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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Walton J. McLeod, Circuit Court Judge

Opinion No. 2022-UP-307 (S.C. Ct. App. filed Jul. 20, 2022)  
(Common Pleas Case Nos. 09-CP-40-01307  
and 13-CP-40-02159)

Frieda H. Dortch, ..... Petitioner,

v.

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

**PETITION FOR A WRIT OF CERTIORARI  
AND FOR A WRIT OF MANDAMUS**

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**I. Certification by Counsel for Petitioner that a Petition for Rehearing was Made and Finally Ruled Upon by the Court of Appeals**

By his signature below, counsel so certifies; to wit, it was made August 4, 2022 and ruled upon September 22, 2022.

**II. The Questions Presented for Review, Expressed in the Terms and Circumstances of the Case, but Without Unnecessary Detail**

1. Did the intermediate appellate court err in declaring its four-issue decision to be unpublished, without precedential value, and uncitable, when the case had twenty-nine (29) issues on appeal, including dispositive constitutional issues, and the unpublished truncated opinion impliedly introduced a drastic change in Supreme Court precedent on the rules of issue preservation for such issues?
2. Did the Court of Appeals act contrary to basic requirements for public confidence in the judicial system and the judicial branch of South Carolina government by issuing an unpublished uncitable opinion?
3. Did the Court of Appeals violate South Carolina Code Ann. §§ 14-3-810, 14-3-820, and 14-3-830 by issuing an unpublished decision?
4. Did the Court of Appeals violate Rule 220 of the South Carolina Appellate Court Rules or order of the Supreme Court by issuing an unpublished decision?
5. Did the Court of Appeals violate applicable statutes and err in refusing to issue an opinion stating every point distinctly stated in the case which was necessary for decision, along with the reason for the Court of Appeals' decision?
6. Was the Court of Appeals' determination without basis and completely erroneous, where the Court of Appeals, without discussion, ruled that Dortch's loss of constitutional grandfathered status was not raised to the Circuit Court?
7. 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?
8. Did Dortch raise the unconstitutionality of applying City Ord. §17-275, regarding lot size, retroactively, and the unconstitutionality of applying City Ord. § 17-202(e), regarding loss of grandfathering, to terminate Dortch's vested right to continue the use of the property?
9. Was the Court of Appeals' determination without basis and completely erroneous, where the Court of Appeals determined, without discussion, that no authority supported the

application of anything other than the application of one scope of review for all BOZA decisions in any instance?

10. Is de novo the appropriate scope and standard of review for a question of law in a case challenging the constitutionality of a zoning administrator's termination of vested rights to continue a previously built and commenced, but now nonconforming, use?
11. Do the state and federal constitutions prohibit use of the general "any evidence" scope and standard of review for the challenge to the refusal of the City of Columbia Board of Zoning Appeals ("BOZA") to grant a lot size variance for a structure that has been located on the lot for over seventy-five (75) years?
12. Does the "any evidence" standard for review of separately stated findings of fact of BOZA apply if BOZA makes no separately stated findings of fact, or the findings stated are, rather, conclusions of law, or are not findings on matters germane to the issue decided?
13. Does the "any evidence" standard for review of separately stated findings of fact of BOZA apply if BOZA follows an illegal procedure or if the decision is guided by legal error or is shown to be arbitrary or capricious?
14. Was the Court of Appeals' determination that the property was vacant for 12 consecutive months virtually irrelevant to determining whether Dortch was prohibited from making the repairs, and not dispositive of at least five dispositive issues clearly presented by Dortch and not ruled on by the Court of Appeals?
15. For example, does City Ord. §17-275 by its terms, allow duplexes on lots of 5,000 square feet or more in RG-1 districts such as Dortch's multi-family district?
16. Is City Ord. §17-275 unconstitutionally vague?
17. Is City Ord. § 17-202(e), if it applies at all, applicable only to statutory grandfathering and inapplicable to the independent constitutional grandfathering of Dortch's property?
18. Is City Ord. § 17-202(e) by its terms, inapplicable when, as here, "vacancy" is not intentional and is not accompanied by subjective intent to abandon the use?
19. Is City Ord. § 17-202(e) by its terms, inapplicable to situations involving reconstruction after damage, i.e., situations to which City Ord. § 17-202(f) applies?
20. If City Ord. § 17-202(e) applies, was it error not to equitably toll its operation in light of the City being the one who prohibited the occupancy?
21. Was the Court of Appeals' outright conclusion, without discussing Dortch's arguments and assignments of error, that BOZA committed no error in denying a variance, erroneous and a failure of the Court of Appeals to rule on the actual issues presented on

appeal, particularly when numerous errors influencing BOZA's decision were not addressed by the Court of Appeals at all, and the two issues the Court of Appeals did mention were incorrectly apprehended by BOZA in making its decision – that is, was one of the very issues presented whether BOZA legally misunderstood what could constitute "extraordinary and exceptional conditions," and did the Court of Appeals simply beg the question by affirming that BOZA did not find any such conditions?

