THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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 BRIEF

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STATEMENT OF ISSUES ON APPEAL

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?

2. 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?

3. 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?

4. 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 district?

5. Is City Ord. §17-275 unconstitutionally vague?

6. 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?

7. 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?

8. 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?

9. 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?

10. 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?

11. 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?

12. 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?

13. Did Dortch's property qualify for a variance under a review of the facts?

14. Were the actions of BOZA in denying the 2008 variance application an abuse of discretion in light of a lack of any findings of fact or conclusions of law?

15. 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?

16. 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?

17. 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 a limited scope of review, a compounded violation of due process?

18. 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"?

19. 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?

20. 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?

21. 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?

22. 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?

23. 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?

24. 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?

25. 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?

26. 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?

27. 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?

28. 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?

29. 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?

STATEMENT OF THE CASE

I. Short, General Statement of Uncontested Facts and Procedural Background.

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, which was a 1930s up-and-down duplex, without physically transforming it into a single family dwelling.

Late in the long procedural history of these two matters, Circuit Court Case 09-CP-40-01307 ("the 2009 case"), and Circuit Court Case 13-CP-40-02159 ("the 2013 case") were consolidated. The Circuit Court affirmed all three decisions of BOZA, Dortch timely moved to reconsider, her motion was denied, and on May 15, 2019, she timely served notice of appeal to the South Carolina Supreme Court. The Supreme Court transferred the case to the Court of Appeals, with the caveat that it should be returned to the Supreme Court if the principal issue was the constitutionality of a statute or ordinance.

II. Additional, Specific Statement of Uncontested[1] Facts and Procedural Background.

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[1]This Statement of the Case is supported with references to items in the ostensible "records" of the BOZA proceedings. The "records" are irregular in numerous respects, and present timing and notice issues.

It is uncontested that at neither of the first two BOZA hearings in 2008 was Dortch provided or shown materials which were provided to BOZA by the zoning administrator or others, which were never introduced into evidence, and which now nevertheless appear in the putative "record."

The items not provided to Dortch at the 2008 hearings include: unsworn, hearsay, "public comment" letters; photographs; an ex parte "case summary" in which the zoning administrator briefs his position on issues to BOZA; diagrams; plats; putative inspection logs; putative utility records; and handwritten notes or other things.

At no time were they formally identified, or offered into evidence, or admitted into evidence. Cf. United States v. Abilene & Southern Railway, 265 U.S. 274 (1924) (finding due process is violated when tribunal takes notice of administrative records not introduced into evidence during the hearing); Johnson v. Johnson, 288 S.C. 270 341 S.E.2d 811 (Ct App. 1986)(Bell, J.)(judge erred in using appraisals in his decree where appraisals were not introduced into evidence and the parties were not given an opportunity to cross-examine the appraiser). BOZA had an ex parte briefing and other hearsay materials Dortch did not have: for example,

"Ms. Webber-Akre stated the Board has notes from the inspector to go with." (Rec. p. AA-000039, R.p. 448.)

The ostensible "record" of the 2008 BOZA proceedings was also not received by Dortch until after January 5, 2018, long after Dortch filed a petition to appeal the 2008 BOZA proceedings to Circuit Court, after Dortch pursued an application to BOZA in 2013, and after Dortch filed a petition to appeal the 2013 BOZA proceedings to the Circuit Court.

In December 2018, the City also provided as part of a brief in Circuit Court, a set of 2/11/97 rules of procedure adopted by BOZA which do not appear to be published. (See City December 11, 2018 Brief in 2009 case, Exh. 1, R.pp. 513-517 .) Dortch did not receive these rules until December 11, 2018.

The "minutes" contained in the "record" of the 2008 BOZA proceedings reflect that only at the very inception of the meeting for numerous different matters to be heard that day, after calling the meeting to order, "[t]he sworn testimony of those intending to speak was taken." (See, e.g., rec. p. V-000027, R.p. 405.) Comings and goings are not reflected in the minutes and those being sworn are not identified. Testimony was not in fact taken at the inception. There is no "testimony" described as such in the "record."

The "minutes" contained in the "record" of the 2008 BOZA proceedings are also not signed by the chairman in accordance with sections I(6), I(7) and V(6) of BOZA's 2/11/97 rules provided on December 11, 2018.

People, including people from the neighborhood and outside the neighborhood, were allowed to speak, or just speak up, or send letters and offer opinions without the minutes showing that they were ever actually sworn. None of the people from inside and outside the neighborhood demonstrated under oath, actual ownership of an identified property as required by 2/11/97 BOZA rule, § II(7). The one most vocal, Mr. Riley, consistently identified himself only as a "resident" in 2008.

The 2008 "records" do not contain a written decision of the City actor from whose action Dortch was seeking relief. Nor do they contain copies of the written decisions of BOZA.

Rather than a "record" of the 2013 proceedings, something referred to as a "copy of the proceedings" was filed, uncertified, as "Exhibit D" to the City's April 30, 2013 motion to dismiss the 2013 Circuit Court case on the grounds of res judicata.

It is also uncontested that until attending the BOZA hearing on February 12, 2013, Dortch did not have the four-page unsworn, hearsay, ex parte agenda and "case summary" of the zoning administrator to BOZA dated seven (7) days earlier. At the hearing, she still did not receive the seventeen-page version appearing in the "copy of the proceedings," with attached unsworn letters, unauthenticated photographs diagrams, plats, etc., other than any of these which were authored or submitted by Dortch herself. At no time were any of these things formally identified, or offered into evidence, or admitted into evidence. It is unknown if there were other things in BOZA's possession, as no 2013 "record" was ever filed by the City as such.

The "minutes" contained in this "copy of the proceedings" do not reflect that anyone at all was sworn. (Cf. rec. pp. BOZA 003-008, R.pp. 304-309.)

The "minutes" contained in this "copy of the proceedings" also are not signed by the chairman in accordance with BOZA's 2/11/97 rules provided on December 11, 2018.

