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SC Court of Appeals

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.

RESPONDENT'S PETITION FOR REHEARING

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INTRODUCTION

Obsta principiis—Nip the shoots of arbitrary power in the bud,
is the only maxim which can ever preserve the liberties of any people.

—John Quincy Adams[1]

G. Allen Rutter ("Respondent") respectfully enters this Petition for Rehearing on the grounds that the Court overlooked or misapprehended certain points of law or fact in reaching its determination to reverse the Circuit Court on appeal from the City of Columbia Design/Development Review Commission ("Appellant" or "DDRC"). Respondent requests that the Court reconsider its opinion for the reasons set forth below.

In its opinion, this Court primarily focused its attention on the proceedings below before the Appellant board of architectural review, which is comprised of unelected individuals. The Court found that Respondent was given due process during the hearing. *Rutter v. City of Columbia Design/Development Review Commission*, Op. No. 2021-UP-242 at p. 4 (S.C. Ct. App. filed June 30, 2021) (hereinafter "Order"). That finding, however, does not address the arbitrary nature of the board's decision. Members of the DDRC made it clear they denied Appellant's application based upon their displeasure and a procedural foul ball—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." Youtube, *Design/Development Review Committee: January 12, 2017* at 01:09, https://youtu.be/tM_qKxeZRGc (hereinafter "video"). 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

[1] John Adams, et al., *Novanglus, and Massachusettensis; or Political Essays, Published in the Years 1774 and 1775, on the Principal Points of Controversy, between Great Britain and Her Colonies* 34 (Hews & Goss 1819).

01:21.) Another board member emphasized the point, saying, "The fact that there were no permits applied for and/or in hand or there at the time these changes were made is a significant factor that we have to consider along with all our decisions . . . ." (Video at 01:04.) Contrary to what the City contends, it is entirely lawful for a citizen to perform certain work on a home he owns without a permit. *See, e.g.,* City of Columbia web page, "Residential Projects," *available at* https://www.columbiasc.net/development-inspections/residential ("NOTE: Painting, flooring, and other cosmetic work does not require a permit. See International Building Code Section 105.2 for exemptions."); Melrose Heights Guidelines, R. at p. 138 (providing the Guidelines do not apply to "Paint"); and R. at pp. 203–08 (photos of other painted homes in Melrose Heights). The Board did not consider that, nor did it matter that, a number of other brick homes in the same neighborhood were (and continue to be) painted or that the Respondent provided the DDRC evidence of the poor quality of the brick.

The statements from the DDRC board in denying the application are particularly concerning because they demonstrate the Respondent's application, which was submitted at the insistence of the DDRC, was dead on arrival without regard to its merit. Such a process cannot satisfy the requirements of procedural due process.

This Court also found that the instant appeal is not moot for three specific reasons. The Court's reasoning on those points is flawed because under the circuit court's order there was no ordinance or design guideline that required Respondent to obtain a certificate of design approval, because nearly all the pre-existing paint on the home was done prior a prior owner and does not relate to the mootness of this appeal, and because the paint that has been applied was done lawfully. These factual distinctions are critical and are overlooked in the Court's order. Finally, the potential

for a hypothetical, future, separate enforcement action, which does not exist and is not pending, is insufficient to support a finding that the appeal is not moot.

In its order, the Court held certain City of Columbia ordinances "enact temporary guidelines that apply until City Council has approved other guidelines." (Order, p. 4.) This finding cites to ordinances that are not part of the record on appeal and Respondent cannot locate any reference in the City's ordinances which references "temporary guidelines" or approves "temporary guidelines." Ordinance 15-655 does say that exterior alternations must be granted a certificate of approval "under the terms of the design guidelines as adopted by the city council" but nowhere is there an ordinance stating whether any such guidelines were approved, by whom they were approved, or where they may be located. *See* City of Columbia Ord. § 17-655(b). Further, there is no reference to guidelines of a "temporary" nature, a concept which, in and of itself, causes significant due process concerns. The guidelines used by Appellant stated that they were "Adopted October 15, 2003." If they are still in use more than fifteen years later, they are not "temporary;" they remain, however, **ambiguous** and merely the window dressing used to disguise a board which wields government power over homeowners without due process and however it pleases since it has no clear guidance from City Council.

ARGUMENT

I. MOOTNESS

This Court rejected the mootness argument in part upon a hypothetical, future, separate enforcement action that does not exist and was never argued in Appellant's Reply Brief. (*See* Order, p. 5 ("Rutter . . . potentially faces an enforcement action . . . .") (emphasis added).) There is no pending enforcement action, nor is there any basis for one. *See, e.g.*, City of Columbia Ord. § 17-111 (providing pending appeal stays all proceedings in cases from board of zoning appeals).