22. Was BOZA guided by legal misunderstanding when it determined that the property, as already improved, may not be considered in determining whether "extraordinary and exceptional conditions" are present?
23. Was BOZA guided by legal misunderstanding, and did the Court of Appeals err, when they both based denial of a variance on the principle that "[t]he board may not grant a variance the effects of which would be to allow the establishment of a use not otherwise permitted in a zoning district," the error being that unpermitted uses in this context do not include mere area requirements for uses expressly permitted in a district, that Dortch's use was expressly permitted in the district, and that to apply the principle in the manner stated by the Court of Appeals would nullify the vast majority of variances granted all the time?
24. Were the actions of BOZA in denying the 2013 variance application an abuse of discretion in light of BOZA relying on the mistaken legal opinion of the acting chairman and two others regarding the density and duplex requirements in the district relative to those in other districts, namely, in not understanding that the next "higher" district allowed a duplex on a lot smaller than Dortch's?
25. Did Dortch's property qualify for a variance under a review of the facts?
26. Were the actions of BOZA in denying the 2008 variance application an abuse of discretion (requiring, at minimum, remand) in light of a lack of any findings of fact or conclusions of law?
27. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA's failure to understand that a nonconforming use legally could be, and, here, was, an exceptional condition?
28. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA's error in determining that the intent of the zoning ordinance foreclosed the possibility of any nonconforming use by anybody ever getting a variance?
29. Is City Ord. § 17-112(3), setting forth conditions to be met for a variance, unconstitutionally vague, and when coupled with lack of procedural due process protections in application and with a limited scope of review, a compounded violation of due process?

30. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA’s failure to understand the legally lighter standard applicable to “area variances,” as opposed to “use variances”?
31. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA relying on letters or verbalizations from unqualified, unsworn lay witnesses on matters having no evidentiary support?
32. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA relying on letters or verbalizations from people purporting to speak for unidentified others who were not present?
33. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA relying on ex parte briefings and other materials from the party from whose decision Dortch was seeking relief?
34. Were the actions of BOZA in denying the 2013 variance application an abuse of discretion in light of BOZA letting the party from whose decision Dortch was seeking relief sign the final decision before it was given to Dortch?
35. Were the actions of BOZA in denying the 2013 variance application an abuse of discretion in light of BOZA relying on facts in another proceeding on another date not involving Dortch and at which she was not present?
36. Were the actions of BOZA in denying the 2013 variance application an abuse of discretion in light of BOZA stating as factual findings, things which were actually issues of law and otherwise making no factual findings on the matters actually necessary for determination of the issues to be decided?
37. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA diverging from its own established practice and arbitrarily deciding Dortch’s application differently than the confirmed traditional way of deciding factually similar but less compelling applications?
38. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA considering “density” effects without any actual evidence being received on the subject?
39. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of BOZA considering speculation on propensity for rental, which is legally irrelevant?
40. Were the actions of BOZA in denying the 2008 and 2013 variance applications an abuse of discretion in light of the compound effect of all the irregularities, oversights, biases, arbitrary and discriminatory handling, and legal errors in the proceedings, as referenced in the other issues on appeal?

### **III. Concise Statement of Case, Containing the Facts Material to the Consideration of the Questions Presented**

#### **A. Brief Procedural Overview**

This is a denial-of-building-permit case. It is also a failure-to-decide-issues-presented-on-appeal case. Dortch will attempt to orient this Court to the errors in what the Court of Appeals did do and rule upon. Dortch will also attempt to orient this Court to the numerous other errors of the Court of Appeals implicit in decision of affirmance, when the affirmance is a nonilluminating truncated opinion not addressing vast parts of the appeal which was presented.

For well over a decade, Mrs. Dortch has not been allowed to occupy the 1930s house she grew up in during the 1960s and 1970s. This is because she has not been allowed to repair it since before this litigation began. The house sits as she grows older and older.

In 2009 and 2013, Appellant Frieda Dortch appealed to the Circuit Court, the refusals of the City of Columbia Board of Zoning Appeals (“BOZA”) to provide any relief from the refusal of the zoning administrator to allow Dortch to repair her family home. It was a 1930s up-and-down duplex. Repair would not be allowed unless Dortch physically transformed her historically “duplex” childhood home into a single-family dwelling. This was not only objectionable to Dortch, by highly problematic, expensive and impracticable. Dortch asserted to the Circuit Court, that the prohibition of repair was unconstitutional, and presented other reasons for reversal of BOZA and the zoning administrator.