The 2013 "copy of the proceedings" does not contain any separate written denial of a building permit by the building official or zoning administrator stating the reasons for denial or conditions for granting. The March 2013 decision of BOZA from the February 2013 hearing

A. Introduction.

Appellant Dortch's childhood home of the 1960s was an up-and-down duplex. It had been built on Heidt Street in Columbia, apparently as a duplex, in the 1930s. It had been physically configured as a duplex at the time Dortch's mother rented a unit for her family, and then, working for modest wages, took out a mortgage, borrowed money, and bought the entire house in the 1960s. It was used as a duplex all the time Dortch grew up in it, with relatives living in the other unit.[2]

Dortch and her brother, Wayne Hatten, inherited the duplex when their mother died. At the time, it was in an "RG-1," "General Residential-1," zoning district, which specifically allowed not only duplexes, but also quadraplexes and other multi-family residential structures.[3] The street on which the house was located had several other duplexes on it as well.

Although Dortch's brother, who had returned from submarine service in the military, lived in the home, Dortch paid the mortgage and the taxes. In April of 2004, a fire caused by a third party damaged a small part of the home. Although it remained damaged and charred on a back portion, it thereafter continued to be occupied, primarily by Dortch's brother, until at least November 1, 2005. City records of water meter readings show active use as late as August 10, 2005 (rec. p. AA-000024, R.p. 433). The City of Columbia states that after communications

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refers to BOZA basing its decision on reviewing a matter at a January 2013 hearing at which Dortch's matter was not considered and at which Dortch was not even present.

[2]As late as May 21, 1996, the City had specifically granted Dortch a permit to make interior and exterior repairs to the house with a present use described as "duplex." (City of Columbia Zoning Permit dated May 21, 1996, rec. p. AA-000018, R.p. 427.)

[3]The house was also in a "DP," Design Preservation area, meaning that the house or the district was in an "historical overlay" with supplemental restrictions on architectural changes, including restrictions and prohibitions on demolition.

with Hatten about his occupancy and the unrepaired damage, Hatten called on October 12, 2005 and stated he would be out by November 1, 2005. (Putative minutes, BOZA 2009 rec. pp. AA-000001 to AA-000002, R.pp. 410-411, and see putative log of City Department of Rehabilitation, rec. pp. AA-000013 to AA-000014, R.pp. 422-423.)

On November 5, 2005, the City posted the property and has continuously thereafter, currently for over fourteen years, prohibited occupancy by anyone. (See id. (stating property was posted November 7 with placards prohibiting occupancy), but see rec. pp. AA-000034 to AA-000035, R.pp. 443-444 (containing pictures date stamped November 5, showing placards posted).

Dortch thereafter continued to pay the mortgage and taxes and deal with the City, and in late 2007 or 2008, eventually was able to acquire her brother's interest in the home.[4]

B. Proceedings By and Before the Building Department and Zoning Administrator.

When Dortch applied, as owner, pro se, for a building permit to fix the damage, the zoning administrator, in interplay with the building official, denied her a permit for any repairs at all, whether exterior or interior repairs. The denial was not based in any way on the nature or extent of the damage she sought to repair.

The zoning administrator eventually asserted the house was not allowed to exist as a duplex. He alleged that a permit could not be granted unless the house were physically transformed into a single family dwelling.

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[4]There is indication in the record that an initial attempt by Dortch to obtain a building permit was denied because she did not reside in the property. (Dortch Aff. ¶¶ 12-17, R.pp. 201-202.) It is unclear when this occurred and whether ownership was also raised at this time or others.

He did not hold a hearing, did not present Dortch with evidence, did not produce any information on alleged vacancy periods at the property, and did not issue any written decision whatsoever at the time stating any of this. (Cf. transmittal letter, notice, certification, putative rec. pp. V-0000001 to V-000031 and AA-000001 to AA-000055, and certificate of service, R.pp. 377-465 (containing no decision of zoning administrator or building official).)

The City, at some point, eventually contended that the duplex did not conform to a City ordinance establishing minimum lot sizes for duplexes. The City, at some point, also eventually contended that, under another City ordinance, "vacancy" terminated the "grandfathered" status of the property. The City issued no written decision at any time prior to Dortch's later appeal to BOZA, stating any of this reasoning, its source, or any statute.

Thus, it at least later appeared that the City based its position on (1) an ex post facto ordinance stating lot area requirements for duplexes, and (2) an ordinance stating the effect on statutory[5] grandfathering, of "vacancy."

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[5]In addition to grandfathering assured by the constitutions, many zoning ordinances specifically provide grandfathering by statute. However, neither a municipality nor the General Assembly has the authority to establish the limit or extent of grandfathering which is independently assured by the state or federal constitution. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970). These constitutional rights are also referred to as "vested rights." There is, thus, a distinction between statutory grandfathering, and constitutional grandfathering. "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 local government's statutory exemption of certain existing or planned land uses from new legislation may be viewed as the statutory "grandfathering" of the uses. Grayson P. Hanes and J. Randall Minchew, On Vested Rights to Land Use and Development, 46 Wash & Lee L. Rev. 373 at 378-79 (1989). While this "statutory" grandfathering of rights may allow affected landowners the same exempted land uses as would true constitutionally vested rights, i.e., "constitutional grandfathering," statutorily grandfathered rights are simpy the result of legislative grace and do not possess the constitutional underpinnings of vested rights, or constitutional grandfathering. Id.

In order to protect property owners from retroactive application of zoning ordinances that

Also without explaining any conflict with the historical overlay district restrictions which existed, the City informed Dortch that the only way to get a repair permit was for Dortch to re-apply for a permit to physically transform the duplex into a single-family house. It is uncontested that such a transformation would require, among other things, cutting open and removing portions of the upstairs floor, installing interior stairs with attendant structural support and railings, changing the upstairs and downstairs floor plans, removing the front exterior stairs, adding railing to the upstairs porch, removing the back exterior stairs Dortch spent money to build under an understanding later reached with the City, changing separately metered utilities, dismantling one of the kitchens, and dealing with any plumbing or other issues uncovered in the course of the work. The City issued no written decision at the time stating any of this.

Although the City would not allow Dortch to make repairs, the City prosecuted Dortch for not making repairs. (See, e.g., rec. p. BOZA 008, 2013 Ct. App. Rec. p. 102, R.p. 309 (noting "open case").)

In May 2008, after a period of attempting to deal with City "staff" on the matter, accommodating their illnesses and other delays[6], Dortch made written application directly to the zoning administrator to have grandfathered status recognized. She stated, "I am requesting to

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> destroy existing uses, the law recognizes the nonconforming use. The term, nonconforming use, refers to certain property which is excepted from the application of zoning regulations. Professor Rathkopf, cited by the court in *Conway,* explains the reason for such an exemption: If, prior to the adoption of a zoning restriction (either in an original zoning ordinance or an amendment thereto) property was used for a then lawful purpose or in a then lawful manner which the ordinance would render thereafter prohibited and nonconforming, such property is generally held to have acquired a vested right to continue such non-conforming use or non-conforming structure.

