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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

The Honorable Walton J. McLeod, Circuit Court Judge

CASE NO. 09-CP-40-01307
CASE NO. 13-CP-40-02159

Frieda H. Dortch, ...Appellant,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals, ...Respondent.

APPELLANT'S REPLY TO RETURN TO PETITION FOR REHEARING

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Introduction to the Instant Reply

For well over a decade, Mrs. Dortch has not been allowed to fix her historically duplex house as a duplex and occupy it. On June 22, 2020, Dortch filed her final Appellant's Brief in this Court. There, she distinctly set forth in the "Statement of Issues on Appeal," twenty-nine (29) issues, numbered as such. Number 1 was that what she has been subjected to is unconstitutional. At oral argument, part of the time was consumed with discussion of a revised ordinance, an issue in which the Court of Appeals was interested, but which neither party had raised or briefed. Zero time was spent on constitutionality or issue preservation, and this Court asked no questions about either.

On July 20, 2022, the Court of Appeals issued its Unpublished Opinion 2022-UP-307, stating that Dortch had four (4) contentions.

The opinion, in addition to stating no factual background from which the issues arose, is marked unpublished, and generally addresses only four questions as framed by the Court of Appeals. The opinion additionally bears a header stating that the opinion is not valid precedent and may not be cited in cases affecting people other than Dortch. Dortch has requested rehearing, a published opinion, a decision addressing omitted issues, and a reversal of the Circuit Court as previously outlined.

The Respondent City in its recent return, only presents the same deficiencies, omissions and misunderstandings as found in the Court of Appeals' decision.

The holding of the Circuit Court, and now the Court of Appeals, that Dortch did not preserve the central issue she argued on appeal is the first thing that has been misunderstood.

This holding is that Dortch did not preserve the issue of her constitutionally vested right to continue a prior conforming use after the enactment of a statute putatively changing the use to

a nonconforming one.

That the issue was in fact fully preserved will be further discussed below, but the holding is clear error, like the other rulings of the Court of Appeals, and must arise from a failure of the Court to apprehend the actual facts of the matter, the actual issues presented, and much of the applicable law.

The Actual Facts, the Actual Issues Squarely Presented, and the Lack of Rulings on Dispositive Issues

Dortch has an up-and-down duplex. It has been such a building for about 60-75 years. It is part of the property as it is presently constituted to this day. Sometime in the 1970s or afterwards, the City, ex post facto, passed an ordinance, changing the rules. The ordinance is now contended by the City to not allow a duplex where Dortch already has hers.

Yet, when Dortch was first refused a permit to repair the duplex as a duplex, she was given no decision in writing. Dortch was put in the peculiar position of not receiving the zoning administrator's reasons or citations of any statutes for his position. He refused to allow her to repair the house as a duplex. (See undisputed facts in Ap. Brf. at 8-13.)

At the same time, if she disagreed, she was expected to appeal to BOZA, appear, and respond to everything she then discovered was supposed to be the basis for the zoning administrator's position. The Record also shows that BOZA, a lay decision-making body which makes its decisions based on gossip, hearsay, and what it divines as public opinion, was possessed of ex parte briefings which Dortch did not have even at the time of appearing before BOZA.

It turns out that the zoning administrator's telling Dortch that zoning no longer allowed her to have a duplex was not because her house is in a zoning district which prohibits duplexes. Her house is in fact in a district zoned for duplexes. The district is in fact also for multi-family dwellings. There are numerous duplexes in her immediate neighborhood and elsewhere in the

same zoning district.

It turns out that the alleged "nonconformity" with the later-enacted zoning code is simply that her lot is not quite the size now allegedly required for a duplex.

It turns out that this alleged lot-size requirement is found in a chart, full of redundancies or contradictions. The chart serves as the operative ordinance, Columbia Ordinance Section 17-275. The version "in force" at the time is in the Record.

In light of the statements made in City's recent return that nothing a zoning board decides can be reversed if there is "evidence" to support it, it is necessary to point out here that interpretation of an ordinance is a question of law, not a question of fact. A question of law is not something that can be ignored under a talismanic recitation that a zoning board can do whatever it wants without any review.

