals entered Opinion 2021-UP-242 on June 30, 2021 in case number 2018-001194. (June 30, 2021 Opinion.)[1] The opinion reversed the order of the Circuit Court. (*Id.*) Following an extension of time Petitioner, Mr. Rutter, filed his Petition for Rehearing on July 30, 2021. (Pet. for Rehearing.) The Court of Appeals entered an order denying the petition for rehearing on August 19, 2021. (Aug. 19, 2021 Order.) This petition follows.

Chelsea J. Clark, Bar No. 102211
Counsel for Petitioner

September 27, 2021
Columbia, South Carolina

[1] Consistent with the Court's order on August 25, 2021 regarding Reduced Number of Copies Required in Appellate Matters an appendix is not submitted herewith. References to documents herein will be either to the Record on Appeal (and its supplement filed September 6, 2019) or a description of a document on file with the Court of Appeals sufficient to locate the same.

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STATEMENT OF THE CASE

This appeal concerns a decision reached by the City of Columbia Design/Development Review Commission ("the DDRC") that Petitioner cannot, among other things, paint his own house. The DDRC's decision was appealed to Circuit Court where it was reversed by Judge Jocelyn Newman. (R. p. 5–15.) On appeal from the Circuit Court, the Court of Appeals reversed the Circuit Court. (June 30, 2021 Opinion.) This petition follows.

This case originated about five years ago when G. Allen Rutter ("Petitioner" or "Rutter") purchased a home located at 1500 Gladden Street in the Melrose Heights neighborhood of Columbia. Shortly after purchasing the home, Rutter applied to the DDRC to paint its exterior brick. (R. p. 158). The DDRC denied that application by letter from Staci Richey on January 17, 2017, following its January 12, 2017 meeting. (R. p. 134).

On appeal to the Circuit Court, Judge Jocelyn Newman reversed the decision of the DDRC. (R. pp. 19, 14). 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. (R. p. 41). The Circuit Court has held in abeyance Rutter's motion for attorney's fees and costs pending the outcome of this appeal. (R. Supp. p. 43).

On appeal, Petitioner filed a motion to dismiss for mootness asserting that he had completed the work in the intervening period between the Circuit Court's order becoming final and the DDRC's notice of appeal. (Sept. 24, 2018 Mot. to Dismiss.) The Court of Appeals denied the motion stating that Rutter could address the issue in his brief. (Nov. 30, 2021 Order.) The DDRC then filed a motion to strike documents designated by Rutter, which was also denied. (Mar. 15, 2019 Mot. to Strike; June 13, 2019 Order.)

Thereafter the parties completed briefing and oral arguments were held by WebEx on February 2, 2021. The Court of Appeals issued an order reversing the Circuit Court on June 30, 2021. (June 30, 2021 Opinion.) Rutter filed a petition for rehearing on July 30, 2021 and that petition was denied on August 19, 2021. (Pet. for Rehearing; Aug. 19, 2021 Order.)

STATEMENT OF FACTS

The DDRC is an administrative body under the umbrella of the City of Columbia that enforces its vision of how Columbia neighborhoods should look through the capricious application of uncodified, unenacted, and unrecorded "guidelines." While City Council did enact 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* R. p. 106 (the ordinance passed on the day in 2003 that does not include guidelines)).[2] Because the guidelines cannot be found in any of the normal places an ordinary, reasonable, and prudent homebuyer might look for laws or covenants governing their house, there is no reason for a purchaser to know that there is a local board that broadly interprets and applies guidelines to prevent local property owners

[2] For this reason, the Court of Appeals called the guidelines "temporary," even though the ones at issue in this case purport to have been put into effect nearly twenty years ago. (*See* June 30, 2021 Opinion at p. 4.)

from making routine repairs or improvements to their homes. This is particularly true because many of the improvements homebuyers might wish to make, such as painting degrading brickwork, have already been done by numerous other houses in the neighborhood. (*See* R. pp. 203–08.)[3]

Rutter purchased the home located at the corner of Gladden Street and Webster Street in the Melrose Heights neighborhood of Columbia, South Carolina in 2016. The two-story Tudor Revival home was a vacant duplex that had fallen into disrepair. *See* YouTube, *Design/Development Review Committee: January 12, 2017* at 53:17–53:39, *available at* https://youtu.be/tM_qKxeZRGc.[4] 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 with wood accents, where the roof line allows, with the remainder of the second level covered by a shingle roof. (R. p. 167). 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. (R. p. 159).[5] The Guidelines are written to apply only to portions

[3] The copy of these photos in the Record is poor. A better—albeit still not good—copy of these photos can be found at page 88 of "Appellant's Brief on Appeal" .pdf filed on February 7, 2018, as included in the Public Index docket for this case.