The Court should not rely on hypotheticals when entering its ruling. *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."). Only the present case is before the Court.

Additionally, the Court's reasoning on mootness seems to suggest that the order of the circuit court had no effect. In other words, although the circuit court reversed Appellant, it did not change, flip, or alter the result of the DDRC's decision. However, the order of the circuit court did not merely start the whole process of applying for a design certificate over at the beginning. Had the circuit court intended for the process to start over again, the procedural mechanism would have been to vacate the DDRC's decision, not reverse it. The circuit reversed without remand to the DDRC, thus flipping the DRRC's decision. Ergo, Respondent was legally authorized to act to finish the work on his house, which he did.

Importantly, the work was completed while there was a fully final circuit court order in effect, after the period for a motion for reconsideration had expired and before Respondent was notified of an appeal. The Court describes this as a "thirty-day period." (Order, p. 6.) However, it is shorter than that. The circuit court's order was entered via the e-filing system on May 30, 2018. (R. p. 15.) The deadline for a Rule 59(e) motion, therefore, was June 9, 2018 (ten days landed a Saturday, which moved the deadline to Monday). *See* Rule 59(e), SCRCP, (setting 10-day deadline) and Rule 6(a), SCRCP (extending deadlines landing on a weekend). No motion was filed in that timeframe, making the circuit court's order final on June 9, 2018. Appellant's notice of appeal of the circuit court's final order was dated June 25, 2018. Therefore, there were sixteen days during which the circuit court's order was final and un-appealed. The DDRC certainly could have done any number of things to protect its rights during that time period. It could have even

notified Respondent it would be appealing the circuit court's order. But, instead, the DDRC stayed mum. Respondent acted in good faith upon a circuit court order vindicating his rights and reversing the DDRC. Respondent completed the work in that time frame.

The Court seems to rely upon the premise that the work in question still required a permit or "certificate of design approval" regardless of the contents or effect of the circuit court's order. However, if the circuit court determined the guidelines were vague and it was not clear if a party needed permission to paint their home, then it was also not clear that they needed a certificate of design approval. If the circuit court had remanded the matter back to the DDRC, it would have been purely ministerial. The gravamen of Respondent's position is that the DDRC was acting arbitrarily and without reference to its guidelines in denying a certificate in the first place—how much more so would that have been the case once the circuit court determined the guidelines to be unconstitutionally vague. It matters not whether the Court of Appeals agreed with the circuit court; what matters is that the circuit court's order was the highest and best authority at the time it was issued.

Under the circuit court's order, there was no requirement for a certificate of design approval. City of Columbia Ordinance § 17-655(a)(1) begins, "Where required by ordinance or design guidelines . . . ." The Appellant can point to no ordinance requiring a homeowner to obtain a certificate of design approval to paint a house. *See, e.g.,* City of Columbia web page, "Residential Projects," *available at* https://www.columbiasc.net/development-inspections/residential ("NOTE: Painting, flooring, and other cosmetic work does not require a permit. See International Building Code Section 105.2 for exemptions."). The Appellant relies instead on the Melrose Heights Guidelines. *See* Melrose Heights Guidelines, R. at p. 138 (providing the Guidelines do not apply to "Paint"). Under the circuit court's order reversing the DDRC, there was no requirement for a

certificate of design approval because the Melrose Heights Guidelines were held to be "self-contradictory and vague" at best and the Guidelines, as applied by the DDRC in this case, rendered the decision arbitrary. Therefore, Respondent acted fully within a time period where it appeared there was an unaltered final circuit court order in his favor and when there was no ordinance or design guideline requiring a certificate of design approval. If the order was not final and enforceable, Appellant could not have later filed a valid appeal. *See* S.C. Code Ann. § 14-3-330. These facts most certainly distinguishes the Court's assertion that the case would be "moot from the beginning" if it were moot now.

With regard to the timing of when the work was performed, the Court rejected the Respondent's representations about that issue because they have not been "subjected to adversarial testing." The Court also referenced the months that passed before the motion to dismiss was filed. Respectfully, that reasoning is flawed because (i) the City in fact had an opportunity to—and did—respond to the Respondent's argument, and (ii) the Court has devices available for the introduction of evidence and disposition of that issue on its merits, rather than reject the argument outright because it arose after the evidentiary hearing. Mootness by definition arises after the evidentiary hearing before the lower court. Based upon the Court's reasoning, no motion to dismiss for mootness should ever be granted. Moreover, the Rules of Appellate Practice required the Appellant to meet certain deadlines before any act was required of the Respondent. Had the parties been able to resolve the dispute prior to Respondent's deadline to file its initial brief, then there would be no need to move to dismiss the appeal. However, they were not, and the motion was filed in lieu of Respondent's initial brief and designation of matter.