Under Dortch's reading of the Section 17-275 ordinance-chart – an issue raised by Dortch but not ruled on by the Court of Appeals -- the chart actually authorizes her duplex and lot size. Otherwise, it is void as unconstitutionally vague. Either of these propositions, if ruled upon in favor of Dortch, would determine the whole case in her favor, but the Court of Appeals did not rule upon these dispositive issues.

It turns out that two more ordinances are involved. One, City of Columbia Ordinance Section 17-202(f), applies to situations in which, as here, alleged nonconforming uses are damaged. Section 17-202(f) deals with what, if any, circumstances would terminate a statutory (as opposed to constitutional) right to continue such a nonconforming use. Namely, in the case of a damaged nonconforming structure, continuity or not depends upon whether damage to the structure was above or below a 75% measure.

Under Dortch's reading – an issue raised by Dortch but not ruled on by the Court of Appeals -- Section 17-202(f) was applicable because her duplex suffered some damage and

reconstruction was sought. However, under this ordinance, the limited fire damage on the back side of the structure was clearly not enough damage to trigger a termination. A ruling on this issue in Dortch's favor would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon it.

Another ordinance, City Columbia Ordinance Section 17-202(e), only applies where § 17-202(f) does not apply. It turns out that this was the ordinance on which the zoning administrator provided BOZA an ex parte briefing. Section 17-202(e), in situations other than those involving damage to a structure, would, if conditions of 12 months of continuous "vacancy" were present, disallow "reestablishment" of a previously disestablished nonconforming use.

Under Dortch's reading – an issue raised by Dortch but not ruled on by the Court of Appeals – § 17-202(e) does not apply because Dortch's situation involved reconstruction after damage, to which Section (f) is applicable instead. Additionally, in any event, no separate provision or act – such as common law, volitional abandonment by physically transforming the house into a single-family structure -- disestablished the immutable fact that her property remained improved with a duplex. A ruling on either of these issues in Dortch's favor would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon them.

Section 17-202(e), if it applied (Dortch contended it did not), and if some separate provision or act disestablished the fact that Dortch's property was improved with a duplex (Dortch contended that nothing had done so), would then, and only then, allegedly prevent "reestablishing" the use if, and only if, the property had been "vacant" for a continuous period of 12 months.

None of the above-discussed three statutes were cited in a written decision by the zoning administrator, or by BOZA after Dortch appealed to BOZA. Through, among other things,

receipt and review of the BOZA record long after the time for filing her appeal to Circuit Court, Dortch eventually learned of the existence of the ordinance (§ 17-202(e)). She thus eventually learned of the City's putative reliance on it as the basis for denying Dortch a permit to repair the property as a duplex.

Neither Section 17-202(e) nor any other informative ordinance was identified in BOZA's decision, which is found in the Record at page 365.

Once she learned of this basis for denying her rights, Dortch also presented the issue – an issue raised by Dortch but not ruled on by the Court of Appeals – that the 12-month period of alleged vacancy the City relied on should be equitably tolled under the doctrine of "equitable tolling."

Dortch contended this because it was undisputed that the only continuous12-month period of "vacancy" the City contended existed was the period after the City required Dortch's brother to leave the property and thereafter posted it and prohibited occupancy. To deny rights based on passage of a time period satisfaction of which is out of control of the party affected is inequitable.

Under this proposition discussed in Dortch's appellate briefs to this Court, it is irrelevant whether there was a continuous 12-month period of "vacancy." This so-called "fact" of "vacancy" is the irrelevant premise upon which the City bases nearly the entirety of its recent return to the petition for rehearing. In its return, the City does little other than emphasize that the "fact" is unreviewable. This irrelevant "fact" is similarly the premise for much of the Court of Appeals' summary, unpublished, affirmance of the Circuit Court with no further explanation or factual context.

A ruling on this issue of equitable tolling in Dortch's favor would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon it.

Dortch clearly raised another issue when BOZA upheld the denial of a permit for Dortch to repair the property as a duplex. Dortch also presented the issue – an issue raised by Dortch but not ruled on by the Court of Appeals – that § 17-202(e), or any other putative basis for denying her constitutionally assured "grandfathered" status, was unconstitutional.