Late in the long procedural history of these two matters, the 2009 Circuit Court Case and the 2013 Circuit Court Case were consolidated. The Circuit Court affirmed all three decisions of BOZA in 2019.

Dortch timely moved to reconsider, including requesting rulings on issues not addressed by the Circuit Court. Her motion was denied, and on May 15, 2019, she timely served notice of appeal directly to the South Carolina Supreme Court pursuant to statute.

The Supreme Court, without explanation or making a factual or legal determination, transferred the nondiscretionary appeal to the Court of Appeals. The Supreme Court did so with the caveat that the case should be returned to the Supreme Court if the principal issue presented (not ruled upon) was the constitutionality of a statute or ordinance.

The Court of Appeals instead heard the appeal, and affirmed in an approximately one-and-a-half-page opinion.

The opinion listed four issues, not as numbered or framed by Dortch or as framed by the facts and legal issues in the case, but as recast by the Court of Appeals in the abstract. The opinion determined summarily (i) that “no authority” supports a “different standard of review,”<sup>1</sup> (ii) that “12 months of vacancy” supported termination of Dortch’s rights, (iii) that BOZA “did not find” extraordinary and exceptional conditions supporting a variance, and, lastly, (iv) that Dortch had not asserted in her petitions to the Circuit Court, a constitutionally vested right to continue using her duplex.

The three-judge panel of the Court of Appeals simply concurred in this “per curiam”

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<sup>1</sup>The two different measures taken by Dortch -- appeal to BOZA of a 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. Errors of law are generally freely reviewable with zero deference to the lower tribunal. 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 as an “abuse of discretion” despite any “findings.” The standard of review provided in a statute also should not apply when the decision of the body whose decision is under review does not comply with the conditions presupposed by the very same statute. Constitutional principles also require 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.

decision. The Court of Appeals also designated the opinion as “unpublished,” and as therefore forbidden to be cited in other cases.

### **B. Other Material Facts**

The subject house was the historically up-and-down “duplex” Dortch’s mother bought to raise her family in. It was the house Dortch helped her mother pay for, the house Dortch inherited from her mother, the house which was perfectly habitable and which was inhabited by Dortch’s brother in 2004 when it suffered only some minor fire damage, the house Dortch purchased her brother’s partial interest in, and the house Dortch completed the mortgage payments on.

An early attempt of Dortch to get a relatively minor repair permit was apparently denied based on Dortch not residing in the house. In 2008, Dortch was denied a building repair permit for zoning-related reasons, which were obscured to her. She was provided no written decision or citation of authority. (The basis later stated was that lot size requirements had been changed.)

She asked the zoning administrator to confirm her “grandfathered” status, and when he denied the request, she appealed the legality of this decision to BOZA. She also, on two occasions, requested a variance, which the record shows is routinely granted to others in the same circumstances as a matter of standing policy.<sup>2</sup>

Each of these three applications resulted in denials by BOZA and appeals to Circuit Court and other proceedings.

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<sup>2</sup>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 BOZA is reminded 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).

In each instance in which she appealed from BOZA to the Circuit Court, Dortch explicitly raised the unconstitutionality of denying her “grandfather” status.

In her 2009 petition of appeal to the Circuit Court, the very decision she was appealing dealt with grandfathering. She appealed BOZA’s affirmance of the zoning administrator’s determination that Dortch was not allowed, by virtue of the prior legal use of the property, to continue that use. Dortch also appealed to Circuit Court in 2013 and explicitly raised the issue then at page 10 of her appeal, R. p. 233.

In the 2009 petition of appeal to the Circuit Court, regarding the specific unconstitutionality of denying her the previous legitimate use of the property, Dortch 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.) Dortch further stated “Applying the Building and Zoning Code in this manner is fundamentally unfair and denial of due process.” (R. p. 192.)<sup>3</sup> She also expounded on the issue in a supplemental filing shortly afterwards, leaving no question how her petition was to be interpreted.

For years, none of the proceedings reached a decision of the constitutional questions clearly raised by Dortch – or, for that matter, of any of the merits of her appeals. Yet, she continued to raise all matters throughout years of false starts. Years were consumed on issues of timeliness and res judicata, all of which were eventually resolved in favor of Dortch.

