

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

The Honorable Jocelyn Newman
Circuit Court Judge

Appellate Case No. 2021-001019

G. ALLEN RUTTER, PETITIONER,

v.

CITY OF COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION, RESPONDENT.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This case involves a Tudor Revival residential structure, built in 1935, located within the Melrose Heights neighborhood in the City of Columbia (“Property” or “Structure”). R. 159. The Structure represents one of the best examples of the Tudor Revival architectural style within Melrose Heights, with its faux half timbering in stucco gables, dark multi-toned brick, arched entry door, and stone accents. R. 159; see also Video¹ 1:15:43 – 1:15:20 (John Sherrer of Historic Columbia testifying that the Structure is a “brilliant example of a Tudor Revival cottage.”). The Property is subject to regulations governing the City of Columbia’s Melrose Heights/Oak Lawn Architectural Conservation District that serve to “promote the public welfare, strengthen the cultural and educational life of the city, and make the city a more attractive and desirable place to live and work.” R. 106, 135, 159.

Towards this end, “[n]o construction, reconstruction, addition, alteration, relocation, repair, or demolition of any structure or site improvement ... within a ... architectural conservation district ... shall be permitted unless a certificate of design approval has been appropriately issued therefore under the terms of the standards or design guidelines as adopted by the city council.” COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-655(a)(1). The City of Columbia Design and Development Commission (“DDRC”) is charged with reviewing applications for a certificate of design approval under the standards and criteria set forth under Section 17-674 and applicable guidelines. The Melrose Heights/Oak Lawn Architectural Conservation District Design Guidelines (“Guidelines”) state that “where brick and other masonry finishes were

¹ The video of the DDRC hearing was filed on a DVD as part of the Appendix to the Record. See page 15 of the Appendix, filed September 6, 2019.

unpainted, they should generally remain so because “[p]ainting obscures detailing and alters the distinguishing original qualities of a building.” R. 145. Additionally, the Guidelines state that “[w]indows are a significant character-defining feature of any structure.” R. 143. Concerning removal and filling in of windows from the brick exterior on the first floor, under section VII(A)(6)(c)(i), masonry features such as walls, cornices, brackets, tooling and bonding patterns that are important to defining the overall historical character of the building are to be retained and preserved. R. 146.

On September 30, 2016, prior to his purchase of the Property, Petitioner Allen Rutter “contacted staff with some questions about exterior changes to the [House], including painting the exterior structure.” R. 159. The City’s DDRC staff told Mr. Rutter that he “could not paint the brick exterior as it did not meet the guidelines” and informed him that exterior changes required review by the DDRC. Id. Mr. Rutter subsequently purchased the Property. On November 11, 2016, the City received several calls from Melrose Heights residents complaining that the Structure’s exterior masonry was being painted. Id. The DDRC staff contacted Mr. Rutter, explained once again the applicability of the Guidelines and issued a stop work order to Mr. Rutter preventing him from continuing the painting unless he obtained a certificate of design approval from the DDRC. Id. On November 16, 2016, Mr. Rutter submitted an application to the DDRC to paint the exterior brick. R. 158. A few weeks later, DDRC staff received a complaint that a window was removed from the Structure. Id. DDRC staff called Mr. Rutter but received no response. Id. The City issued a stop work order to Mr. Rutter, preventing him from filling in the window unless he obtained a certificate of design approval from the DDRC. Id. An agent for Mr.

Rutter then spoke with the DDRC staff to notify them of other exterior changes planned for the Structure that was not identified in his prior application to the DDRC.

On January 12, 2017, a hearing before the DDRC was held on Mr. Rutter's application to: 1) paint the exterior brick; 2) remove two windows and one door on the first floor visible from the street and fill in with brick; and 3) replace two windows, remove one window, and remove one door on the second floor that is not visible from the street, and fill in the removed doorway and window with brick. R. 167 – 170, 181 – 184. For approximately eight (8) minutes, the DDRC staff presented Mr. Rutter's request and provided their evaluation and recommendation concerning Mr. Rutter's application. R. 159 – 165; Video 48:08 – 51:54. Mr. Rutter did not appear himself, but rather, appointed an agent, Mr. Russell Jones, to represent him. App. R. 14. For approximately eight (8) minutes without interruption, Mr. Jones presented Mr. Rutter's requests and arguments for approving his requests. Video 52:50 – 1:03. Following a comment made by a member of the DDRC, Mr. Jones spoke for another two minutes to address the comment. Id. at 1:05 – 1:07. After the DDRC took testimony from other interested persons, Mr. Jones was given additional time to provide any rebuttal to comments made. Video 1:17:03 – 1:20:14. The DDRC then moved to deny Mr. Rutter's request to paint the exterior brick and fill in two windows and a door on the first floor, and approve Mr. Rutter's request to replace two windows, remove one window, and fill in a door on the second floor. R. 134, 165, 184. Mr. Rutter was required to remove the paint on the exterior brick, using a gentle method, within sixty (60) days. Id. The DDRC's decision was sent to Mr. Rutter in a letter dated January 17, 2017. R. 134.