Gerald Berendt, Zoning- Non-Conforming Use, 22 S.C. L. Rev. 844 at 845 (1970)(footnotes omitted)(available, courtesy of The John Marshall Institutional Repository, http://repository.jmls.edu/facpubs/463).

[6]"The time frame was not her fault; she began the process with the City Staff, who became ill and the case was put on hold." (Rec. p. AA-000038, R.p. 447.)

maintain grandfather status on the residents at 825 & 825½ Heidt Columbia, S.C. 29205- RG1-DP. This property has been listed as 825 & 825½ since 1968 that I can attest and has been occupied by family members (i.e. mother, brother)." (Rec. p. AA-000019, R.p. 428).

Her request was either denied or never granted. The City issued no written decision at the time stating any reasoning or support for not granting the request, and none appears in the putative record of the 2008 proceedings filed by the City in January 2018.

C. Proceedings Before BOZA in 2008.

Dortch thereafter appealed, pro se to BOZA, the zoning administrator's verbal decision, embodied in the building official's summary denial of a building permit, and the zoning administrator's verbal decision or indecision on the application she had made directly to him. (See Appeal for Administrative Review, rec. p. AA-000007, R.p. 416.)

In her filing, she contended that the zoning administrator erred by "denying an application," "for a compliance certificate - nonconformity," and "other – Granting this property as a duplex." (Id.) She elaborated that the zoning administrator's decision and reason was "Denied Zoning Permit to Renovate as Duplex," and that he erred in that "Grandfather status exist because this property was occupied after the fire." (Id.) She added that she was aggrieved in that "to convert into single family would completely alter the structure of the house – hardship /loss of property." (Id.)

On June 11, 2008, Dortch also applied to BOZA for a variance. (Rec. pp. V-000005 to V-000006, R.pp. 383-384.)

The top of the June variance application is the only record of a written statement of the zoning administrator of the basis for not letting Dortch fix her house. However, it is not signed by him or even attributed to him on the form. There, some time after Dortch had first been

denied permission to fix her house, in handwriting contrasted from Dortch's, and employing references and symbols nowhere used by Dortch, he states: that the ordinance classifies the structure as "two family"; that the house is "3400 [symbol for square feet]"; that there are four (4) parking spaces upon the property; and that ordinance section "17-275" requires "10,000 [symbol for square feet] for a duplex." He states, instead, that the "proposed" lot size is "7,644 [symbol for square feet]." (Id.) The Circuit Judge's Order at 4 and 11 (R.pp. 42 and 49), incorrectly attributes these statements to Dortch.

There is no reference by the zoning administrator to any ordinance other than § 17-275. For clarity, Dortch did not "propose" a duplex or "propose" the lot size. The duplex was already a duplex and her lot was already the size it was throughout all this history and she had no way to change it.

In the portion of Dortch's 2008 pro se variance application filled out by her, she tracked the five statutory factors for consideration. She stated that the exceptional conditions that pertain to the property which she sought to use as a duplex were that it was already constructed; it was not constructed by her; it was not constructed while a prohibitory ordinance was in effect; and it was, physically, a duplex. She stated, "Builted as Duplex, maintained as Duplex, costly for conversion – ecomical distress." (Id.) She stated these conditions did not generally apply to other property in the area. (Id.) She stated that because of these conditions, the zoning ordinance unreasonably restricted the use of the property, that it was not reasonable to require "convert to single family." (Id.) She stated that granting a variance would not be a substantial detriment to adjacent property or to the public good, and that the multifamily character of the district would not be harmed, in that "No property builted, and always maintained as duplex, must restore natural character of property." (Id.) She stated the proposal was in harmony with the purpose

and intent of the zoning ordinance, and would not be injurious to the neighborhood or otherwise detrimental to the public welfare. (Id.)

On July 8, 2008, BOZA heard Dortch's June pro se application for a variance. On September 9, 2008, BOZA heard her pro se appeal of the zoning administrator's decisions.

At each of the hearings, Dortch was provided no materials in advance or upon walking in. At no time were any materials formally offered into or received into evidence. The minutes do not reflect who came and went or which witnesses, if any, were actually sworn. Dortch had only what she had filed or prepared and walked in with.

Dortch's 2008 appeal to BOZA was denied in a letter dated January 16, 2009. It stated no findings of fact whatsoever. The letter stated that "based on the application, submitted documents and testimony considered," none of which were identified, "the Board of Zoning Appeals hereby denies your Application." (R.p. 365.)

Dortch's 2008 variance application to BOZA was denied in a letter also dated January 16, 2009, which cited Ord. § 17-112(2)(c), pertaining to special exceptions, rather than the section pertaining to variances. The letter made no separate statement at all, of findings of fact or conclusions of law. This letter, too, stated that "based on the application, submitted documents and testimony considered," none of which were identified, "the Board of Zoning Appeals hereby denies your Application." The letter did state, "In accordance with § 17-112(2)c, the Board found that there is no extraordinary or exceptional conditions."

At this point, Dortch had appealed to BOZA, the decision of the zoning administrator without having the decision in writing. She had also requested a variance from restrictions he asserted existed, without having his assertions in writing, other than what he wrote on the top of her variance application some time after she had been refused a building permit. She would next

appeal the decisions of BOZA, without being provided any statement of the facts upon which they were based.

BOZA later heard other variance applications in which, like Dortch's, the property was already a duplex, was already grandfathered for use as a duplex, had an allegedly insufficient lot size, was in an RG-1 district, and was in the area of town east of Gervais Street. (See, e.g., Dortch's February 11, 2019 Reply Brief, Exhibits A and B, R.pp. 560-574.) In these matters, such as the ones on November 9, 2010 pertaining to property on Butler Street, the unidentified "staff" of BOZA briefed BOZA on the application.[7] The staff reminded 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. (R.pp. 561 and 567.) In these other applications before BOZA, BOZA voted to grant the requested variances.