In the Circuit Court, Dortch also raised other issues, including issues pertaining to scope of review of inferior tribunals. Some of these issues were also constitutional in nature. The

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<sup>3</sup>The Court of Appeals is thus simply wrong in stating that Dortch did not include the issue. South Carolina Supreme Court precedent for standards of issue preservation was briefed at length to the Court of Appeals, but was not discussed at all in its opinion.

scope of review of the Circuit Court over BOZA decisions is an issue which is nonexistent at the BOZA stage and which could not have been raised until after filing the appeal from BOZA to the Circuit Court.

Dortch eventually did get a merits hearing in Circuit Court. In 2019, the Circuit Court reviewed Dortch's arguments on all three applications Dortch had made to BOZA starting in 2008, including Dortch's arguments of unconstitutionality.

In an order dated March 25, 2019, the Circuit Court denied Dortch all relief on the denial of her vested rights to repair her duplex childhood home. The Circuit Court ruled that Dortch had not raised and preserved the vested rights issues. These were the issues which had been consistently presented in Dortch's briefs and other papers for approximately a decade. The Circuit Court made this issue-preservation ruling without discussion of the reasons, even though issue preservation had been briefed. The Circuit Court also denied Dortch relief on all other issues to the extent there were actual rulings.

After an unsuccessful motion to reconsider (including asking for rulings), Dortch appealed to this Court, the Supreme Court. This Court transferred the case to the Court of Appeals.

On June 22, 2020, Dortch filed her final Appellant's Brief in the Court of Appeals. 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 before the Court of Appeals in 2022, part of the time was consumed with questions regarding a revised ordinance, an issue which the Court of Appeals directed the parties to be prepared to discuss, but which neither party had raised or briefed. Almost zero time was spent on constitutionality or on whether the issue was raised and preserved, but the Court of

Appeals acknowledged that all briefed arguments had been read, would be considered, and were not abandoned. The Court of Appeals asked no questions about constitutionality, grandfathering, vested rights, or issue preservation.

On July 20, 2022, the Court of Appeals issued its Unpublished Opinion 2022-UP-307, stating that Dortch had four (4) contentions, which the court summarily ruled on as described above.

The opinion states no factual background from which the issues arose. The opinion is marked unpublished, and generally addresses only four questions. 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.

The opinion affirmed the Circuit Court, and, among other things, similarly avoided deciding the constitutional issue by summarily declaring that the constitutional issues were not preserved. Although issue preservation had been briefed, the Court of Appeals made this ruling without discussion of the facts or law pertaining the question of issue preservation.

Dortch requested rehearing, a published opinion, and a decision addressing issues omitted by the Court of Appeals. Here, Dortch also presented in the first instance, the reasons why the form of decision of the Court of Appeals violated the Appellate Court Rules, South Carolina statutes, conventions of the South Carolina Constitution, and rules of sound public policy and transparency in government. Dortch also requested a reversal of the Circuit Court as previously outlined.

The Court of Appeals denied rehearing, stating in a short-form order that it had not overlooked anything. However, the Court of Appeals did not address at all, Dortch's request – which had not before been considered or addressed – that the form of appellate decision violated

South Carolina statutes, the Appellate Court Rules, and state constitutional principles.

#### **IV. Direct and Concise Argument in Support of Granting Certiorari**

##### **A. Three traditional reasons for granting certiorari are present.**

“The Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari to review a final decision of the Court of Appeals.” Rule 242 (a), SCACR.

A writ of certiorari “will be granted only where there are special and important reasons.” Rule 242 (b), SCACR. The reasons which will be considered include the following: (1) That “there are novel questions of law”; (2) That “the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court”; and (3) That “substantial constitutional issues are directly involved.” Rule 242 (b), SCACR.

Here, there are novel questions of law, the Court of Appeals’ decision conflicts with prior decisions of the Supreme Court, and there are substantial constitutional issues directly involved, as well as issues important to the transparent and orderly functioning of a responsible government.

Regarding novel questions, while the form and designation of decisions of the Court of Appeals are governed by statute and appellate court rule, there has been no decision of the Supreme Court involving these rules as applied to the Court of Appeals other than an “administrative” order affirming that the Court of Appeals must answer the questions presented. No opinion by the Supreme Court has stated that the Court of Appeals is allowed to issue an unpublished or uncitable opinion in any instance.

Other novel issues include whether the entire scheme of scope of review frequently employed for zoning board decisions is unconstitutional or otherwise incorrect and misapplied.

Other novel, or at least unelucidated, issues include the fact that already improved property is considered in its already improved and already used condition for purposes of considering exceptional circumstances authorizing a variance.

Conflicts with Supreme Court precedent include the fact that, in order to affirm the denial of Dortch's vested rights, the Court of Appeals ignores, and therefore abrogates, the Supreme Court's holding in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) that appellate courts are to be "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner."