This issue, which is discussed further separately below, has been expressly omitted from decision by the Court of Appeals. The Court has done so on the basis of alleged failure of Dortch to raise and preserve the issue.

A ruling in Dortch's favor on this issue of unconstitutionality would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon it. Because, in keeping with urging issue avoidance, the City will contend that review of the issue by the S.C. Supreme Court is only discretionary, the effect of the Court of Appeals' decision to avoid the issue is to have the court of effectual last resort refuse to address a vital issue squarely presented to it for decision.

The Record also shows that others similarly situated, with less compelling circumstances, have been routinely granted variances from the alleged lot-size requirement as a matter of standing City policy stated in writing to BOZA by the zoning administrator. (See R. pp. 561 and 567 (exhibiting November 9, 2010 brief of the unidentified "staff" of BOZA (the zoning administrator) pertaining to property on Butler Street, in which the unidentified "staff" of BOZA remind BOZA that the "traditional" practice in these situations was to make positive findings on the same five statutory factors Dortch had addressed in applying for a variance, and to grant the variance).)

When Dortch was denied a permit to do repairs and renovation to the partially fire-damaged building, Dortch did two things. She appealed to BOZA, the zoning administrator's position that, despite the historic prior use of the property as land improved with a duplex, she could not repair it as a duplex. She thus appealed his position that her property was

nonconforming and that she had no "grandfather status." I.e., she disputed the assertion that she had no right to continue the use of the property by virtue of the prior legitimate status of the property.

She also, as an alternative measure, applied to BOZA to simply grant a variance from the putative lot-size restriction the applicability of which she was essentially simultaneously disputing.

She was essentially giving BOZA the opportunity to use the variance mechanism to serve as a safety valve against unconstitutional ex post facto laws and other extreme measures.

In the course of Dortch's presenting her variance request to BOZA, and in the course of her presenting another variance request a few years later, Dortch encountered numerous statements and circumstances which in review would seem to arise from a collaborative work of Franz Kafka and Lewis Carroll. In light of the statements in the City's recent return that all acts of a zoning board are reviewed under the same standard and upheld if there is any "evidence," it is necessary to point out here that under even the most deferential standard of review, when a decision of a tribunal is influenced or guided by an error of law, all the fact-finding in the world will not make the decision sustainable.

Reciting a one-size-fits-all standard of review will not save the decision. Dortch carefully raised and detailed numerous outcome-determinative legal errors of BOZA to the Circuit Court and to the Court of Appeals, but the Court of Appeals did not rule upon them.

Many examples are addressed to in the Petition for Rehearing and presented in Dortch's Appellant's Brief and Reply Brief. For example, the Record indicates that, erring on a matter of law, BOZA thought it could not find that all the elements for a variance were present because one of the elements was whether the variance would be harmonious with the zoning ordinance, and BOZA determined that the intent of the zoning code was to disfavor nonconforming uses.

This fallacious reasoning, of course, would prevent the granting of any variance to anyone, ever. This erroneous thought process would negate the variance provisions that are found in the zoning code itself.

A ruling in Dortch's favor on this issue of misinterpretation of the statute would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon it.

As another example, the Record indicates that, erring on a matter of law, BOZA thought it could not consider the property in its presently improved state for purposes of determining whether there were extraordinary circumstances. I.e., BOZA erroneously thought that the "property" had to be considered as if it were a vacant lot on which someone asked permission to build a duplex, instead of a lot already lawfully improved with one. This error was determinative because a zoning board could readily determine that a hypothetical, small, unimproved lot which feasibly could still be improved with a conforming structure would not present a hardship. In contrast, a property consisting in part of improvements already with fixed distances from setbacks, fixed square footage, fixed absence of internal stairs, fixed nonmirroring floorplans upstairs and down, connected utilities, and numerous other fixe features presents an entirely different picture.

A ruling in Dortch's favor on this issue of misinterpretation of the statute would dispose of the appeal in favor of Dortch, but the Court of Appeals did not rule upon it.

Standards of Review

The two different measures taken by Dortch -- appeal to BOZA of matter of statutory interpretation, and application to BOZA for variance – and the numerous arguments pursued by Dortch, implicate different standards of review for different things. Dortch discussed specifically these standards of review in her appellate briefs. For example, errors of law are generally freely reviewable with zero deference to the lower tribunal, and, even when there is a

deferential standard of review of errors of fact, when factual findings are guided by errors of law, the lower decision is reversible despite any "findings."