D. Proceedings in the Circuit Court in 2009.

Dortch appealed BOZA's two decisions to the Circuit Court for Richland County, pro se. In her 2009 appeal, Dortch raised, among other issues, BOZA's and the zoning administrator's determination that her vested right to use the house as a duplex was not constitutionally grandfathered.

In her Petition for Appeal to the Circuit Court, she stated, among other things, that the property "has been contained one unit up-stairs and one unit down-stairs since before any change in Zoning Codes," that "[i]t was error to deny the Permit," and that "[a]pplying the Building and Zoning Code in this manner is fundamentally unfair and a violation of due process of law."

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[7]These 2010 briefs were not presented to BOZA in 2008, but were presented by Dortch to the Circuit Court to show that BOZA's treatment of Dortch's application was arbitrary and steered by the party from whose decisions Dortch sought relief.

(R.pp. 191-192.) She then secured counsel. She elaborated on these things in an Amended Petition for Appeal and in an affidavit filed with it. (See R.pp. 194-216.)

Rather than file the record of the 2008 BOZA proceedings and address the merits of the appeal to Circuit Court, the City of Columbia contended the appeal to Circuit Court was filed by Dortch a day or two too late.

The Circuit Court ruled the appeal should be dismissed on that basis, without considering the merits.

Dortch timely moved for reconsideration. At the time, Dortch was also still being prosecuted by the City in Municipal Court for not proceeding with repairs for which the City had denied Dortch a permit.[8] Dortch's motion for reconsideration in Circuit Court was not scheduled by the circuit judge in those proceedings,[9] was not heard, and was not decided, and for an extended period thereafter, Dortch repetitively dealt with the Municipal Court prosecution and explored ways to fix the house.

E. Proceedings Before the Zoning Administrator in 2012 and Before BOZA in 2013.

Under an understanding with the City, Dortch eventually spent about $35,000 and made some substantial exterior-only repairs, including repair and construction of exterior rear stairs. (See, e.g., rec. p. BOZA 020, R. p. 321 (understanding with City), rec. p. BOZA 005, R. p. 306 ($23,000 on back and $12,000 on front), and rec. p. BOZA 006, R.p. 307 ($7,000 on back stairs).) These things were done while engaging in time-consuming and expensive consulting on

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[8]As late as BOZA proceedings in 2013, City personnel stated "There has been an open case on this property since 2004." (Rec. p. BOZA 008, R.p. 309.) The "open case" was criminal charges against Dortch under the property maintenance code for not making repairs for which she was refused a permit.

[9]It later appeared that although the motion was served and filed, and a copy was also mailed to the judge, he did not receive it.

historical overlay requirements. In 2012, Dortch applied, pro se, through a contractor, for a permit to proceed with interior painting, replacing some floor coverings, and doing interior repairs. The zoning administrator denied the permit, again stating that a permit would only be granted if it involved transforming the house physically into a single family dwelling.

There is no record of a hearing by him, or of the taking of evidence, and the record does not contain any written decision. He advised Dortch to apply for a variance, and his office supplied Dortch with a form. In November 2012, she, pro se, sent in the application to BOZA for a variance. She then engaged counsel.

At the February 2013 BOZA proceeding, the City did not assert that this years-later application for variance could not be heard. In the "case summary," unidentified "staff" of BOZA mentioned the potential question, and advised BOZA: "neither the Zoning Ordinance nor the Board Rules and Procedures prohibit this reapplication." (Rec. p. BOZA 023, 2013 Ct. App. Rec. p. 117, R.p. 324.)[10] BOZA proceeded with no objections to reapplication.

At the hearing, Dortch and her counsel were provided a four-page agenda and "case summary to BOZA," the latter of which was dated seven days previously. They were not provided other information in BOZA's file, as later reflected in the uncertified "copy of proceedings" filed April 30, 2013 by the City. Dortch and her counsel otherwise had only what they had filed or prepared and walked in with in February 2013.

BOZA refused to hear constitutional arguments, even as context for arguments in favor of a variance. (Rec. p. BOZA 005, 2013 Ct. App. Rec. p. 99, R.p. 306.) At the BOZA hearing, a BOZA advisor also confirmed that a house could not be considered single-family without interior

[10]BOZA's 2/11/97 rules provided on December 18, 2018 provided in §V(5) that subsequent applications for variance filed more than six months after a previous application, were allowed, and those filed within six months were subject to conditions. (City December 11, 2018 Brief in 2009 case, Exh. 1,§V(5), R. p. 517.)

stairs. (Rec. p. BOZA 008, 2013 Ct. App. Rec. p. 102, R.p. 309.) Another speaker asserted that the house "cannot be demolished because it is in a historic protective overlay district." (Rec. p. BOZA 007, 2013 Ct. App. Rec. p. 101, R.p. 308.) As noted above, another speaker confirmed that Dortch was being prosecuted for not making the repairs for which she was denied a permit.

However, BOZA "voted" to deny Dortch a variance. The March 13, 2013 written decision denying Dortch relief was also signed by the zoning administrator. He was the party from whose decision relief was sought. (BOZA 002, 2013 Ct. App. Rec. p. 96, See R.p. 303 (exhibiting signature of zoning administrator on decision.))

The only findings of fact stated by BOZA in the decision were the following: (1) There was notice of the hearing; (2) The property is at 825 Heidt Street; (3) Dortch "has testified" that the building was constructed as a duplex in or around 1930; (4) The lot is about 7,644 square feet, but the now applicable RG-1 zoning requires 5,000 square feet of lot for each dwelling, which would be 10,000 square feet of lot for a duplex; (5) The structure had been vacant for more than 12 months, since at least November 7, 2005; (6) Dortch submitted a site plan offering to put four off-street parking spaces in the backyard if it would help the application.

On these factual findings alone, BOZA "concluded as a matter of law," that Dortch did not meet all the requirements for a variance, and denied one. (Decision at 1, rec. p. BOZA 001, R.p. 302).

F. Proceedings Before the Circuit Court in 2013.

In 2013, Dortch, through counsel, appealed BOZA's decision to the Circuit Court. Rather than address the merits of the appeal, the City moved to dismiss the appeal on the basis that a second variance application to BOZA was barred under the "defense" of res judicata. The Circuit Court held that the "defense" of res judicata barred Dortch from having a second

proceeding before BOZA. The Circuit Court dismissed the appeal from that second proceeding on the precise basis of "res judicata."