On February 10, 2017, Mr. Rutter appealed the DDRC decision to the circuit court. R. 31-36. Mr. Rutter argued that the DDRC hearing violated procedural due process and the DDRC

decision was based upon a vague and indefinite standard. R. 120. Mr. Rutter further argued that the DDRC decision constituted an abuse of discretion because it was based upon unsworn testimony and hearsay. Id. A hearing was held before The Honorable Jocelyn Newman on February 9, 2018. On May 30, 2018, Judge Newman entered an order reversing the DDRC decision. R. 5-15. The order concluded that the DDRC violated procedural due process because the DDRC hearing did not give Mr. Rutter a right to counsel, an opportunity to question or cross examine staff, reasonable notice of what DDRC staff would present in opposition to his application, or a right to call his own witnesses. R. 9. In addition, the circuit court ruled that Mr. Rutter was denied any notice of the Melrose Heights/Oak Lawn Guidelines. Further, the circuit court held that the DDRC decision was controlled by vague and indefinite standards within the Guidelines. R. 11-14. After ten days had passed from the date the circuit court order was entered, Mr. Rutter proceeded to undertake the work that the DDRC had denied - paint the exterior brick of the structure, and fill in the two windows and door on the first floor. Petition, p. 6-7. He apparently rushed to complete this work before June 29, 2018, the deadline in which the City of Columbia could file an appeal of the circuit court order. Id.

On June 25, 2018, the City noticed an appeal of the circuit court order to the Court of Appeals. R. 41. After the City had filed its Initial Brief, Mr. Rutter moved to dismiss the appeal as moot because he had completed the work that the DDRC had denied but the circuit court had reversed. The Court of Appeals denied this motion, but allowed the question of mootness to be argued in the Parties' Briefs. On February 2, 2021, oral argument was held before a panel of the Court of Appeals. On June 30, 2021, in an unpublished decision, the Court of Appeals reversed the circuit court order and found the appeal was not mooted by Mr. Rutter's actions. Rutter v.

City of Columbia Design/Dev. Rev. Comm'n, No. 2018-001194, 2021 WL 2701549 (S.C. Ct. App. June 30, 2021). Mr. Rutter's Petition for Writ of Certiorari was filed on September 27, 2021.

ARGUMENT

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The following factors, while not exclusive, are illustrative of the type of "special and important reasons" this Court considers when deciding to grant a writ of certiorari:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR

Petitioner fails to identify any special and important reason why this Court should grant review.

Instead, Petitioner seeks to impermissibly relitigate the facts of the case, contrary to the proper standard of review and rules of issue preservation. Under S.C. Code Ann. § 6-29-930, "[t]he findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and "[in] determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." An issue of fact or law not raised before the DDRC cannot be addressed on appeal. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating that "issue preservation requires that an issue be raised to and ruled upon by the trial judge."). In his effort to cobble together what he describes in hyperbolic terms as "a series of small tyrannies," Petitioner sets forth allegations of

fact that are not only distorted, refuted, unsupported and/or irrelevant, but some of these allegations are beyond the scope of review by this Court. Petition, p. 8 – 9.

Petitioner claims that his property and due process rights were thwarted by “unenacted laws being applied to people who have no notice of them.” Mr. Rutter had actual and constructive notice of the Guidelines.² What is more, Mr. Rutter did not raise before the DDRC any question of whether the Guidelines were properly adopted; therefore, Petitioner’s claim that the Guidelines were not lawfully adopted by City Council is unreviewable by this Court.³ Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Petitioner goes on to claim that “[t]here’s a board that took a particular dislike to Petitioner simply because he did not anticipate their interpretation of the guidelines.” Petition p. 8. Because Mr. Rutter did not raise this argument in his Final Brief to the Court of Appeals, any due process claim based on “personal dislike,” is unpreserved for review. See Rule 242(d)(2) (“Only those questions raised in the Court

² R. 159 (Staff evaluation stated that on September 30, 2016, Mr. Rutter “contacted staff with some questions about exterior changes to the building, including painting the brick exterior. Staff told [Rutter] they could not paint the brick exterior as it did not meet the guidelines and referenced review for the exterior by the D/DRC.”); Video 59:05 – 1:00:31; 1:05:44 – 1:05:54 (Mr. Rutter’s agent stating to the DDRC that prior to stop work order, Mr. Rutter assumed, upon reading the Guidelines, that he was allowed to paint the exterior without permission from the DDRC); Video 52:50 – 1:03; 1:05 – 1:07; 1:16:53 – 1:20:14 (Mr. Rutter’s agent given three opportunities to rebut staff account of informing Mr. Rutter of Guidelines before he started painting the exterior brick but did not dispute this account).