The result is that the affirmance by the Court of Appeals contradicts the vested-rights rules of the Supreme Court in James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955), and Conway v. City of Greenville, 254 S.C. 96, 173 S.E.2d 648 (1970), the U.S. Supreme Court's guidance in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and the Court of Appeals' own cases, Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (Ct. App. 1986), F.B.R. Inv'rs v. Cty. of Charleston, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991), and Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000).<sup>4</sup> These cases are part of the South Carolina law of property and zoning.

The Court of Appeals also ignores, and therefore abrogates, established law pertaining to the nonconforming uses and exceptional circumstances. See, e.g., Black v. Lexington Cnty. Bd. of Zoning Appeals, 396 S.C. 453, 460-461, 722 S.E.2d 22, 26 (Ct. App. 2012)(concluding "as a

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<sup>4</sup> Under the state constitution, "[a] landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety

matter of law,” despite the fact that the land’s dimensions, buffering and setback requirements also applied generally to other property in the area, that the property had extraordinary and exceptional condition because the fabrication facility existed prior to the zoning of the area), reh. den. (2012).

In ignoring issues presented and materials in the record, the Court of Appeals also impliedly ruled erroneously against precedent for the doctrine of equitable tolling as applied in Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011), Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008), and Hooper v. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (Ct. App. 2008). Instead of ruling on these issues, the Court of Appeals made either made generalized conclusory rulings or reframed questions so as to avoid addressing the questions entirely. This should not shield the affirmance from being reviewed.

Substantial constitutional issues directly involved include Dortch’s vested right to continue a nonconforming use. Also involved are the proper scope of review of BOZA decisions under the Administrative Procedures Clause of the South Carolina Constitution and other guiding constitutional principles, and constitutionally contemplated mores and conventions for reporting and publishing of appellate opinions.

The foregoing are some, but not all, of the novel, contradictory, and important issues represented by the decision of the Court of Appeals. The sweeping omissions and consequent errors on distinct and important legal principles present an acute need for a prohibition against designating such opinions as “unpublished.” Certiorari should be granted.

**B. This Court should rule on the form of decision of the Court of Appeals and, if necessary, issue a writ of mandamus requiring a revised opinion, because the**

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or welfare.” Vulcan (quoting F.B.R. Inv'rs v. Cty. of Charleston). See also James v. City of Greenville.

**intermediate appellate court's issuing a one-and-a-half-page, unpublished non-memorandum decision, in a case with twenty-nine (29) issues on appeal, and thus commanding that the decision be uncitable and without precedential value, was unconstitutional or contrary to the basic requirements for public confidence in the judicial system and in the judicial branch of South Carolina government, violated statutes enacted by the General Assembly, violated the South Carolina Appellate Court Rules, and violated an order of the Supreme Court. (Questions 1-5)**

**1. It was error for the Court of Appeals to designate the opinion as unpublished and uncitable.**

Providing for the publication of Supreme Court and Court of Appeals decisions is vested by the state constitution in the General Assembly. S.C. Const. (1895) Art. V, § 25.

By statute, South Carolina adopted and continued “in full force and effect,” “[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State” in the same manner as before this adoption. S.C. Code Ann. §14-1-50 (1976). Stare decisis (“letting the decision stand,” and following it as precedent in future cases) has clearly been part of the English common law for centuries. See, e.g., Bradley Stewart Chilton, “Star Trek” and Stare Decisis: Legal Reasoning and Information Technology, 8(1) Journal of Criminal Justice and Popular Culture, 25-36 (2001).

Stare decisis is not merely part of the common law. Rather, stare decisis is the cause and the mother of the common law. It was stare decisis which built, reconciled and recorded the common law and distinguished the common law from Roman codes and civil law starting after the Norman Conquest in 1066.

The South Carolina Constitution and political custom recognize legal and judicial tradition based on precedent, equal application of laws, and limits on judicial lawmaking or abrogation of law. The Constitution specifically contemplates the publication of the decisions of the Supreme Court and Court of Appeals. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9),

S.C. Const. Art. I, § 3, S.C. Const. Art. I, § 23, id., Art. I, § 9, id., Art. I, § 8, id., Art. I, § 7, and id., Art. V, § 25.

Pursuant to the Constitution, the General Assembly prescribed laws pertaining to the issuance and publication of decisions, and pertaining to rulemaking and lawmaking by the Supreme Court. See S.C. Code Ann. § 14-3-810 (implying presumption of General Assembly that all opinions will be published), S.C. Code Ann. § 14-3-820 (same), S.C. Code Ann. § 14-3-830 (same), S.C. Code Ann. § 14-3-940 (manner of establishing court rules with approval of General Assembly), S.C. Code Ann. § 14-3-950 (same), S.C. Code Ann. § 14-8-250 (points stated in the case to be stated in opinion and decided with reasons being stated), and S.C. Code Ann. § 18-9-280 (points stated in the case to be stated in the appellate opinion and decided with reasoning stated; memorandum decisions allowed only when certain determinations are unanimously made by S.C. Supreme Court).