G. Proceedings Before the Court of Appeals in 2013-2015.

After timely serving a motion for reconsideration and receiving an order denying the same, Dortch timely appealed to the South Carolina Court of Appeals on December 4, 2013. Dortch briefed numerous issues on appeal directed to the lack of applicability of the "defense" of res judicata in a proceeding of the type involved and under the facts of the case, and the Court of Appeals held oral argument.

On November 25, 2015, the Court of Appeals issued an unpublished order which did not decide any of the issues presented on appeal. However, the Court of Appeals remanded the 2013 Circuit Court case to the Circuit Court and directed that the Circuit Court decide the motion for reconsideration Dortch had filed and served years earlier in the 2009 Circuit Court case.

H. Proceedings in the Circuit Court After 2015.

The Circuit Court vacated the 2009 order which had dismissed the 2009 appeal to Circuit Court as untimely. (Order dated September 14, 2017, R.pp. 6-37.) In January 2018, the City filed and served the putative record of the 2008 BOZA proceedings. On November 7, 2018, Dortch filed a motion in both cases for consolidation and complex case designation, seeking assignment of one judge.

On December 11, 2018, the City provided the aforementioned 2/11/97 Rules of BOZA. On December 12, 2018, the Circuit Court began a hearing for the first time of the actual merits of Dortch's appeals to the Circuit Court in the 2009 Circuit Court case and the 2013 Circuit Court case. Dortch argued, among other things, "Dortch's building and lot also should have been grandfathered. Dortch has a constitutionally protected vested property right in the property and

the use as it existed before the passage of § 17-275 and any other portions of the zoning code that did not exist in the 1960s, or 1930s." (12-5-18 Brief at 23-24, R.pp. 23-24.)

On February 25, 2019, the two Circuit Court appeals were consolidated and designated as complex, for purposes of assignment to only one judge. Dortch raised the constitutional issue again in a reply brief.

At a resumed hearing March 13, 2019, the Circuit Court vacated the Circuit Court's 2013 res-judicata dismissal of the 2013 Case. (R.pp. 139-140.) The Circuit Court thereafter affirmed BOZA in all three of BOZA's decisions. (Order dated March 25, 2019, R.pp. 39-53.)

I. Opinion of the Circuit Court.

Although "disagreeing" with Dortch's argument that "she has a vested constitutional right to continue the nonconforming use despite the vacancy," and although addressing James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955) and related cases in its order at 9-10 (R.pp. 47-48), and although acknowledging that "an issue need not have been raised during BOZA's administrative process in order to be preserved on appeal to the circuit court," the Circuit Court, among other rulings, then stated that Dortch had not raised the issue of her vested rights "to BOZA." (Id. at 9, R.p. 47.) The Circuit Court also stated, "and it was not stated in the Petition for Appeal [to the Circuit Court] or the Amended Petition for Appeal [to Circuit Court]." (Id.)

J. Motion to Reconsider and This Appeal.

Dortch received written notice of entry of the March 25 order on March 25 and filed and served a motion to reconsider on March 29. Dortch raised the constitutionality issues again in the motion. (R.pp. 592-596, 598-601, and 605.) Dortch received notice of entry of an April 15, 2019 order denying her motion to reconsider on April 15, 2019. On May 15, 2019, Dortch timely served notice of appeal of these orders to the South Carolina Supreme Court pursuant to S.C.

Code Ann. § 14-8-200(b)(3), pertaining to appeals in which the principal issue is the constitutionality of an ordinance or statute.

On May 24, 2019, the South Carolina Supreme Court inquired of counsel about the location of a ruling by the Circuit Court on the constitutional issues. Counsel responded. On June 6, 2019, the South Carolina Supreme Court transferred these appeals to the Court of Appeals with the directive that if after the final briefs are filed, the Court of Appeals determines that this appeal does in fact involve "a challenge on state or federal grounds to the constitutionality of a ...municipal ordinance...", it should transfer the appeal to the Supreme Court. (S.C. Sup. Ct. Order dated June 6, 2019.)

On October 16, 2019 Appellant filed with the Court of Appeals, a motion to exceed the page limit on the initial brief by as much as fifteen pages, because of the long procedural history of the cases, the involvement of two cases in one brief, additional issues with standard of review, the need for some white space in the brief, etc., and on October 17, filed Appellant's Initial Brief, exceeding the page limit by ten pages. Respondent opposed, stating, inter alia, that Appellant would also be allowed a reply. On January 16, 2020, the Court of Appeals denied the motion to exceed page limit and ordered the filing of a substitute initial brief ten or more pages shorter.

ARGUMENT

I. Applying the municipal ordinance to terminate Dortch's vested rights to have and maintain the up-and-down duplex which was her family home is unconstitutional under the state and federal constitutions. (Issue 1)

A. Standard of Review. (Issue 2)

Determinations of questions of law are reviewed de novo. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and

-330 (1976 & Supp. 2003), and S.C. Code Ann § 14-8-200 (Supp. 2003)). The appellate court is free to decide the question with no particular deference to the lower court or other tribunal. Id.

"In reviewing decisions of administrative agencies, [an appellate court] is not bound by the [trial] court's decision. [The appellate court] may conduct an independent examination of the administrative agency's record and decision and arrive at its own conclusions as to the propriety of that determination." In re Signal Delivery Serv., Inc., 288 N.W.2d 707, 710 (Minn. 1980). That is, where the trial court reviewing an agency decision does not make independent factual determinations or otherwise act as a court of first impression, the appellate court reviews the agency's record directly without deference to the legal rulings or factual leanings of the trial court. Where the trial court "is itself acting as an appellate tribunal with respect to the agency decision, [the appellate] court will independently review the agency's record." In re Hutchinson, 440 N.W.2d 171, 175 (Minn. App. 1989) (citations omitted), review denied (Minn. Aug. 9, 1989).

An issue need not have been raised during BOZA's administrative process in order to be preserved on appeal to the circuit court. Newton v. Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011).

Statutory interpretation, and constitutional interpretation, are issues of law. "The interpretation of a statute is not a finding of fact." Williamson v. Middleton, 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2007)(citing Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942) and numerous other cases), rev'd on other grounds, 383 S.C. 490 681 S.E. 2d. 867 (2009). See also Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008).