The Court is well within the bounds of case law to consider a mootness argument on appeal, an issue addressed in Respondent's return to the motion to strike. Mootness necessarily requires

the consideration of later-developed facts, and it is well within the Court's purview to consider them. *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)). A case becomes moot; it does not begin as moot. *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case *becomes* moot when judgment, if rendered, will have no practical legal effect upon existing controversy." (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 Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999)). At present there is no dispute by the DDRC that the work took place within the timeframe that Respondent has stated it did.[2] Indeed, there is no argument by the DDRC as to whether the mootness argument is somehow tied to an enforcement action. The Court is imposing its own view of this matter onto the parties, none of whom argued about a hypothetical, separate enforcement action. The law should tend towards finality. In this case, there is a clear path to letting Mr. Rutter live in his home in peace. Respectfully, Respondent requests that the Court reconsider its position on mootness.

The Court also considered matters not before it and failed to address the distinguishing procedural points necessary to a review for mootness in this matter. Moreover, the issue of mootness received full briefing, but each instance of Respondent's attempts to provide information

[2] In fact, while the Court asserts that painting was done prior to Respondent's application, the DDRC staff member presenting the case to the DDRC said "the majority of the brick has never been painted" which lends against the insinuation that Respondent painted the house prior to the time a valid circuit court order was in force. (*See* Video at 49:10.) While the record on appeal contains Google Maps images of the house, they are in remarkably bad quality. (R. p. 152–57.) The original images from 2014, which are still on Google Maps today, clearly show the painted sills, just as Respondent stated. There is also a visible mortar repair on the gable wall on the front of the house on Gladden Street.

were met with adversity from Appellant, which filed a motion to strike matter Respondent sought to use in support of his argument, including a copy of the permit he obtained. Notably, the Appellant argued in its motion to strike, "Additionally, whether Rutter had a building permit is not at issue in this appeal." Appellant made that argument despite having argued throughout its Return to the Respondent's motion to dismiss that the Respondent performed "unpermitted work" on the house. The permit was properly obtained.

II. PROCEDURAL DUE PROCESS

The Court's opinion also addresses several points related to due process. However, the Court does not address the arbitrary nature of the DDRC's ruling. Appellant has significant power over homeowners in historic overlay districts, despite not providing any ascertainable standard for the public to understand how the DDRC will wield its power. The DDRC's purview infringes on sacred American rights such as free speech, self expression, and property rights. Citizens' rights cannot be infringed upon or waived based on what the "neighbors" want. Under circumstances where important rights are implicated, the law should be vigilant in ensuring that the power is wielded impartially and with an eye towards fairness. For instance, when a state agency acts through its administrative and executive power, the legislature has created the Administrative Procedures Act and a whole court specifically to allow for thorough judicial review. *See* S.C. Code Ann. §§ 1-23-310, *et seq.* and §§ 1-23-500, *et seq.* Here, the legislature also created a route for judicial review under S.C. Code § 6-29-900 and § 6-29-915. Under the latter section, the Legislature created a process for peaceful resolution through mediation. The Legislature even provided that the board in question could deviate from set standards to resolve a matter. Yet, when Respondent filed to avail himself of this process, the DDRC thumbed its nose and failed to send a person with authority to mediate. (*See* R. p. 100, ll. 20–24 (attorney for DDRC stating that she did

not feel a letter addressing the DDRC's failure to mediate per statutory procedures was "worthy of a response").)

This event was symptomatic of a disrespect for the rule of law and fairness the DDRC shoed the Respondent from the outset. In this case, the Board members made it clear they were denying Respondent's application because of the stop work orders (which appear nowhere in the record) and the procedural posture of the application, not because of the merits of the application itself. The application was never considered; it was dead on arrival. There is no provision in the guidelines, in the ordinances, or in the law giving the DDRC the authority to treat private citizens in this way. In finding that due process occurred in this case, the Court ignores this blatant element of bias.

There is longstanding case law in the state administrative context dealing with this precise element of arbitrary and capricious behavior by an executive agency. *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. 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. *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. of S.C. Reinsurance Facility*, 333 S.C. 432, 443, 511 S.E.2d 48, 54 (1998) (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.") The record in this case leaves no doubt the members' decision was steered not by the guidelines, the law, or the merit of the application but rather by their own feelings about Respondent.[3] When a proceeding is clouded with such bias, there can be no opportunity to be heard in a meaningful way. That is, in and of itself, a violation of due process and an independent ground for affirmation of the circuit court under Rule 220(c), SCACR. Therefore, Respondent respectfully requests that the Court reconsider its position on this issue. An adversarial process of the kind the Appellant conducted require more due process than Respondent was afforded.