This is conventional law, not constitutional law. This is not an argument, as suggested by the City, that Dortch contended she was entitled to a variance as a matter of law, although she was. This is simply the conventional standard of review, in which potentially outcome-determinative or outcome-influencing errors of law result in reversal. The Court of Appeals misapprehended this principle.

For further example, Dortch discussed the legal question of whether the standard of review provided in a statute should apply when the decision of the body whose decision is under review does not comply with the conditions presupposed by the very same statute. Namely, the legislature intends that the stated standard only applies provided that the decision it applies to is as described in the same statute. She also discussed and argued extensively, with citation of authority, the constitutional principles which required plenary review of decisions of lay tribunals empowered to determine serious rights in property.

Applying the wrong standard of review is itself an error of law. Dortch clearly presented arguments for the proper standard of review, based on common law, statute, public policy, and constitutional principles. The Court of Appeals overlooked all these arguments and all the authorities argued, holding, essentially, that there was but one standard of review of anything a zoning board did in any context. The Court further stated incorrectly that Dortch had presented no authority to the contrary.

Since the Circuit Court and the Court of Appeals based their decisions on standard of review, it is not an insignificant issue. The issues squarely presented by Dortch should have been ruled upon other than by an incorrect assertion that there was "no authority" for anything other than a singular standard for everything involved.

Issue Preservation and Dortch's Clear and Persistent Contention That Destroying the Vested Right to Continue a Lawfully Commenced Prior Use Was Fundamentally Unfair and a Violation of "Due Process of Law"

No one has contended, or ruled, that Dortch failed to preserve the issue of her constitutionally vested right to continue the prior use of the property when she appealed to BOZA. She was not required to in order to later raise and preserve the issue. Newton v. Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011)(holding specifically that an issue need not have been raised during BOZA's administrative process in order to be preserved on appeal to the circuit court).

Nor has anyone ruled or contended that Dortch did not vigorously argue the constitutional issue throughout the years she attempted to get the Circuit Court to squarely address the issue. During these years, the City raised nonmerits reasons not to reach the constitutional issue or any of the other merits of Dortch's appeal. Examples are issues of timing and res judicata.

The City now focusses on implying there is a monolithic, globally deferential standard of review of everything decided by a lay decision-making body. The City focusses now on erroneously characterizing everything (including statutory interpretation and other questions of law) as a "question of fact." The City focusses on the irrelevant question of whether "12 months" of "vacancy" occurred. The City suggests that the City neither understands "due process" as a reference to a constitutional issue, nor understands which constitutional issue it could be. These urgings all run in the same vein of avoiding a decision on the merits of the actual issues actually presented.

Nor does anyone seriously argue that the constitutional issue of the vested right to continue a nonconforming use was not distinctly set forth in the Statement of Issues on Appeal to the Court of Appeals. The City does argue this generally as to virtually all issues Dortch now

contends were overlooked, but not seriously. In its return at 2, the City does so by citing the Rule 208, SCACR requirement that "[t]he statement of issues on appeal" shall be concise and direct as to each issue presented.

The City then never shows the absence of a concise statement regarding any issue Dortch now complains was overlooked. As to the particular issue of the unconstitutional interference with Dortch's grandfathered rights in her property, there certainly can be no such contention.

Numbered "1" in Dortch's "Statement of Issues on Appeal" in her Appellant's Brief, at Page 1, is this issue: "1. Is retroactive application of City Ord. §17-275 unconstitutional and is application of City Ord. § 17-202(e) to terminate Dortch's vested right to have and maintain the up-and-down duplex which was her family home unconstitutional?" The issue was of course also argued extensively in both of Dortch's briefs on appeal.

The City's allegation of "failure to preserve" is traced solely to Dortch's petition of appeal from BOZA to the Circuit Court in 2009. (She also appealed to Circuit Court in 2013 and explicitly raised the issue then at page 10, R. p. 233.) She filed the 2009 appeal from BOZA without the benefit of a proper discursive written decision from BOZA and noted this deficiency as an additional ground of appeal. She filed the appeal without a record of the BOZA proceedings and without any written decision of the zoning administrator in the first place.