For example, BOZA's "finding of fact" in its March 12, 2013 decision that '[t]he RG-1 district requires 5,000 square feet of lot area per unit, and 10,000 square feet of lot area would normally be required on order to establish a duplex" is actually a freely reviewable question of law and not a fact to be found. Similarly, the circuit judge's order stating at page 5 that "evidence was presented" that the lot required 10,000 square feet, is completely erroneous in viewing a question of law as an unreviewable fact on which evidence was presented.

The question of whether a statute or its application violates the constitution is a question of law. It is freely reviewable. I.e., it is reviewable de novo. Authority from the legislature, whose power, along with a city's, is subject to constitutional restraint, does not answer a challenge to the constitutional legitimacy of a provision in a zoning ordinance terminating vested rights. Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970).

Thus, a statutory provision outlining conditions for terminating a status conferred by statute does not bind a court to the same conditions for terminating a status which is independently assured by the constitutions.

South Carolina recognizes the authority of municipalities, in exercising their police power, to enact zoning ordinances which restrict the use of privately owned property. See S.C. Code Ann. § 5-7-30 (Supp.1998); Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997); and James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955). However, as enunciated in Conway, such power does not permit a municipality to impair or destroy vested property rights. The determination of whether such ordinances deprive a citizen of constitutional rights is a judicial function and not legislative. Id. And where an ordinance is clearly violative of constitutional rights, it is the duty of the court to so hold. Id., 254 S.C. at 101, 173 S.E.2d at 650.

The facts involved in making a legal determination of constitutionality are not the type reserved for sole consideration of a lower tribunal fact finder. The scope of review of facts figuring prominently in constitutional decisions should be more liberal than in an ordinary "law" case not involving such decisions. See, generally and comprehensively, Ann Zobrosky, Constitutional Fact Review: An Essential Exception to Anderson v. Bessemer, Indiana Law Journal: Vol. 62:Iss. 4, Article 8 (1987).

B. Dortch Did Appeal to the Circuit Court, the Constitutionality of Terminating Her Vested Rights in the Property. (Issue 3)

Contrary to the Circuit Court's statement in its order at 9, Dortch appealed to the Circuit Court, the zoning administrator's and BOZA's unilateral extermination of the "grandfathered" status of Dortch's house.[11] That unconstitutional act is the principal issue of this appeal. Separately from her statement that it was error for BOZA to deny a variance, 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 Zoning Codes." This is the definition of a nonconforming use protected by the constitutions, and alone, sufficiently raises the issue. See 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)(defining "vested rights" and "nonconforming use"). She further stated, "It was error to deny the Permit." She also pointed out her disadvantage in responding to BOZA's decision: "The decision of the Permit Official and the Zoning Board of Appeals are not supported by any facts or reasons or code references sufficient to justify the

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[11]In her appeal to BOZA from the zoning administrator's nonwritten refusal of a repair permit, Dortch had stated to BOZA, "Grandfather status exist." (R.p. 364.) BOZA's written decision, it will be remembered, stated no reasoning whatsoever. At the time of her pro se appeal to Circuit Court, for all Dortch knew, the City may have still thought the property was zoned single-family, when it was not. (See, e.g., Dortch 2009 Aff., ¶¶ 12-17, R.pp. 369-371 (recounting first denial of permit on the basis that she did not reside in the house, continued pro se efforts to get the permit, and going on to explain that the zoning was not single-family).)

action taken." (Petition for Appeal, R.p. 192.) She stated that "[i]t was error to deny the Permit," and that "[a]pplying the Building and Zoning Code in this manner is fundamentally unfair and a violation of due process of law." (R.pp. 191-192.)

The Circuit Court's assertion that Dortch did not state her vested right to continue the nonconforming use in the Petition for Appeal "or the Amended Petition for Appeal" is therefore simply incorrect.[12]

C. Applying the municipal ordinance to terminate Dortch's vested rights to have and maintain the up-and-down duplex which was her family home is unconstitutional under the state and federal constitutions. (Issue 1 and Part of Issue 4))

At some point, likely in 1975, the City of Columbia enacted Ord. § 17-275, which is a chart in the form of a matrix, bearing numbers, general footnotes, and specific footnotes. (See

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[12]Dortch's Amended Petition of Appeal states, "This structure has been constituted by two separate dwelling units since at least prior to 1967 and upon information and belief, since it was built back in the 1930s." (R.p. 195.) The Amended Petition further stated, "It was error to deny Petitioner Dortch's permit." The amended petition further states:

> Further, where, as here, there is no applicable law which actually makes the use of the property a nonconforming use, or no applicable law which prohibits continuation of the use if it is nonconforming, there is no need to vary the application of the law, no variance is required (and no special exception is required), and the use should be permitted.

(R.p. 196.) Dortch's affidavit supporting her appeal to Circuit Court also states:

> No "special exception" should be needed. The property is zoned RG-1-DP, which is General Residential (not RS Single Family Residential) with a Design and Preservation overlay. RG-1 is a medium or high density area characterized by, among others, two-family detached structures. This is an historical two-family detached structure. Attached are copies of pertinent ordinance sections and descriptions. The use as a duplex is not prohibited by the zoning. Even if it were, it would be a prior, legal, nonconforming use at worst – that is, a use commenced legally in the past and grandfathered. All I want to do is fix my property which my mother acquired at great effort and which I have also spent money on, and I want to continue it in the form it has always been and preserve its design as it is. For the City to require me to transform it into something completely different with limits on its use and at great expense, as a condition of allowing the repair of relatively minor damage appears to me to be illegal, unfair, arbitrary, capricious, and in violation of due process of law.

Dortch thus unequivocally argued that the City's prohibition of Dortch's "prior, legal, nonconforming use" was "illegal, unfair, arbitrary capricious, and in violation of due process of law." The issue was sufficiently raised and perserved.

R.pp. 782-785.) It states, through the headings for the columns and compartments filled in on the chart, that the first dwelling unit in an RG-1 zoning district is required to have a lot area of 5,000 square feet (first column) and that a second dwelling unit is required to have a lot area of 5,000 square feet (second column). However, the chart clarifies this specific entry with a footnote. The footnote clarifies that the RG-1 requirements are for "detached" single-family dwellings. "Detached" means not attached. That is, the requirements are not for duplexes or townhouses. The explanatory footnote states, "Detached single-family dwellings shall be required to have 5,000 square feet per unit." (Ord. § 17-275 fn. g.)