Rule 220, SCACR was established pursuant to the procedure of S.C. Code §§ 14-3-940 and 14-3-950. Rule 220 is partly repetitive of state statutes, S.C. Code §§ 14-8-250 and 18-9-280. Neither statute has been repealed.

Only memorandum opinions can be unpublished opinions. Rule 220(a), SCACR.<sup>5</sup> Only unpublished opinions are declared by rule to be without precedential value. Rule 220(b)(1), SCACR; Rule 268(d)(2), SCACR. Therefore, only memorandum opinions can be declared to be

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<sup>5</sup>“The appellate court shall make its decisions in writing by published opinions or memorandum opinions.” Rule 220(a) (emphasis added). An “unpublished” decision can be defined as a memorandum decision which, even if available on the internet, is not published in “the Official Reports” or designated for inclusion in a hard-bound volume. See Rule 220(a), SCACR, and S.C. Code Ann. §§ 14-3-810, 820 and 830.

Rule 220(a), SCACR uses the term “memorandum opinion” in literal contradistinction from the term “published opinion,” making clear that all opinions are to be published decisions unless they are memorandum decisions.

without precedential value. Further, only unpublished opinions are declared by rule to be uncitable – that is, forbidden to be cited or argued by counsel. Rule 268(d)(2), SCACR.

Therefore, only memorandum decisions are uncitable.

A “memorandum opinion” is defined by Rule 220(b)(1). It is defined as a decision that qualifies under Rule 220(b)(1) for exception to the rule that the decision state in writing, and decide, and state the reason for, “every point distinctly stated in the case” by the appellant. Rule 220(b), SCACR.

The Court of Appeals is not allowed to issue memorandum opinions.<sup>6</sup> The opinion in the instant case was not a memorandum opinion. It was therefore error for the Court of Appeals to designate the opinion as unpublished and uncitable. Not only should the error be corrected by appropriate order, but the opinion should be regarded as precedent in other cases and should be ordered published for public application and scrutiny, regardless of its determinations.

**2. It was error for the Court of Appeals to not identify and decide all the issues distinctly numbered and presented.**

“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.” Rule 220(b), SCACR; S.C. Code Ann. §18-9-280 (1985); *id.*, §14-8-250 (Supp. 1992)(emphases added). “Must” and “shall” are generally regarded as imperative,

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<sup>6</sup>In South Carolina, only the Supreme Court can issue memorandum decisions. Rule 220(b)(1), SCACR. By its own convention, in 1993, the Supreme Court issued memorandum decisions only sparingly, even in the limited instances in which it was authorized to do so. In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). The Court of Appeals defended its issuance of unpublished decisions in Lanham v. Blue Cross and Blue Shield, 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000), on the basis, stated in a footnote, that it had been issuing unpublished decisions.

mandatory, directives, not discretionary ones.

The Court of Appeals' opinion failed to identify and decide at least twenty-four (24) issues which were distinctly presented and argued on appeal, most of which were dispositive in either requiring affirmative relief for Dortch or a reversal and remand.<sup>7</sup>

The Supreme Court and the Court of Appeals are treated differently under Rules 220(b) and (c), SCACR and under analogous statutes. This difference is vital to the orderly functioning of the "Unified Judicial System" of Art. V. § 1 of the 1895 Constitution of the State, and is essential to meaningful opportunity for review of erroneous decisions by the Court of Appeals.

The Court of Appeals' decision violates Rule 220(b) in all three particulars. It does not disclose all the issues raised on appeal, it does not decide the skipped issues, and it obviously does not provide reasoning on the skipped issues. It also provides no actual reasoning even on material issues which it does identify, such as issue preservation. In this manner, the opinion tends to further evade review.