In the 2009 petition of appeal to the Circuit Court, the specific decision being appealed was BOZA's affirmance of the zoning administrator's determination that Dortch was not allowed, by virtue of the prior existing use of the property, to continue that use. The context alone would alert the sleepiest of practitioners and jurists to the issue.

Dortch stated in the 2009 petition of appeal to the Circuit Court that the zoning administrator's position and the decision of BOZA were fundamentally unfair and a denial of due process. She expounded on the issue in a supplemental filing shortly afterwards.

This was sufficient to raise and preserve the issue on constitutionality of denying her the previous legitimate use of the property. Certainly, neither the City nor the Circuit Court can claim that when the merits of Dortch's appeal in the Circuit Court were finally heard years later, either was unaware of the contention or in any way surprised by the issue.

At page 6 in its recent return to Dortch's petition for rehearing, the City in fact acknowledges that, in the first petition for appeal to Circuit Court, in 2009, of BOZA's determination, Dortch:

1. Stated, "the structure in question is Family property for many decades and has been contained one unit up-stairs and one unit down-stairs since before any change in the Zoning Codes." (R. p. 191.)

2. Stated, "Applying the Building and Zoning Code in this manner is fundamentally unfair and denial of due process." (R. p. 192.)

Yet, in its Return at 6, the City incredibly argues that "fundamentally unfair and denial of due process" used in contesting denial of continuation of prior legitimate use of property is insufficient to "put any tribunal on notice" that the action is claimed to be "unconstitutional." If anything is manifestly without merit, it is such an argument.

Any holding that Dortch did not put the entire world on notice of the unconstitutionality of the acts complained of and of her intention to argue it cannot be based on any actual surprise or prejudice suffered by the City or any tribunal. Rather, such a holding can only be based on misunderstanding of the facts or law regarding issue preservation and erroneous subscription to the City's urging of a technical device to avoid reaching a clearly presented issue with a devastating effect on Mrs. Dortch.

Thus, the City's factual and legal arguments that the issue of unconstitutionality of denial of a vested right was not raised in Dortch's appeal from BOZA to the Circuit Court are wrong.

To the extent the City impliedly argues, or the Court of Appeals impliedly held, the same

as to inapplicability of Ord. § 17-202(e), and equitable tolling, the position is similarly wrong. This is particularly so in light of the fact that Dortch expressly noted in her appeal to the Circuit Court that the decisions from which she was forced to appeal were unaccompanied by "any facts or reasons or code references" sufficient to justify the action." (R. p. 192.)

The purpose of the rules of issue preservation is to give the court whose decision is under review the opportunity to make a decision on the issue which is appealed. The Circuit Court had that opportunity in abundance.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) (internal quotes omitted) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

However, a party is only required to lead the horse to water, twice; the party is not required to make the horse drink after the second offer. Where an issue presented to the trial court is not explicitly ruled on in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appeal. McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504 n.3, 719 S.E.2d 660, 662 n.3 (2011) ("[T]he circuit court's ruling did not specifically address those grounds, and Appellants failed to make a Rule 59(e), SCRCP, motion. Accordingly, those issues are not preserved for review, and we do not address them.")(citing Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000)); Great Games, Inc. v. South Carolina Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000) (holding that, because circuit court failed to rule on constitutional issue and appellant did not raise omission in its Rule 59, SCRCP, motion, the issue was not preserved for appellate review). Here, Dortch raised the Circuit Court's omission of the subject issues in a Rule 59 motion.

Once the issue has been properly raised by a Rule 59 motion, however, it is preserved for appeal even if the trial judge does not rule on it. Sierra Club v. South Carolina Dep't of Health and Envtl. Control, 387 S.C. 424, 433-34, 693 S.E.2d 13, 17-18 (Ct. App. 2010) ("[B]ecause the Sierra Club properly filed a Rule 59(e) motion with the ALC, we believe these issues are preserved even though the ALC did not specifically rule on them.")(applying Pye v, Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006)). See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling). A party need not "request additional conclusions of law" from a hearing officer in order to preserve his issues for appellate review where the officer has ruled in favor of the opposing party and rejected the party's argument. South Carolina Dep't of Motor Vehicles v. Brown, 406 S.C. 626, 636-37, 753 S.E.2d 524, 529 (2014).