[4] This link directs to a video of the DDRC hearing on this matter, which has not been transcribed, but was relied on by the Court of Appeals as the record for the proceeding.

[5] DDRC staff member stated at the meeting that this phone call addressed painting of the brick

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* R. p. 135, Section I).

The Guidelines provide that "actions that do not require review" include "Painting and Color." (R. p. 138, 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 (R. pp. 203–208), 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* R. p. 159). 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. (R. p. 158). Separately, on November 21, 2016, the City of Columbia ("the City") issued a building permit. (R. Supp. p. 50; R. p. 107).

The DDRC hearing on January 12, 2017, was video recorded, but no transcript was taken.[6] 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

specifically but Rutter disputes this. However, Petitioner was not given an opportunity to address this hearsay statement by staff during the hearing.

[6] On appeal by Rutter to the Circuit Court, production of the record of its administrative proceedings was the responsibility of the DDRC. *See* Rule 75, SCRCP. The record filed with the Circuit Court by the DDRC included a DVD of the hearing, but not a transcript.

performed a mass swearing-in of all persons who wished to speak. (*Id.* at 11:22, *et seq.*) There is no record of the individuals sworn-in for the proceeding and no way for a reviewing court to determine who actually took the oath.

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 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.

Realtor 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. (*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.)[7] Mr. Jones pointed out the poor condition of the house, including the exterior and foundation, and pointed out that the type of paint Rutter wished to apply (Loxon®) was designed to preserve masonry. (*Id.* at 53:17 and 01:17:54.) The DDRC staff did not dispute that the masonry was in poor condition when pointing out that Rutter had made that contention in his submissions to the DDRC, but the Court of Appeals stated that Rutter failed to even argue his brick was in poor condition. (*Id.* at 49:32; June 30, 2021 Opinion at pp. 4–5.)

[7] 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, until recently, the DDRC maintained a pugnacious and antagonistic attitude towards Rutter.

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.'" (R. p. 7). Following the meeting, Ms. Richey notified Rutter of the DDRC's decision by letter. (R. p. 134). That letter contained no findings of facts or conclusions of law that can be given judicial review.

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. (R. pp. 33–35). Petitioner made multiple attempts to mediate, which culminated in a single meeting where no representative of the DDRC with authority to recommend a settlement appeared. (R. pp. 226, 230). 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. (R. pp. 8–14, 19). The DDRC filed no motion to alter or amend, nor did it request a stay from the Circuit Court. Petitioner waited until the order became final ten days after it was entered and then proceeded to paint the house and complete the project based on the Circuit Court's order. The order was entered on May 30, 2018. (R. p. 15.) Because it was e-filed all parties would have received a Notice of Electronic Filing at the same time. The deadline for the DDRC to file a Rule 59(e) motion was June 9, 2018, but because the ten-day deadline fell on a Saturday and was therefore pushed to Monday June 11, 2018. *See* Rule 59(e),

SCRCP (setting deadline), and Rule 6(a), SCRCP (extending deadlines falling on the weekend). Because no motion to alter or amend was filed the order became final on June 11, 2018. The deadline to appeal the order fell on June 29, 2018 (thirty days after the order was entered pursuant to Rule 203(b)(1), SCACR). The notice of appeal was filed with the Court of Appeals on June 25, 2018. That left two weeks in between these two points in time during which Petitioner completed the project. There was no attempt during that time by the DDRC to stop enforcement of the Circuit Court's final order and there was no notice that there would be an appeal until June 25, 2018.

Notably, at the time Petitioner completed the work on the house, 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."). The Circuit Court's order was a straight reversal; there was no remand or any other required conditions precedent to it taking effect. Therefore, no further permitting, permissions, or approval was required for Rutter to paint the house. The work cannot be easily undone.

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. (R. p. 2). Petitioner's motion for attorney's fees remains pending. (R. Supp. p. 43).