In its order, the Court also recites the legal truism that citizens are charged with knowledge of existing law. (Order, p. 4.) However, this statement presumes that the "law" in question is actually a law, duly codified by a legislative body. "Temporary" guidelines not included anywhere in the municipal code are not law. This is demonstrated specifically by the use of the term "guidelines." There is no maxim requiring citizens to have familiarity with guidelines; there is in fact case law decrying the use of non-legislative "guidelines" in lieu of actual law. *See Joseph v.*

[3] Facts which fully developed during the pendency of this appeal show the full scale of the DDRC's retributive dislike for Respondent. Some time ago, Respondent purchased a duplex in the Shandon neighborhood of Columbia in terrible condition, with serious structural defects. Backed by the full support of the local community and the state representative of the area, as well as reports evidencing the structural problems, Respondent proposed demolishing the duplex and replacing it with a single family dwelling suitable for the neighborhood. The DDRC twice denied the certificate of design approval. However, after Respondent sold the home to another contractor, the DDRC approved the very same demolition. The request and plan were the same; the only difference was the owner. *See* Julia Kauffman, *Pink Polka Dot House in Shandon Neighborhood to be Demolished* (Oct. 8, 2020 11:50PM), https://www.wltx.com/article/news/local/pink-polka-dot-house-in-shandon-getting-demolished/101-14c35612-6e56-4369-afd5-f1a4ef46613c.

S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016) (quoting S.C. Code Ann. § 1-23-10(4) (2005)) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."). Specifically, the Court held that "[t]he Board's process in adopting the 2011 Position Statement thus amounts to administrative overreach that attempts to end run the legislative process." *Id.*, at 455, 790 S.E.2d at 773.

Calling the guidelines at issue in this case "law" is not an accurate reflection of their history or status. Indeed, the guidelines are not recognized in the ordinances in any fashion that could lead a person to interpret them as "law." The Court cites to Ordinances 17-681, 17-655, 17-674, stating among other things that two of these ordinances "enact temporary guidelines that apply until City Council has approved other guidelines." (Order, p. 4.) In the first instance, guideline purporting to be from 2003 (more than fifteen years ago) could hardly be considered temporary. (R. p. 135 (see date of "adoption" in footer).) In the second instance, nowhere in the cited ordinances does it state whether there are guidelines, where they might be located, or whether they've been approved by any governing body. Despite the fact that the guidelines purport to have been "adopted" by City Council, there is no evidence of such an adoption, temporary or otherwise. Perhaps that is why the Appellant so vigorously moved to strike ordinance the Respondent designated to be included in the record on appeal. The mere fact that Respondent may have heard about guidelines does not make them law, does not make them less vague, and does not create an imputation of knowledge. Therefore, Respondent respectfully asks the Court to reconsider its position on the validity and application of the guidelines.

III. PRESERVATION

Finally, the Court stated in its order that "Rutter made no effort whatsoever to introduce evidence (or even argue) his brick was in poor condition." (Order, p. 4–5.) This statement is not

accurate. Respondent's realtor pointedly mentioned that the abandoned property was in very terrible condition, inside and out, including the foundation. (Video at 53:17.) He also made a clear argument that the particular kind of paint Respondent wanted to use (Loxon®) was designed to preserve the masonry, which was in poor condition as previously stated to staff. (Video at 01:17.) The DDRC staffer presenting at the meeting herself stated that, "the Applicant has suggested that there was some damage to the masonry and mortar . . . ." (Video at 49:32.) While she argued that repairs should be made rather than painting, she did not question the point about the condition of the masonry. The fact that the brick was in poor condition was not disputed by the DDRC and should not be disputed by this Court.

CONCLUSION

At the end of the day, the record demonstrates a board of architectural review that acted arbitrarily and with caprice. The lower court recognized issues in the way the DDRC conducts business and reversed their decision. After the circuit court's order was final, Respondent respected the circuit court's order and painted his residence without violating any ordinance or other law. The DDRC would not let the matter rest, and it filed this appeal. The appeal became moot and this Court reached for hypothetical enforcement actions as justification for keeping the case alive. Meanwhile, Mr. Rutter has been forced to litigate this case for years just to finish the painting he did not even start.

[signature page to follow]

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PROOF OF SERVICE

Pursuant to Rule 420(c)(1), SCACR, and the Order of the Supreme Court regarding procedures during the Coronavirus emergency, the undersigned attorney certifies that she served Respondent's Petition for Rehearing upon counsel for Appellant on July 30, 2021, via AIS-registered email address as follows:

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s/ Chelsea J. Clark (102211)

July 30, 2021
Columbia, South Carolina