A party is not required to use the exact name of a legal doctrine in order to preserve the issue. Herron (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict)). See also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue). Perhaps this is where the City, the Circuit Court and the Court of Appeals have all gone awry. For example, “nonconforming use” and “vested right” refer to the same concept – that a use of property that existed lawfully before the enactment of a zoning ordinance may continue afterwards even though the use does not comply with the zoning restriction. Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480 at 496 n.13, 536 S.E.2d 892 at 900 n.13 (Ct. App. 2000).

“A party need not use the exact name of a legal doctrine in order to preserve [an issue], but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). There is no question on what ground Dortch presented her argument.

For example, a party' s wording can change between court and a Rule 59(e) motion without jeopardizing preservation of the issue. Conits v. Conits, 422 S.C. 74, 77, 810 S.E.2d 253, 254 (2018). For further example, a party who properly invokes a rule of civil procedure without referencing it by name has preserved arguments based on closely related provisions. Patton v. Miller, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) (noting that "the Rules were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principle").

That is, South Carolina appellate courts “are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.” Herron, 395 S.C. at 470, 719 S.E.2d at 644.

Certain concerns, such as the inability to raise an issue earlier, can provide exceptions to the preservation rules. For example, because the ALC is part of the executive branch, it lacks authority "to pass on the constitutional validity of a statute or regulation"; thus, such challenges "present an exception to [the] preservation rules and should be raised for the first lime on appeal to the circuit court." Travelscape, LLC v. South Carolina Dep't of Rev., 391 S.C. 89, 108-09, 705 S.E.2d 28, 38 (2011). While Dortch did, clearly, raise the issue to the Circuit Court, if she had not done so or had not done so clearly, she could hardly be faulted, in that the ability of most people in her situation would have been hampered by the lack of statement by BOZA of the actual rationale for its decision or citation of any statute.

Where an argument is neither clearly preserved nor clearly unpreserved, courts should resolve this dispute "in favor of preservation." Johnson v. Roberts, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018).

An appellate court is not bound to issue preservation rules and might address other unpreserved issues which it could raise sua sponte. See, e.g., Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 520 (2010) (noting that, although a party's references to "appellate court rules regarding error preservation" were generally correct, such rules were "inapplicable" to the issue of "enforc[ing] an illegal contract"— an issue which other courts had raised sua sponte).

An appellate court may also address an unpreserved issue "for purposes of judicial economy." Bell v. Prog. Direct Ins. Co., 407 S.C. 565, 582 n.9, 757 S.E.2d 399, 407 n.9 (2014); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) ("Regardless of any preservation problems we address this issue in the interest of judicial economy. The first time this case was tried, it ended in a mistrial. This appeal involves the second trial, and based on the unappealed rulings of the Court of Appeals, this case will be tried for a third time.").

For over a decade, the instant cases have demonstrated the distinct lack of economy in avoiding issues. The Circuit Court avoided the issues at the City's urging in the 2009 case, by erroneously determining that Dortch's 2009 appeal was a day or two late. Dortch moved to reconsider. When, in the interim, Dortch applied to BOZA again for a variance, and found herself appealing that decision of BOZA to the Circuit Court in 2013, the City persuaded the Circuit Court to avoid the issues again by erroneously determining that the nonfinal, nonmerits, lateness dismissal in 2009 was "res judicata."

Dortch appealed. The Court of Appeals avoided the issue on appeal, namely, whether res judicata was an erroneous ruling, and ordered that the still pending motion for reconsideration of the lateness dismissal of the 2009 case be determined. After a nonretired judge was assigned, the motion for reconsideration was determined by the nonretired judge and the 2009 dismissal was vacated. The res judicata dismissal of the 2013 case was later vacated.

When Dortch filed the instant appeal, she filed it properly, pursuant to the letter of the applicable statute, in the S.C. Supreme Court. Without explanation, it was sent to the Court of Appeals, with instruction to send it back if the primary issue presented was unconstitutionality. This was always the primary issue presented, regardless of whether it was an issue any court had yet actually ruled on.