STANDARD OF REVIEW

Considerations the Court may analyze in granting a petition for writ of certiorari are contained in Rule 242(b), SCACR. Matters on appeal from the DDRC to the Circuit Court and above 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.[8] 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").

ARGUMENT

This case is about a series of small tyrannies that together form a significant barrier to simply property rights and basic due process. There are unenacted laws being applied to people who have no notice of them. There's a board that took a particular dislike to Petitioner simply because he did not anticipate their interpretation of the guidelines. There's a binding decision written by the opposing party instead of the board and containing no reviewable findings of fact or conclusions of law. There's a party that refused to mediate the issue in good faith and tied up

[8] 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, there are no formal findings of fact that were put in writing by the DDRC.

Petitioner's house in lengthy litigation. Most recently, this appeal went through multiple years of litigation at the Court of Appeals, despite being moot.

I. THE COURT OF APPEALS ERRED IN FAILING TO DISMISS THIS APPEAL AS MOOT.

It is well established that our appellate courts do 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.* Petitioner has made the changes to the house that he sought DDRC approval for while those changes were fully permissible under a final, un-appealed Circuit Court order. This appeal therefore has become academic.

This is demonstrated by a similar case heard by the Court of Appeals in 2018. 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.[9] The Court held that the matter

[9] Notably, the final order issued by Judge Tanya Gee in that case, required the city to issue a permit to effectuate the Circuit Court's order. No such instruction needed to be completed pursuant to

was moot and dismissed the 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.

When a judgment goes into effect and is carried through, the appeal of such a judgment generally becomes moot in a construction context. For instance, 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 and should have been dismissed by the Court of Appeals.

Judge Newman's order in this case. *See Christ Central Ministries v. City of Columbia Board of Zoning Appeals*, Case No. 2015-CP-40-03375, at p. 7 (order filed Nov. 12, 2015, S.C. Ct. of Common Pleas for Richland County).

The Court of Appeals relied on a truly hypothetical statement to support not dismissing the case as moot. The Court's order stated that "Rutter . . . potentially faces an enforcement action . . . ." (June 30, 2021 Opinion at 5.) The Court relied in that statement upon complete conjecture, supposing that the City *might* file some other related action. But no such action has been filed, making the assertion purely speculative. Petitioner contends that relying on a hypothetical event to avoid dismissing a case for mootness is an error of law. See 4 S.C. Jur. Action § 22 ("The court should not consider and pass upon hypothetical and abstract questions, theoretical matters, or issues dependent upon the existence of facts not yet determined.").

Other arguments against mootness are unavailing as well. For instance, attempts to differentiate this case from *Christ Central* are flawed. There was no requirement by Judge Newman for any further steps to be taken before her order went into effect. The order was a straight reversal of the DDRC, not a reversal and remand. Ergo, one cannot reasonably argue that anything needed to be done by the City before Rutter could proceed to finish his work. Further, no permit is required by the building code to paint a house. The City's own website advises citizens, "**NOTE:** Painting, flooring, and other cosmetic work <u>does not</u> 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, § 105.2 (emphasis added). Moreover, even if a building permit was

required, Rutter had already obtained one for work on the house. (R. Supp. p. 50; R. p. 107). An argument that Petitioner had to jump through additional hoops to complete the work and that failure to so was an act of bad faith *while there was a final court order in his favor* is unavailing and logically flawed. Painting the house did not require any further act. None of the alleged authority, including the City's ordinances, building code, or guidelines, required any further process for Petitioner to paint his house. As the New York court pointed out, the proper way to prevent the carrying out of an order is to apply for a stay or injunctive relief. That was not done in this case. For these reasons, Petitioner asserts that the Court of Appeals erred as a matter of law by not dismissing this appeal as moot.

II. THE COURT OF APPEALS ERRED IN DETERMINING THAT DUE PROCESS WAS GIVEN TO PETITIONER BEFORE THE DDRC.

The Court of Appeals chose to decide this case on the merits and in so doing disregarded certain principles of due process and constitutional rights.[10] 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.

[10] In fact, Judge Newman was the second Fifth Circuit judge finding fault with the DDRC's guidelines and process. Her conclusions were similar to Judge Hood's conclusions in another DDRC case. (R. pp. 22–30). After his order was entered, the case was appealed and subsequently dismissed by this Court on May 8, 2018 at the request of the parties. (R. p. 233).