The only information conveyed in footnote "g" not already stated in the chart entry itself is the clarification that it applies to "detached" single family dwellings, as distinguished from attached ones. Thus, Dortch's structure is not subject to the restriction.

Yet, the City purports to interpret the chart, contrary to the footnote, as only allowing duplexes on lots with 5,000 square feet per attached single-family dwelling. The City contends that for a duplex, the chart thus requires a 10,000 square foot lot, which is bigger than Dortch's lot. On this basis, the City contends Dortch can no longer use the duplex as a duplex and has commanded her to change it. In practical effect, the City has commanded Dortch through actual criminal prosecution, to affirmatively physically alter the house to make it not a duplex, at her expense.

The City contends that Dortch is not "grandfathered" in the use of the house as a duplex. The City bases its position only on a second ordinance pertaining to statutory grandfathering.[13] The second ordinance, however, does not appear in any written decision of the zoning

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[13]The ordinance, City Ord. § 17-202(e), pertains to conditions under which a nonconforming use, once somehow unestablished, cannot be "re-established," but does not, itself unestablish or terminate a nonconforming use. For the ordinance to be applicable, the use would have to have been first unestablished under some valid other ordinance or authority.

administrator or BOZA at any time. Despite Dortch's assertion of unconstitutionality, the City and the Circuit Court ignore constitutional grandfathering and the supreme and preemptive rights protected by the constitutions. These rights are not subject to modification by statute or ordinance. Conway.

The City bases its retroactive application of the misinterpreted "lot size" ordinance solely upon Ord. § 17-202(e), alleged to pertain to loss of grandfathered status after a specified time period of "vacancy," a term not defined in any of the zoning ordinances. For the twelve continuous months of "vacancy" referenced by the ordinance, the City relies soley upon "vacancy" starting after November 4, 2005, when the City began prohibiting occupancy.

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 or welfare." Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480 at 498, 536 S.E.2d at 901 (quoting F.B.R. Inv'rs v. Cty. of Charleston, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991)). Dortch and her predecessors therefore acquired a vested right to the structure as a duplex unless a duplex would cause a detriment of the sort described.

Phrases in variance statutes referring to such things as lack of "detriment to the public health, safety or welfare" generally are referring to lack of things of such severity that they would rise to the level of being a public nuisance. See Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986) ("Generally, in American jurisdictions a landowner who uses his property for a lawful purpose before the enactment of zoning which subsequently prohibits that use may continue the nonconforming use after the enactment of

zoning unless the use clearly constitutes a public nuisance. Otherwise, the landowner would be deprived of a constitutionally protected right.").

This property is not a concrete plant, a brick kiln, a fertilizer factory, a landfill, a porno store, or a tattoo parlor. Dortch's property is in a district specifically zoned for duplexes and higher density housing. As specifically permitted uses in the district, these uses, as a matter of law, could not be considered "noxious" uses presenting a "nuisance or threat to health or safety." Dortch therefore has a vested right to continue owning and using the duplex.[14]

"Vested rights under zoning ordinances are undergirded by the same constitutional footing which precludes retroactive application of zoning ordinances." Friarsgate, Inc., 290 S.C. at 269, 349 S.E.2d at 893.

Thus, a vested right of a landowner to continue a nonconforming use already in existence at the time her property is zoned is a state and federal constitutional right, not a mere statutory right. It is, by its very definition, a right to continue. It is not merely a right to use, subject to termination by the acts of a third party or statutes passed by a third party. Arguably, such vested rights may end when the use is completely destroyed or when the rights are intentionally relinquished through willing abandonment by the owner. However, such constitutional rights to continue a use may not be exterminated merely by statutes placing a time limit on the constitutional right. James v. City of Greenville, 227 S.C. 565, 577-579, 88 S.E.2d 661, ___ (1955) (holding unconstitutional, zoning statute attempting to terminate vested right to continue prior nonconforming use after one year).

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[14]As the Court stated in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), "[A]s it would be required to do if it sought to restrain Lucas in a common law action for public nuisance, South Carolina must identify background principles of nuisance and Property law that prohibit the uses he now intends in the circumstances in which the property is presently found." Id. at 1032. The City and the Circuit Court did not do this; the record does not support it.

Therefore, Dortch had a vested constitutional right to continue having and using the house as a duplex. The City's and the Circuit Court's application of City Ord. § 17-275 and § 17-202(e), or any other ordinance, in order to try to terminate this constitutional right of Dortch's violated the due process, equal protection, and takings clauses of the South Carolina Constitution and the due process and takings clauses of the United States Constitution.

The Circuit Court incorrectly distinguishes the unmodified decision in James as not prohibiting time limits on nonconforming uses. (Order dated 3-29-19 at 10, R.p. 48.) James invalidated a one-year time limit and did not authorize any other exception or qualification for the law of this State. The Court of Appeals quoted James in 2000: "[T]he substantial value of property lies in its use. If the right of use [is] denied, the value of the property is annihilated, and ownership is rendered a barren right." Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480 at 499, 536 S.E.2d 892 at 902 (second alteration by court) (quoting James, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955)).[15]

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[15]The United States Supreme Court does not appear to have ruled favorably upon the validity under the federal constitution of statutory amortization periods or other statutory delayed-effect time limits on constitutionally vested property rights. See, e.g., Craig A. Peterson and Claire McCarthy, Amortization of Legal Land Use Nonconformities as Regulatory Takings: An Uncertain Future, 35 Wash. U. J. Urb. & Contemp. L. 37 at 59 and 79 (1989) (available at: https://openscholarship.wustl.edu/law_urbanlaw/vol35/iss1/3)(noting absence of Supreme Court rulings on amortization of nonconformities and the suggestion that amortization ordinances might be found unconstitutional under developing standards).

Even if it did, the decision would not control the question under the South Carolina Constitution, which is the constitution under which James was decided. Nor would another state's interpretation of its own constitution control South Carolina's interpretation of South Carolina's constitution. This state may construe, and has construed, its own constitution in a manner to provide more protection of individual property and other rights than does the federal constitution. Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964) (holding that South Carolina's constitution is interpreted differently from the federal constitution and the constitutions of other states).