The Court of Appeals did not send it back, but never issued any order or determination on the subject of whether unconstitutionality was the primary issue presented.

At oral argument before the Court of Appeals, part of the discussion was on an issue which provided no relief and which was not presented or briefed by either party.

The Court of Appeals later issued the instant unpublished, per curiam, memorandum decision, not stating the factual background and erroneously ruling on four issues as framed by the Court of Appeals. One ruling was that the constitutionality of the prohibition to which Dortch was subjected was not raised and preserved.

Now is not the time to continue to avoid the issue.

There are other instances in which judicial economy and the practicalities of the case counsel against slavish adherence to a rigid preservation rule. Normally, "[e]ven in the context of juvenile criminal matters, South Carolina courts have applied the general error preservation rule." State v. Bonner, 400 S.C. 561, 565 n.3, 735 S.E.2d 525, 527 n.3 (Ct. App. 2012) (aggregating cases). However, a party can properly argue an improper sentence for the first time

on appeal in at least two instances: (1) where "the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"; or (2) where "there is a 'real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue [PCR].'" Id. at 566, 735 S.E.2d at 527.

There is a very real threat that someone may be dead before Dortch can get this issue before a court again. That is not economy. That is injustice.

Dortch fairly raised all present issues to the Circuit Court, and pursued a ruling when the Circuit Court did not rule on them. Neither the City nor the Circuit Court were under any misapprehension of what Dortch meant when she said it was a "violation of due process" to deny her grandfather status for a family home which had lawfully been used as a duplex for decades.

Arguments that they were unaware of the issue are solely for the purpose of ducking a question of which the City has been acutely aware, and that has been well understood from the time the matter entered Circuit Court. It was error to hold that Dortch's central issue on appeal to the Court of Appeals was not raised and preserved.

Lack of Statutory and Rule Authority, Potential State Unconstitutionality, and Abysmally Poor Public Policy in an Intermediate Appellate Court Suppressing the Reviewability of Its Own Decisions by Stating Partial Issues Without Factual Context, Not Ruling on All Issues Conscientiously Presented, and Marking the Decision Unpublished, Nonprecedential and Uncitable in Other Proceedings

In her opening briefing of her petition for rehearing, Dortch has already briefed adequately, without significant response from the City, the lack of statutory and rule authority, potential state unconstitutionality, and abysmally poor public policy in an intermediate appellate court suppressing the reviewability of its own decisions by stating partial issues without factual context, not ruling on all issues conscientiously presented, and marking the decision unpublished, nonprecedential and uncitable in other proceedings. No one can support this as a healthy practice.

The City does, however, support the practice as, according to the City, authorized by rule. The City essentially contends only that the practice is authorized by Rule 220(a), SCACR, if one ignores and treats as meaningless and superfluous, Rule 220(b), SCACR, and all previous statutory history and state constitutional context.

That is, the City asserts that the above-described practice is authorized sheerly because Rule 220(a), SCACR states that "the appellate court" shall make its decisions in writing "by published opinions or memorandum opinions."

The City contends that this provision explicitly authorizes the Court of Appeals, as an "appellate court," to issue, as it may choose, without any strictures, either a published decision or an unpublished decision, and that the latter being, by rule, nonprecedential and uncitable, these features, too, are simply a matter of inclination and choice of the intermediate appellate court.

Such an interpretation renders Rule 220(b), SCACR meaningless and ignores legislative and state constitutional intent, state history, and all common sense. Rule 220, SCACR in pertinent part, states:

> **(a) Opinions.** The appellate court shall make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached. Published opinions shall appear in the Official Reports of the Supreme Court and the Court of Appeals; memorandum opinions shall not be published in the official reports and shall be of no precedential value. Published opinions shall be sent to the official reporter and other reporters or publishers when the time for rehearing has expired or, if a petition for rehearing has been filed, when the petition has been finally decided by the appellate court. The court may affirm, reverse, or modify the decision below or remand all or any issues for further proceedings.
>
> **(b) Decision by the Court.** In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. This rule does not apply to the following:
>
> > **(1)** The Supreme Court may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court

> for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.
>
> **(2)** The Court of Appeals need not address a point which is manifestly without merit.