S.C. Const. Art. I, § 22.

Given the explosion of administrative regulation in this state, the Court of Appeals opined on the importance of this provision in 2018, calling the committee that sought the enshrinement of this provision "prophetic." *See McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 446–47, 823 S.E.2d 193, 196–97 (Ct. App. 2018). 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. (R. p. 8). This case concerns the infringement Rutter's right to use, maintain, 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).

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"); (R. p. 61, ll. 6–7 (counsel for the DDRC stating "[we're] not here for a *de novo* 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. (R. pp. 8–10). 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."). 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*. (R. p. 138). Rutter 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 allow an applicant to present their own case or explain their own position, the DDRC allows its staff to give an elaborate presentation and recommendations before the applicant event speaks. This creates a barely rebuttable presumption in favor of staff from the inception. This is far afield of the normal procedure for an adversarial proceeding. Plaintiffs go first in civil cases, and the prosecution goes first in a criminal case. The DDRC's hearing far more resembled the prosecutorial format than the civil plaintiff format. This was particularly prejudicial because the staff accused Rutter of acting in bad faith before he or his agent ever had an opportunity to explain.

Once Rutter's agent was allowed to speak, there was no chance to question the staff member making prejudicial statements about Petitioner. 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. The Court of Appeals suggested that Rutter should have interrupted the proceedings to tell the DDRC how wrong their process was, but given that the

DDRC was making statements against Rutter already, it is simply not reasonable to expect a non-attorney litigant to prejudice themselves further with a vindictive board that can not and would not evaluate the constitutionality of its own actions. That very predicament is recognized in cases pointing out the pointlessness of raising constitutional challenges to administrative bodies that are part of the executive, rather than judicial, branch of government. *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).

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. (R. p. 134). 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.").

This lack of a proper written decision is particularly concerning where the DDRC members were so clearly showing bias against Petitioner. Members of the DDRC made it clear they denied

Rutter's application based upon their displeasure—not on the merits. One member said, "I think that the fact that this work was started without approval almost makes the rest of the argument moot." (Video at 01:09.) Later in the meeting, another Board member said, "I just don't think, we cannot set a precedent where an owner starts to do work, whether they think it's an improvement or not, we just cannot set that precedent," in reference to the procedural posture of the case and with no regard to the merits of the application. (Video at 01:21.) There is a long line of case law that guards against this form of biased, capricious, and unreasoned exercise of power. *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citations omitted) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.").

The ruling in this case was made based on the displeasure of the board, not on the merits of the application made by Rutter. It does not matter terribly much whether this is viewed through the lens of administrative law or constitutional law or both—it is a violation of the rule of law and an infringement on procedural due process either way. *See Kizer v. Dorchester Cty. Vocational Educ. Bd. of Trustees*, 287 S.C. 545, 552, 340 S.E.2d 144, 148 (1986) (citations omitted) ("Individual decision makers must not have exhibited bias as to the factual questions to be decided at hearing, and evidence of actual bias which offends due process consists of statements on the merits by those who must make factual determinations on contested fact issues where fact finding is critical."); *Garris v. Governing Bd.*, at 443, 511 S.E.2d at, 54 (citing *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464 (1975)) ("A fair trial in a fair tribunal is a basic requirement of due process, and this applies to administrative agencies which adjudicate as well as to courts."). Judges may not and cannot decide a case based on whether they like someone. But the DDRC is

not made of trained judges, it is made of people more concerned with deference to their vision of architecture than with the rights of citizens.

In this case there was open and evidence bias, a lack of due process, and a complete lack of findings of fact or conclusions of law. There has been no *de novo* review to cure those problems. Rather, the DDRC summarily stripped Rutter of his property rights and his due process without any reference to the rule of law and he has had to fight for years to try get them back. The Court of Appeals erred as a matter of law by reversing the Circuit Court and upholding the DDRC's decision.

Furthermore, the Court of Appeals itself failed to give a full and fair hearing to this case by bringing in assertions not argued even by the DDRC. For instance, the Court of Appeals held that Rutter failed to preserve the issue of the poor condition of the brick and mortar on the home. (June 20, 2021 Opinion at pp. 4–5.) However, even the DDRC staff member presenting the case noted that Rutter had contended the poor condition of the brick and that position was not opposed. (Video at 49:32.) Additionally, Rutter's agent, Mr. Jones, specifically addressed the poor condition of the house how the proposed paint would help preserve the masonry. (*Id.* at 53:17 and 01:17:54.) The Court of Appeals erred by relying on fact not in evidence and holding an issue not preserved where it was in fact not only preserved, but essentially unopposed.