³ Even if preserved, the record includes the City’s ordinance, effective October 15, 2003, designating Melrose Heights/Oaklawn as an architectural conservation district. R. 106. Pursuant to Section 17-654(b), the procedure for creating historic protection classifications requires that guidelines for an architectural conservation district are to be presented to City Council along with an ordinance designating such a district, and the guidelines are made a material part of City Council’s enactment of a district. COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-654(b). City Council may amend the Guidelines after a public hearing is held. Id. Consistent with this procedure, the Guidelines state, in the footer of the document, that they were adopted on October 15, 2003, the same date as second reading of the ordinance creating the District. See R. 106, 135. The Guidelines were lawfully adopted in the manner prescribed under Section 17-654(b). On August 20, 2019, the City Council repealed and replaced its land development code with a new ordinance that substantially revised its land development regulations to be consistent with its new comprehensive land use plan. Under this new ordinance, all historic preservation guidelines, including those for Melrose Heights, were adopted by reference. See § 17-3.7(j)(3)(d) at <https://planninganddevelopment.columbiasc.gov/wp-content/uploads/2021/01/COC-Unified-Development-Ordinance.pdf>.

of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”)

Finally, Petitioner attempts to impugn the City of Columbia by accusing the City of failing to mediate the appeal in good faith, which is not even relevant here, and in any event, the circuit court disagreed with Petitioner’s allegation of bad faith, as evidenced by the court’s denial of Petitioner’s motion for sanctions, which Petitioner did not appeal. See R. p. 79 – 104. Petitioner’s attempt to cast the City as tyrannical is simply an effort to deflect from its weak arguments for review by this Court.

1. The Court of Appeals correctly ruled that the Appeal was not moot.

On appeal to the Court of Appeals, Mr. Rutter argued that the City’s appeal was mooted by his completion of the work during the two-week window of time between the circuit court order becoming final and the deadline to appeal the circuit court order. The Court of Appeals disagreed, finding that a justiciable controversy remained. The Court of Appeals committed no error in deciding that the appeal was not mooted.

“A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” Peterson Outdoor Advert. Corp. v. Beaufort County, 291 S.C. 533, 535, 354 S.E.2d 563, 564 (1987). Here, the relief sought by the City on appeal is to reverse the circuit court order thereby affirming the DDRC decision; that is, to uphold the DDRC decision to deny a certificate of design approval for the work Mr. Rutter had started before seeking approval from the DDRC and to require him to remove the paint on the exterior masonry. An affirmed DDRC decision would also require Mr. Rutter to restore the door and window on the

first floor that he bricked in.⁴ Further, an affirmed DDRC decision would bring about enforcement action against Mr. Rutter should he fail to comply with the DDRC decision, unless he obtains an injunction against the City, or reaches a compromise or settlement with the City in order to avoid an enforcement action. Clearly, the Court of Appeal's decision has a very real legal effect on the controversy between the parties. The City's appeal is not moot.

As the Court of Appeals correctly determined, Christ Central Ministries v. City of Columbia, 424 S.C. 358, 360, 818 S.E.2d 30 (Ct. App. 2018) is of no help to Petitioner. In Christ Central, the City of Columbia denied a request to issue a permit for erection of a billboard. Id. at 360, 31. Christ Central appealed this staff decision to the Board of Zoning Appeals. Id. The Board affirmed the staff decision. Id. Christ Central appealed to the circuit court, which reversed the Board's decision and ordered the City to issue the permit. Id. The City appealed the circuit court decision. Id. However, during the pendency of the appeal, the City issued the permit to Christ Central, id. at 361, 31, even though Rule 241(a), SCACR, automatically stayed the circuit court order requiring the City to issue the permit. Because the City had issued the permit, this Court dismissed the appeal as moot because "there is nothing more for this court to do." Id. at 362, 32. In contrast, the circuit court in this case did not order the City to issue a certificate of design approval to Petitioner in this case, and the City has not, on its own accord, issued a certificate of

⁴ Mr. Rutter may complain that requiring him to chemically remove the exterior paint and restore the first floor door and window is just too difficult to accomplish and therefore unjust or unduly harsh. However, he chose to quickly complete this work before the circuit court order was automatically stayed by virtue of the City's notice of appeal. See Rule 241(a), SCACR. Mr. Rutter's own actions put him in the position he now complains about. He knew or should have known of the risk that the City would appeal the circuit court decision and that the Court of Appeals could reverse the circuit court and affirm the DDRC decision. That he now must undo the work, when he surely understood this outcome to be a distinct possibility at the outset, is the consequence he must face for taking the risk that he did. See e.g. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("a party cannot complain of an error which his own conduct has induced.").

design approval to Petitioner. Unlike the facts in Christ Central, the City's requested relief on appeal – reversal of the circuit court decision so that the DDRC decision stands – remains as having legal effect.