Rule 220, SCACR.

Rule 220(a) defines a memorandum opinion as something other than a "published opinion." That is, an appellate court shall make its decisions in writing by either "published opinions or memorandum opinions." Rule 220(a), SCACR. Therefore, a memorandum decision is defined as an unpublished decision.

The question of whether, and under what circumstances, the Court of Appeals can issue an unpublished opinion, therefore, depends on whether the Court of Appeals can issue a memorandum opinion. Rule 220(b), SCACR answers that the Court of Appeals cannot do so.

Rule 220(b), SCACR does not use the same term, "appellate court," deliberately used elsewhere in Rule 220. Rule 220(b) only states that the "Supreme Court" may issue memorandum opinions and states that the Supreme Court may only do so if certain requirements are met.

These requirements include requisites that only the Supreme Court can meet, such as that, in unanimous decision, "the Supreme Court determines" that a published opinion would have no precedential value. Note also that even the Supreme Court does not get to decide that it wants the decision to have no precedential effect and simply order it so: the Supreme Court determines whether the decision, by virtue of its own issues, subject matter, and reasoning, would have no precedential value. The issues and the opinion itself, and not the wishes of the court, determine whether the opinion has precedential value.

As to the related question of whether, even if published, a decision of the Court of Appeals must "state in writing, with the reason for the court's decision, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court," the whole rule, rather than part, must again be understood.

A "memorandum opinion" is further defined by negative implication in Rule 220(b)(1), SCACR, which specifies that a memorandum opinion is a decision which fits the exception to the requirement of Rule 220(b), that every decision of an appellate court state in writing, with the reason for the court's decision, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court. A memorandum opinion is therefore an opinion that does not do these things.

The question of whether, and under what circumstances, the Court of Appeals can issue an opinion which does not identify and rule upon all issues fairly presented in the case, and state the reasons for the rulings, therefore, also depends on whether the Court of Appeals can issue a memorandum opinion. Rule 220(b), SCACR answers that the Court of Appeals cannot do so. Only the Supreme Court can do so, and then, only in certain carefully described circumstances that can never be present here.

Conclusion

For all the foregoing reasons, it was wrong for the Court of Appeals to issue a partial decision, issue a clearly erroneous decision, and designate it as unpublished, and its act of doing so should be corrected.

On rehearing and re-issue of the decision, the Court of Appeals should: (1) hold the City's prohibition of Dortch's duplex to be a violation of the due process, equal protection, and takings clauses of the state constitution and the due process and takings clauses of the federal constitution; (2) conclude and declare, in the alternative that there had been any principle saving

the constitutionality of the City's actions, that the area restriction applicable to the property as a duplex is, if anything, 5,000 square feet, and that the property is conforming with this restriction and any other valid area restrictions applicable to it; (3) conclude and declare, in the alternative that there had been any nonconformity, that the use would have been allowed to continue, grandfathered, under statute and under the constitutions; (4) conclude, in the alternative that there had been any nonconformity, that BOZA's decisions on the variance applications were without any findings of fact and therefore without any evidentiary support whatsoever, were legally erroneous, and were an abuse of discretion; (5) conclude, in the alternative that there had been any nonconformity, that BOZA should have granted the variance; and (6) direct the zoning administrator and the building department to grant Dortch a repair permit or repair permits forthwith.

Respectfully submitted,

s/M. Baron Stanton

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FRIEDA H. DORTCH

Date: 8/20/22

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Aug 22 2022
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, Circuit Court Judge

CASE NO. 09-CP-40-01307
CASE NO. 13-CP-40-02159

Frieda H. Dortch, ...Appellant,

v.

City of Columbia, Planning & Development Services/Zoning Division a/k/a City of Columbia Board of Zoning Appeals, ...Respondent.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on this date, served the foregoing **Appellant's Reply to Return to Petition for Rehearing** upon the Respondent by causing a copy to be e-mailed in accordance with current rules to peteb@rplfirm.com . The postal mailing address of the above addressee is:

Peter M. Balthazor, Esquire
P. O. Box 11412
Columbia, SC 29211

s/M. Baron Stanton
M. Baron Stanton

Date: 8/20/22