Rules 220(b)(1) and 220(b)(2) provide limited exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a "memorandum

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<sup>7</sup>These issues included issues on appeal numbered "2" (de novo review of questions of law), "4" (interpretation of Ord. 17-275), "5" (unconstitutional vagueness of Ord. 17-275), "6" (scope of Ord. 17-202(e)), "7" (applicability of Ord. 17-202(e) to nonvolitional vacancy), "8" (inapplicability of Ord. 17-202(e) when Ord. 17-202(f) applies), "9" (equitable tolling), "11" (standard of review of decisions not meeting standard required for decision), "12" (standard of review when illegal procedure is followed or when guided by legal error or caprice), "14" (reversability for lack of findings and conclusions), "15" (decision guided by error as to what can constitute exceptional condition), "16" (decision guided by legal error as to "intent of zoning ordinance"), "17" (unconstitutional vagueness of variance criteria applied by inferior lay tribunal not being saved by abjectly insufficient scope of review), "19"- "25" and "27-29" (distinctly stated, material, procedural, legal, evidentiary, and procedural-due-process irregularities requiring, at minimum, reversal and remand), and "26" (subjective caprice and denial of equal protection in granting variance as a matter of standing policy to others similarly situated).

opinion.” Rule 220(b)(1) provides four exceptions, which require unanimity of the 5-member Supreme Court, and which are not for the intermediate Court of Appeals.<sup>8</sup> 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.<sup>9</sup> Rule 220 and the applicable statute therefore required that the Court of Appeals state its reasoning on each issue.<sup>10</sup>

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<sup>8</sup> In 1993, the Supreme Court of South Carolina issued an order regarding issuance of memorandum decisions by the Court of Appeals. See In Re Memoradum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). However, the order did not arise from an advocated appeal and the order was not listed in the Court Register pursuant to S.C. Code Ann. § 14-3-940(a). Nor was the order submitted to the legislature pursuant to S.C. Code Ann. §§ 14-3-940(b) and 14-3-950. In the order, the Court advised of its opinion as to what level of detail was sufficient to prevent a Court of Appeals decision from constituting a “memorandum opinion” disallowed by both statute and rule. In Re Memorandum Decisions by Court of Appeals. The order required at least an identification of all the issues by number, and required reasoning allocated to each issue. As to the issues not discussed, the opinion of the Court of Appeals in the instant case did not meet the standards set out in the Supreme Court’s order.

Even if the Court of Appeals were unwisely to be considered eligible to invoke the Rule 220(b)(1) exceptions to the requirement of issuing a “published opinion,” none of the four stated exceptions would apply in this case, and a “published opinion” would still be required. The exceptions pertain to findings of fact in a bench trial, JNOV, findings of fact of administrative agencies, and complete absence of error of law. Rule 220(b)(1), SCACR; S.C. Code Ann. §18-9-280 (1985).

<sup>9</sup>Note also that even the Supreme Court does not get to decide that it wants the decision to have no precedential effect. The Supreme Court is not allowed to determine that the decision “shall have” no precedential effect, and simply order it so. Rather, it is a subjunctive concept -- 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 simply the wishes of the issuing court, determine whether the opinion has precedential value.

<sup>10</sup>Both Rule 220(b)(2) and the applicable statute provide one exception which is available to the Court of Appeals. The limited exception is made for “a point which is manifestly without

**3. Even if constitutionally enabled statutes and written rules of appellate procedure did not prohibit the Court of Appeals from issuing an unpublished uncitable decision and refusing to identify and decide issues distinctly stated in the case on appeal, the subject practices are erroneous as bad public policy.**

Depriving an appellate decision of publication and precedential effect by judicial fiat is outright destruction of stare decisis. South Carolina's constitutionally and statutorily recognized judicial tradition of written appellate decisions, followed for all people as legal precedents, was already in the vanguard of governmental transparency and responsibility before fairly recent measures taken by the United States Supreme Court with related issues in the federal appellate judicial system.<sup>11</sup>

Neither the South Carolina Constitution, nor the statutes enacted pursuant to it, nor the rules of appellate procedure established pursuant to statutory rule-making procedure, authorize as an expedient, bulk intermediate appellate resolution by unpublished fiat.

Objections to uncitability and deprivation of precedential value in other jurisdictions have been based on First Amendment grounds, due process grounds, violation of Article III powers,

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merit." Rule 220(b)(2), SCACR; S.C. Code Ann. § 14-8-250 (Supp. 1992). None of the twenty-nine distinct points presented by Dortch to the Court of Appeals were identified by the Court of Appeals in its decision as manifestly without merit – they all presented precedent and arguments of error by the Circuit Court.

<sup>11</sup>See Federal Rule of Appellate Procedure 32.1 (abolishing, in the wake of over a decade of protest, the uncitability of unpublished decisions from 2007 forward). Quick references, with links, for the background and status of Fed. R. App. P. 32.1 are currently available at the URL, <http://www.nonpublication.com/32.1.HTML> . Protest over the practice of allowing obscure or oblique staff-generated summary opinions, and not requiring them to be published, not allowing citation of them, and not regarding them as law applicable to others has generated more writing than can be conveniently cited, including over 150 presentations, law review articles and journal articles. These include 155 resources, which even in a readable footnote, would require about twelve pages to list; these can be directly accessed by links found at the URL, [www.nonpublication.com/ARTICLES.HTML](http://www.nonpublication.com/ARTICLES.HTML) .

pure logic, public policy, and loud outcry.<sup>12</sup>

Designating an erroneous opinion as unpublished and “without precedential effect” perpetuates the errors by shielding the opinion from examination and correction. This effect is heightened if the opinion also does not identify all the issues which were raised on appeal. Such a measure should not be allowed to lessen the prospects of further judicial review on the grounds that, as an unpublished decision, the opinion is unlikely to do much further harm. 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 reviewed.