Petitioner is simply wrong in his argument that the City's relief on appeal is conjecture. Rather, reversal of the circuit court order has very real consequences for Petitioner – he must undo what he raced to complete or face criminal penalty. See COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-655(a)(1) (“No construction, reconstruction, addition, alteration, relocation, repair, or demolition of any structure or site improvement ... within a ... architectural conservation district ... shall be permitted unless a certificate of design approval has been appropriately issued therefore under the terms of the standards or design guidelines as adopted by the city council.”); § 17-656 (“Any person who engages in any action for which a certificate of design approval is required under this article when such certificate is not in effect shall be in violation of this article and shall be guilty of a misdemeanor.”). A person convicted for violating Section 17-655(a)(1) shall be fined up to \$500.00 or imprisoned for not more than 30 days, and also must pay all costs and expenses involved in the case. § 17-656. “Each day such violation continues shall be considered a separate offense.” Id.

Petitioner ignores this reality. Instead, Petitioner argues that, unlike the facts in Christ Central, there are no further permits or approvals, such as a building permit issued pursuant to the City's Building Code, that he needed from the City in order to proceed with the work on the Structure. The City's Building Code has no relevance here. In terms of mootness, it does not matter in this appeal whether the City's Building Code requires or does not require a building permit to paint the exterior of the Structure. In Christ Central, the appeal was mooted because

the City voluntarily agreed to issue the billboard permit that was the subject of its appeal. Christ Central, 424 S.C. 358, 361, 818 S.E.2d 30, 31 (Ct. App. 2018). In contrast, the DDRC has not reconsidered its denial of a certificate of design approval for the Property, much less granted a certificate of design approval. Petitioner's argument about a building permit accomplishes nothing because a building permit is not the subject of this appeal. Even if this Court considers Petitioner's argument, the lack of a building permit requirement for exterior painting has no effect on the City's requirement that "no construction, reconstruction, ... alteration, ... repair, or demolition of any structure or site improvement ... within a ... architectural conservation district ... shall be permitted unless a certificate of design approval has been appropriately issued therefore under the terms of the standards or design guidelines as adopted by the city council." COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-655(a)(1). Under Section 102.2 of the 2015 International Building Code adopted by the City, "[t]he provisions of this code shall not be deemed to nullify any provisions of local, state or federal law." See 2015 International Building Code at https://up.codes/viewer/south_carolina/ibc-2015/chapter/1/scope-and-administration#divider_1. Indeed, under Section 17-655(a), "[a] certificate of design approval shall be required whether or not a building permit is required." COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-655(a).

Petitioner's alternative argument that he already obtained a building permit likewise is of no import in this appeal. See R. 107; App. 50. The issued building permit dealt with interior improvements to the electrical, plumbing, mechanical and gas systems of the Structure. R. 108. The permit had no bearing on painting the exterior masonry or removing windows. Further, the building permit states that Mr. Rutter, as the applicant, "understands that the issuance of this

permit does not constitute a privilege to violate any applicable government ordinances, codes or laws ...” App. R. 50. A building permit does not give Petitioner a free pass to ignore restrictions on construction, alteration, or repair of structures within the Melrose Heights/Oaklawn Architectural Conservation District, nor does it do away with applicable enforcement mechanisms should Petitioner disregard the DDRC decision upheld by the Court of Appeals.

Petitioner’s reliance on a New York case, Driekausen v. Zoning Board of Appeals of City of Long Beach, does not work in his favor. 98 N.Y.2d 165, 169, 172, 774 N.E.2d 193 (2002). In Driekausen, adjacent landowners challenged a variance granted to a developer to build condominiums and a marina. Id. at 171. About five months later, the lower court affirmed the grant of the variance. Id. Landowners did not seek a stay or injunction during the pendency of their appeal heard by the lower court. Id. Instead, about ten days later, they sought injunctive relief when they filed notice of appeal with the appellate court. Id. The Court denied the requested injunctive relief. Seven months later, the appellate court affirmed the lower court’s decision. Id. at 172. By the time the New York Court of Appeals granted leave to appeal three months later, the developer had already built twelve of the twenty permitted units. Id. The Landowners sought an injunction requiring the developer to demolish the construction it had completed. Id. The developer argued mootness based upon substantial completion of the project. Id.