III. THE COURT OF APPEALS ERRED IN RULING THAT THE DDRC'S "GUIDELINES" ARE NOT VAGUE AND INDEFINITE.

To the extent that the DDRC's decision was based on any law, that law was the Melrose Heights "Guidelines." The Guidelines are not law and they are vague, indefinite, and inherently contradictory. Yet, the Guidelines are the only source of authority to which the DDRC ever alludes throughout the hearing. This Court has previously 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. 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.[11] 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. (R. p. 106; *see also* R. p. 6).

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

[11] The Court of Appeals' order glosses over this issue by saying the ordinances allow for "temporary" guidelines, while still insisting that Rutter should be familiar with them. (June 30, 2021 Opinion at p. 4.) The DDRC does not think they are temporary as they believe them adopted by City Council and have been using them since 2003. (*See* R. p. 135 (footer of guidelines stating erroneous adoption date)).

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). This Court has 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, this 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). This 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, *supra*. 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.").

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. And yet, the

DDRC disregarded that language, focusing only on other, contradictory provisions that enhanced its perceived authority. Under that approach, the DDRC issued stop work orders and then justified the denial of Rutter's application based on the stop work orders. On page 11, the Guidelines provide both that masonry should not be painted *and* that it should be painted, if required for protection. Petitioner's ultimate application, after learning more about the DDRC's interpretation by virtue of the stop work orders, attempted to reconcile and comply with these conflicting and vague sentiments, by asking to paint 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, making this entire years-long case stem from the interpretation of vague and confusing unenacted guidelines. Vague law is supposed to be interpreted in favor of citizens, not against them.[12] One recent case demonstrates that point in the context of city ordinances about docks. The Court of Appeals reversed a criminal conviction for the violation of a city ordinance where a dock contractor built a dock longer than the language of a dock permit allowed. *See Town of Sullivan's Island v. Michael Murry*, Op. No. 5856 (Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 116). The Court reversed the conviction on the basis that the ordinance cited by the city was vague as applied and did not provide sufficient notice to the affected citizen. *Id.* at 121.

Noticeably absent from the record is anything justifying the DDRC's staunch refusal to deny an application to paint a brick home. If there is any authority at all it is vague and contradictory unenacted guidelines. Neither the DDRC, nor its staff considered the fact that

[12] For instance, sentencing ambiguities are interpreted in favor of defendants. *See Tant v. S.C. Dep't of Corrs.*, 408 S.C. 334, 342, 759 S.E.2d 398, 402 (2014) (quoting *State v. DeAngelis*, 257 S.C. 44, 50, 183 S.E.2d 906, 909 (1971)). Workers' compensation laws are liberally interpreted in favor of claimants. *See James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) (citations omitted). Ambiguous insurance contracts are construed in favor of the insured. *See Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183, 763 S.E.2d 598, 602 (Ct. App. 2014).

numerous homes throughout the neighborhood have painted brick, including some that were painted after the introduction of the Guidelines in 2003. (R. pp. 203–08). 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.[13] 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.

In this case, 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 rationally applied in the DDRC's decision. The decision makes no findings of fact and gives no conclusion of law, or even any reason. (R. p. 134, 109–15). 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* R. pp. 13, 150.). 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. The Court of Appeals erred in reversing the Circuit

[13] 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." (R. p. 137, Section III(B)).

Court and upholding the DDRC's decision, which was arbitrary, capricious, and based on the unconstitutional application of unenacted, vague, and indefinite guidelines. The Court of Appeal's decision conflicts with the precedent of this Court on the issues of due process, the application of unenacted guidelines, and the safeguards that are meant to protect against administrative overreach.

CONCLUSION

Petitioner requests that the Court issue a writ of certiorari to the Court of Appeals to review the opinion in this case on the basis that the Court of Appeals erred as a matter of law and found facts not supported by the Record when it failed to dismiss this appeal as moot and reversed the order of the Circuit Court, which acknowledged serious flaws in the DDRC's actions below.

Respectfully submitted,

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