**C. The Court of Appeals erred on the vested rights issue itself simply by not ruling on it, and similarly erred on all the other dispositive issues by not understanding them, not identifying them as being presented, or not deciding them at all. (Issues 6-40)**

The holding that Dortch did not preserve the issue of her constitutionally vested right to continue a prior conforming use is clear error. Like the other rulings of the Court of Appeals, the ruling evinces a failure of the Court of Appeals to apprehend the actual facts of the matter, the actual issues presented, and much of the applicable law.

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<sup>12</sup> One citizen formed his own organization, Committee for the Rule of Law, and commented as follows:

Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.

FRAP 32.1 is essential to preserve the integrity of not only our judicial system, but our entire system of government.

Kenneth J. Schmier's comment on Proposed Fed. R. App.P. 32.1 to the Appellate Rules Committee. (Available currently by link in <http://www.nonpublication.com/32.1.HTML>.)

Dortch's up-and-down duplex has been such a building for about 60-75 years. The "property" is not a vacant lot – the building 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 and denied her grandfathered status. (See undisputed facts in Ap. Brf. at 8-13.)

She was required to appeal to BOZA, and was expected to appear, and respond to everything she could discover 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. The appeal from BOZA lies in the Circuit Court, and the appellant does not receive the BOZA record until after appealing to Circuit Court.

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 was changed to a zoning district which did not permit duplexes. Her house is in a district zoned for duplexes, as well as 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" 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.

Interpretation of an ordinance is a question of law. It is 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.

Dortch’s reading of the Section 17-275 is that the chart actually authorizes her duplex and lot size. Dortch also clearly argued that, otherwise, Section 17-275 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 Dortch presented.

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, not upon vacancy, but upon whether damage to the structure was above or below a 75% measure.

Dortch’s reading of Section 17-202(f) is that 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 this dispositive issue Dortch presented.

Another ordinance, City of 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.<sup>13</sup> 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 the statutory right to “reestablish” a previously disestablished nonconforming use.

Dortch’s reading of Section 17-202(e) is that § 17-202(e) does not apply because Dortch’s situation involved reconstruction after damage, to which Section (f) is applicable instead. Additionally, Dortch contended that 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 these dispositive issues Dortch presented.

Dortch explicitly argued that if Section 17-202(e) applied (Dortch contended it did not), and if some separate provision or act also disestablished the fact that Dortch’s property was improved with a duplex (Dortch contended that nothing had done so), Section 17-202(e) would then, and only then, allegedly prevent a statutory right to “reestablish” the use if another condition were met. The property would also have to have been “vacant” for a continuous

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<sup>13</sup>Notably, although Dortch was burdened with appealing to BOZA in order to get permission to repair her own property (rather than the authorities bearing the burden of stopping her), 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.

period of 12 months.

Dortch contended that Section 17-202(e) was not capable of destroying her constitutional right to continue the prior lawful use. Once she learned of Section 17-202(e) as the basis for denying her rights, Dortch also presented the issue of equitable tolling to the Circuit Court. Dortch's argument of equitable tolling, like the constitutional issue, was an issue raised by Dortch but not ruled on by the Court of Appeals.<sup>14</sup>

## **V. Conclusion**

This case presents special and important issues concerning zoning, constitutionally vested rights, scope of review, statutory construction, and civil and appellate procedural law in South Carolina. The unpublished opinion does not qualify under existing law to be unpublished or uncitable and this Court should so state in its ruling. The opinion illegally omits issues presented on appeal.

On certiorari, this Court should additionally: (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

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<sup>14</sup>Dortch argued that the 12-month period of alleged vacancy the City relied on should be equitably tolled, because it was undisputed that the only continuous 12-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 explicitly presented in Dortch's appellate briefs to the Court of Appeals, the Court of Appeals' determination there was a continuous 12-month period of "vacancy" is irrelevant. 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.

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.

The decision of the Court of Appeals should be published and the decision of this Court should also be published, whether it be reversal or affirmance. To the extent procedurally required, a writ of mandamus or other appropriate writ should be issued to the Court of Appeals requiring compliance with Rule 220, SCACR.

Respectfully submitted,

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