The Court of Appeals explained that any “race to completion [by the developer] cannot be determinative, and cannot frustrate appropriate administrative review” Id. at 172. Instead, the court turned to several factors that New York courts consider in determining whether a case involving substantial completion was moot: whether the challengers sought a stay or injunctive

relief, whether the respondent acted in bad faith or without authority in completing the work, whether novel issues or public interests warrant continuing review, and whether the challenged work is readily undone, without undue hardship. Id. at 173. Applying these factors to the facts of the case, the court ruled that the case was mooted by the developer's substantial completion of the construction because the Landowners did not seek a stay from the lower court, the developer did not act in bad faith or without authority, and the public benefited from the construction. Id. at 174.

Should this Court find the Driekausen factors persuasive, they weigh against Petitioner's argument of mootness. Because Mr. Rutter knew or should have known that a notice of appeal would automatically stay the circuit court decision, his actions in completing the work before this deadline is clearly a "race to completion" that under Driekausen, "cannot be determinative, and cannot frustrate appropriate administrative review" Driekausen at 172. Mr. Rutter's race to completion was done in bad faith. See Northfork Citizens For Responsible Dev. v. Bd. of Cty. Comm'rs of Park Cty., 2010 WY 41, ¶ 21, 228 P.3d 838, 846 (Wyo. 2010) ("[a]ctions taken in reliance on a variance or permit while the time for appeal is pending are inherently unreasonable."). The work completed on the Structure is contrary to the purpose of the Melrose Heights/Oaklawn Architectural Conservation District to improve the quality of the neighborhood through conservation and maintenance of areas, sites, and structures which constitute or reflect its distinctive architectural features. R. 135; COLUMBIA, SOUTH CAROLINA MUNICIPAL CODE § 17-651. Therefore, the public interest is not served by Mr. Rutter's rush to complete work that did not comply with the City's standards and guidelines. In comparison to the builder in Driekausen facing demolition of twelve condominiums, requiring Mr. Rutter to remove the exterior paint,

along with the bricked in windows and door, can be readily undone without undue hardship. The Driekausen factors weigh against Mr. Rutter's mootness argument.

2. The Court of Appeals correctly ruled that the circuit court erred in finding a procedural due process violation.

The circuit court entered an order reversing the DDRC decision. R. 5-15. The order concluded, without any supporting authority, that the DDRC violated procedural due process. R. 9. In addition, the circuit court ruled, again without citing any supporting authority, that Mr. Rutter was denied any notice of the Melrose Heights/Oak Lawn Guidelines. R. 10. The Court of Appeals reversed, concluding that Mr. Rutter received notice, an opportunity to be heard in a meaningful way, and judicial review. Rutter v. City of Columbia Design/Dev. Rev. Comm'n, No. 2018-001194, 2021 WL 2701549, at *2 (S.C. Ct. App. June 30, 2021). The Court of Appeal's decision was unquestionably correct.

The circuit court ruled that Mr. Rutter was denied the right to counsel, an opportunity to question or cross-examine staff, reasonable notice of staff's assessment of his application, and a right to call witnesses. This ruling was contrary to controlling precedent, Kurschner v. City Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). In Kurschner, the Kurschners sought approval to subdivide their property, which the planning commission denied. Id. at 169, 348. The Kurschners argued on appeal "that they were effectively deprived of due process at the hearing before the Commission because the Commission did not inform them of the opposing evidence prior to trial, considered hearsay evidence, deprived them of the opportunity to cross-examine adverse witnesses, and failed to allow them to conduct *voir dire* questioning of the members of the Commission." Id. at 171, 349. This Court disagreed,

finding that “[d]ue process does not require a trial-type hearing in every conceivable case of government impairment of a private interest.” Id. at 171, 350. “Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” Id. In the context of decision-making by a planning commission, the power exercised by the planning commission pursuant to the Local Government Comprehensive Planning Enabling Act was discretionary, not adjudicatory in nature. Id. at 172, 350. Due process did not require the planning commission to use trial-type hearing procedures in making its discretionary decisions. Id.

Like the planning commission in Kurschner, the DDRC is an entity authorized under the Local Government Comprehensive Planning Enabling Act to exercise discretionary power. S.C. Code Ann. §§ 6-29-870 and 880. During its scheduled meeting, the DDRC held a public hearing to consider Mr. Rutter’s application. R. Video. The agenda for this meeting was published. See R. 109 (minutes stating the agenda had some revisions subsequent to its publication). The DDRC received and reviewed information provided to the City by Mr. Rutter. R. 171 – 179. Mr. Rutter’s agent appeared and was given ample opportunity to present his reasons why the DDRC should approve his applications and to rebut any statements made by City staff, DDRC Commissioners, and members of the public. See Video 52:50 – 1:03; 1:05 – 1:07; 1:17:03 – 1:20:14. Judicial review is authorized under S.C. Code Ann. § 6-29-900.

Moreover, Mr. Rutter had actual and constructive notice of the Guidelines. City staff stated that they made Mr. Rutter aware of the Guidelines prior to his purchase of the Property. R. 159. During the DDRC’s hearing, Mr. Rutter’s agent had three opportunities to rebut this statement, but did not. Further, Mr. Rutter’s agent stated to the DDRC that prior to the City’s issuance of a stop work order, Mr. Rutter assumed that the Guidelines allowed him to paint the

exterior without permission from the DDRC. Video 1:05:44 – 1:05:54. Therefore, Mr. Rutter had actual notice of the Guidelines. He was also charged with constructive notice of the Guidelines. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 568 (2007) (stating that Petitioner is charged with knowledge of the ordinance at issue). Section 17-674(d)(1) of the City’s historic preservation and architectural review ordinance states that “issuance of a certificate of design approval shall be based upon the requirements set forth in the standards or **design guidelines** adopted by the city council for each historic district.” (emphasis added). Petitioner was in the business of renovating houses, thus he knew or should have known about ordinances affecting his business. Clear Channel, at 236, 568.

Mr. Rutter complains that “he had no notice of the DDRC’s assertion of authority over his actions, based upon its expansive interpretation of the unenacted Guidelines.” Even with a full review of the Guidelines, he argues, “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 they are not.”⁵ Petition, p. 15. As the Court of Appeals correctly noted, Petitioner’s argument evaporates upon a proper reading of the Guidelines.

Petitioner cannot claim lack of notice by picking and choosing isolated phrases in the Guidelines while ignoring other provisions. See e.g. Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) (“The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose.”). The Guidelines state that:

⁵ Petitioner does not make any argument that the DDRC’s decision to deny his request to remove and fill in the windows and door on the first floor is based upon any vagueness of the Guidelines or lack of notice.

“[p]ainting historic masonry is another concern. The color of masonry, particularly brick, is often an important part of the character of a building. In addition to color, the bonding pattern, treatment of mortar joints, and texture are significant parts of brick buildings. Where brick and other masonry finishes were unpainted, they should⁶ generally remain so. Painting obscures detailing and alters the distinguishing original qualities of a building. Under some circumstances, particularly where the brick quality is poor or abrasive cleaning methods have been used, painting brick may be appropriate as a protective measure. R. 145.

The Structure’s exterior is made of brick. R. 158, 159. It also has contrasting stone accents at the window corners and patterned within the brick veneer on the chimney. R. 159, 166.⁷ The Guidelines clearly and plainly state that exterior brick and masonry must remain unpainted unless evidence is presented to the DDRC showing why painting brick and masonry is more suitable. Reading the provision stated above together with the Guideline’s exclusion of “painting and color” from DDRC review, one can readily ascertain that a property owner is able to paint the exterior of a structure built with wood, stucco, fiberboard or other siding without DDRC review, but cannot paint exterior brick and stone without DDRC approval. The Guidelines provide fair notice of the conduct proscribed. S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 505, 757 S.E.2d 388, 392 (2014).

Petitioner’s remaining extraneous complaints raised under his due process argument are easily disposed of. Mr. Rutter claims “there is no record that any person who spoke at the hearing did so under oath.” Petition, p. 16. The video of the DDRC hearing shows that, at the beginning of the meeting, all those present at the meeting were sworn by the DDRC Chairman to tell the

⁶ The term “should” is defined in the Guidelines as “what must happen unless evidence is presented to illustrate why an alternative is more suitable.” R. 151.

⁷ To the extent the filed record on appeal does not contain photographs in color, the same document in the record on pages 159 – 180 can be found in color at https://www.columbiasc.gov/depts/planning-boards/commissions/ddrc/agendas/20170112/gladden_1500_webster_2801_eval_jan_2017.pdf. Pages 8-12 show color photos of the Structure before and after the painting and removal of some windows as of January 2017.

truth in these proceedings. Video 11:15-11:31. If a speaker approached the podium that the Chairman did not recognize as being sworn in at the beginning of the meeting, he administered the oath to that speaker. Video 1:10:04 – 1:13:53. The record is sufficient to show that the relevant speakers in this case took an oath to tell the truth.

Petitioner also complains that the decision letter mailed to him contained “no reviewable findings of fact or conclusions of law.” Petition p. 8, 16. However, Petitioner’s claim does not hold up in light of well-established precedent explaining that courts review the DDRC’s decision by looking “to written documents as well as records of proceedings as sufficient formats” for findings of fact and conclusions of law. Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 34, 606 S.E.2d 209, 212 (Ct. App. 2004). The staff’s written evaluation along with the video of the DDRC hearing provides a sufficient basis for judicial review. The City’s evaluation sheet applied the facts to relevant sections of the Guidelines. R. 159 – 165. Mr. Rutter’s requests to remove a door and windows on the first floor, and paint the exterior brick and stone, was contrary to provisions within the Guidelines. Id. During the DDRC hearing, Commissioners referred to the Guidelines as part of their deliberation.⁸ Commissioners also emphasized their duty to make decisions that serve to protect and advance the purposes of the Melrose Heights/Oaklawn Architectural Conservation District, and viewed Mr. Rutter’s work on the Property without first obtaining the required DDRC approval as undermining the purposes of the District. See COLUMBIA, SOUTH CAROLINA, MUNICIPAL CODE § 17-674(c)(1) (The commission shall endeavor to ensure that the exterior appearance and arrangement of buildings, structures and premises in these districts will

⁸ See Video 1:21:21 – 1:22:55 (DDRC Commissioner highlighting principles within Section VII of the Guidelines and stressing importance of the Guideline’s provisions concerning preservation of exterior brick and rationale for not painting exterior brick).

... [e]nhance the attractiveness and functioning of each district in keeping with its purpose and intent"); See Video 1:08:40 – 1:09:37. This fact relates to the DDRC’s role and constitutes a “pertinent factor” that effects the “appearance and efficient functioning of the district.” See § 17-674(c) (“In its review of material submitted with applications for approval, the commission shall examine the architectural design, the exterior surface treatment, the arrangement and location of buildings and structures on the site in question and their relation to other buildings and structures within the district involved, and other pertinent factors affecting the appearance and efficient functioning of the district.”).

In sum, the Court of Appeals properly concluded that Kurschner v. City Camden Planning Comm’n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), controls in this case. Under Kurschner, Mr. Rutter was afforded the process he was due. Petitioner’s efforts to obscure or distract from this sound conclusion should be rejected.

3. The Court of Appeals did not err in concluding that the Guidelines were not unconstitutionally vague and indefinite.

Concerning Petitioner’s argument that the Guidelines were unconstitutionally vague and indefinite, the circuit court agreed, ruling that the “guidelines fail to establish any ascertainable or specific standard, leaving the DDRC and its staff ‘free to make any determination whatever that appeals to its sense of justice.’” R. 11. The Court of Appeals reversed, holding that the relevant provisions of the Guidelines “plainly instruct that unpainted brick should remain unpainted unless paint is needed to prevent further damage” and “also explain, in straightforward fashion, that significant features like windows and doors should be preserved and repaired whenever possible.” Rutter v. City of Columbia Design/Dev. Rev. Comm’n, No. 2018-

001194, 2021 WL 2701549, at *4-5 (S.C. Ct. App. June 30, 2021). Petitioner persists in its assertion that 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.” Petition, p. 20. The Court of Appeals did not err in concluding that the Guidelines were not vague and indefinite.

“A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application.” S.C. Dep’t of Soc. Servs. v. Michelle G., 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). “The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” Id. “Consequently, a statute may be unconstitutionally vague where “(1) it does not provide fair notice of the conduct proscribed,” or “(2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.” Id. “All the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices.” Id.

The Guidelines provide fair notice of the conduct proscribed. The Guidelines clearly define the boundaries in which the Guidelines apply. R. 137. They list actions that require design review, including “actions that alter the exterior appearance of a building.” R. 138. Although the Guidelines state that “painting and color” do not require design review, the Guidelines also state that “[m]asonry features, such as ... color are important to the historic character of a building” and “should be retained.” R. 145. “Where brick and other masonry finishes were unpainted, they should generally remain so.” Id. Deteriorated masonry material must be repaired or if necessary,

replaced. R. 146. A person of common intelligence is not left to guess as to the Guidelines' meaning or differ as to its application. S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014).

Petitioner's only real argument seems to be that the Guidelines, based upon his overemphasis on some language and willful refusal to acknowledge other language not helpful to him, are conflicting or contradictory and therefore Petitioner proclaims them to be unconstitutionally vague. Petition, p. 21-22. Whether the Guidelines are vague does not turn on Mr. Rutter's subjective opinion of the Guidelines and his tortured interpretations of them. See S.C. Human Affairs Comm'n v. Zeyi Chen, 430 S.C. 509, 531, 846 S.E.2d 861, 872 (2020) ("The subjective opinions of the parties and the court in this case and the difficulties they encountered in defining conciliation and its parameters are not a sufficient basis for advancement of a constitutional challenge."). If any objectively reasonable and practical construction can be given to the language in the Guidelines, then they are not unconstitutionally vague. Id. "Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory." Id.

Objectively read as a whole, the Guidelines addressing exterior brick are not unconstitutionally vague. The Structure's exterior is made of brick with stone accents. R. 158, 159. The Guidelines clearly and plainly state that exterior brick and masonry must remain unpainted unless evidence is presented to the DDRC showing why painting brick and masonry is more suitable. R. 145, 151. Reading this provision together with the Guideline's exclusion of "painting and color" from DDRC review, one can readily ascertain that a property owner is able to paint exterior wood, stucco, fiberboard or aluminum siding without DDRC review, but cannot

paint exterior brick and stone without DDRC approval. R. 145, 138. The Guidelines explain that exterior masonry is treated differently because masonry features, including the color of brick, are important to the historical character of a building. R. 145. The Court of Appeals did not err in reversing the circuit court's ruling that the Guidelines were vague.⁹

Petitioner goes on to argue that the DDRC's decision-making discretion was unconstrained and therefore unconstitutional under Schloss Poster Advertising Co. v. Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939). In Schloss, the court struck down an ordinance that conferred permitting authority without any criteria or standards. Id. at 394. Unlike the ordinance in Schloss, the Guidelines are packed with specific principles and standards that the DDRC must adhere to. For example, under Section VII, Guidelines for Maintenance and Rehabilitation, there are clearly articulated principles concerning doors, windows and exterior masonry. R. 142, 143, 145. To carry out the principles, there are more specific guidelines covering doors, windows, and exterior masonry. Id. Principles and guidelines need not be so specific that they delve into minutia or address every conceivable scenario. See Burke v. City of Charleston, 893 F. Supp. 589,

⁹ Petitioner seemingly claims that the term "contributing structure" is impermissibly indefinite. Petition, p. 23. Under Section 17-652(b)(2), the DDRC must review applications for "[m]ajor alterations which alter the exterior appearance or materials of individually designated landmarks and **contributing historic buildings** in landmark districts, architectural conservation districts, historic commercial districts, and protection areas." (emphasis added). The term "contributing structure" is defined in the Guidelines as "a building, structure or site that reinforces the visual integrity or interpretability of a historic district. A contributing structure is not necessary historic (50 years or older). A contributing building may lack individual distinction but add to the district's status as a significant and distinguishable entity." R. 150; see also §17-652 (defining "contributing" as "any building, structure, or object, generally 50 years old or older, which adds to the historical integrity or architectural qualities that make the historic district significant." A contextual definition such as this is common in historic preservation districts, and courts have rejected claims that contextual definitions and standards within historic preservation ordinances are indefinite. See A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979); Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regul. Affs., 655 A.2d 865, 873 (D.C. 1995); Park Home v. City of Williamsport, 545 Pa. 94, 102, 680 A.2d 835, 838-39 (1996). In the DDRC evaluation sheet, DDRC staff found that the Structure "contributes to the Melrose Heights/Oaklawn Architectural Conservation District" and "in fact, ... is one of the best examples of [Tudor Revival style] in the neighborhood." R. 159.

612 (D.S.C. 1995), vacated on other grounds by 139 F.3d 401 (4th Cir. 1998) (in considering claim of an unconstitutionally indefinite ordinance, court rejected notion that to survive a claim of indefiniteness, the ordinance must include a high degree of precision and identify entire range of potential violations or nonconformities). An objective review of the Guidelines reveal that they are sufficiently specific and definite such that the DDRC's discretion is limited.

Lastly, Petitioner argues that the DDRC's application of the Guidelines as a "binding norm" constitutes an "arbitrary evil" under Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016). Petition, 18-19. Joseph dealt with whether a state agency's adoption of a position statement complied with the Administrative Procedure Act ("APA"). Id. at 453, 772. Under the APA, "policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." Id. The court concluded that, because the position statement established a "binding norm," the position statement created a regulation that should have been promulgated under the procedure set forth in the APA. Id. Joseph has no bearing on this case because the DDRC is not subject to the APA. See S.C. Code Ann. § 1-23-100 (providing procedures for "agencies" to promulgate regulations); S.C. Code Ann. § 1-23-10 ("'Agency' or 'State agency' means each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases."). Here, the City is empowered to adopt regulations by resolution or ordinance. S.C. Code Ann. §§ 5-7-260 - 5-7-280; COLUMBIA, SOUTH CAROLINA MUNICIPAL CODE §§ 2-81 - 2-87. There is nothing evil or arbitrary about the manner in which the Guidelines were adopted by the City.

Petitioner has not presented any persuasive or compelling arguments that the City's Guidelines are vague and indefinite. To the contrary, the provisions of the Guidelines at issue, read objectively, "convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014).

CONCLUSION

For these reasons, Petitioner's Petition for Writ of Certiorari should be denied.

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