Yet, both the South Carolina Constitution and the federal constitution were based upon the Lockean recognition that property rights are the basis of civil liberty and the most fundamental of civil rights. See Lynch v. Household Finance Corp., 405 U.S. 538 at 552 (1972) (Stewart, Justice) (recognizing a fundamental interdependence between the personal right to

Fairly construed, ordinance terms delineating the termination of prior nonconforming

liberty and the personal right in property, such that "rights in property are basic civil rights," citing John Locke's 1689 Of Civil Government); Ruckelshaus v. Monsanto, 467 U.S. 986 at 1002-1003 (1984) (Blackmun, Justice) (examining the definition of property protected by the constitution, in this case, trade secrets, and citing John Locke's 1689 The Second Treatise of Civil Government); Palazzolo v. Rhode Island, 533 U.S. 606 at 627 (2001) (Kennedy, Justice) ("The State may not put so potent a Hobbesian stick into the Lockean bundle"); and Stop the Beach Renourishment v. Florida Dept. of Env. Prot., 560 U.S. 702 (2010) (Scalia, Justice) (quoting Palazzolo regarding the "Lockean bundle"). See also Boice v. Vill. of Ottawa Hills, 999 N.E.2d 649 at 654 (Ohio 2013) (rejecting contention that a lot area restriction could be imposed retroactively on a lot which had not yet been built upon, referencing "Lockean notions of property rights" that were built into the Ohio Constitution, demonstrating "the sacrosanct nature of the individual's 'inalienable' property rights" which were to be held "forever 'inviolate'").

There were many different due process and "law of the land" clauses adopted in America in the fifteen years preceding the Fifth Amendment's ratification, "with substantial differences in both their language and meaning." Andrew T. Boduh, Liberty is Not Loco-motion: Obergefell and the Originalists' Due Process Fallacy, Campbell L.R., Vol. 40:2, 481 at 490 (2018). The first "law of the land" clause in South Carolina's constitutions is found in the Constitution of 1778 (before ratification of the present federal constitution). It is verbatim the clause found in the declaration of rights in Maryland's Constitution of 1776. See S.C. Const. of 1778, XLI, and cf. Md. Const. of 1776, decl. of rights XII. Maryland took a different course from other states at the time, by joining "life, liberty and property," as opposed to merely "liberty," with traditional Magna Carta language pertaining primarily to criminal matters, thus distinguishing the phrase from the limited context of criminal prosecution. The term "life, liberty or property" derives from the broader Lockean notion of liberty as including civil rights founded on property ownership and freedom from arbitrary government. Boduh, id. at 484. South Carolina's Constitution of 1868, instituted as part of post-Civil War Reconstruction, was modeled largely after the Ohio constitution of the time. Harold, E. Albert, "Home Rule and a New Constitution," National Civic Review, November 1977.

Relative to other states, scholars of the subject have recognized South Carolina to be among the most protective of vested rights in property. See Osbourne M. Reynolds, Jr., The Reasonableness of Amortization Periods for Nonconforming Uses - Balancing the Private Interest and the Public Welfare, 34 Wash. U.J. Urb. & Contemp. L. 099 at 105 nn. 23 and 24 (1988) (available at: http://openscholarship.wustl.edu/law_urbanlaw/vol34/iss1/4) (citing James as placing South Carolina among those states in which vested rights continue despite an amortization period, and which "overlook any distinction" between immediate cessation and cessation after a grace period). Whereas the traditional rule is that a zoning law that requires the immediate cessation of a nonconforming use is unreasonable and is an unconstitutional taking of property without compensation, South Carolina is among a number of states which "have reached the same conclusion when the zoning law provides an amortization period after which the use must terminate." Id. (citing James). Prospective enactments that are unreasonable in affecting the value of property "do not become less so through passage of time or title." Palazzolo v. Rhode Island 533 U.S. 606 at 627 (2001). A state cannot, on the theory of advance notice of a limitation, "put an expiration date on the Takings Clause." Id. at 627 (referring to limitation of the right of subsequent generations to challenge unreasonable limitation on the use and value of land).

uses upon cessation not involving substantial destruction of the property in question, all mean subjective "abandonment" in the constitutional sense of Conway v. City of Greenville, 254 S.C. 96, 173 S.E.2d 648 (1970). See City of Myrtle Beach v. Juel, 344 S.C. 43, 543 S.E.2d 538 (2001) (reversing the Court of Appeals's conclusion that objective, bright-line, time termination provisions are enforceable despite absence of landowner's intent, and stating that statutes limiting prior uses not conforming to later statutes are in derogation of common law and are to be strictly construed) and see Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (discussing, in dissent, synonymous usage of "abandon" and "discontinue" in zoning ordinances). "Common law abandonment" requires subjective intent of the owner to abandon the use. Juel. It cannot be gainsaid that Dortch did not, and does not, subjectively intend to abandon the use.

In violation of the state and federal constitutions, the City applied Columbia Ord. § 17-202(e) to terminate an owner's constitutionally vested right to continue a use lawfully commenced before the enactment of the zoning ordinance, upon, among other things, a bright-line continuous twelve months of "vacancy," regardless of the owner's intent with respect to the use of the property.[16]

Specifically, the City eventually contended that a period after which the City essentially forced Dortch's brother to leave the property and during which the City then continuously prohibited occupancy, constituted twelve continuous months of "vacancy," destroying Dortch's vested rights.[17] If applicable in this manner, Ord. §17-202(e), pertaining to termination upon a

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[16]To the extent § 17-202(e) is construed to apply only to statutory grandfathering, and to not apply to constitutional grandfathering, nothing prohibits Dortch from repairing the house. However, if the statute is construed to terminate not only grandfathering conferred by statute, but also grandfathering conferred by the constitutions, there are also other issues as to its applicability.

[17]Stating that Dortch "does not strenuously dispute the evidence of vacancy," the Circuit Court recites no evidence whatsoever establishing any one year period of vacancy before the City

time of "vacancy, abandonment or discontinuance," is unconstitutional on its face and as applied in Dortch's case, because Dortch's discontinuance was involuntary. She lacked "intent" to permanently abandon the use. Although the constitutional question is whether Dortch intended to abandon the use, not whether she intended for the property to be "vacant," there is also no evidence that she intended for the property to be vacant.

Passage of time cannot be used alone to determine intent to abandon, nor to terminate a vested right without a finding of abandonment. Although not apposite here, the South Carolina Court of Appeals got close to this issue when it stated in a reversed holding of a reversed opinion that where there is both destruction of the use to a reasonably high and specified percentage and failure to begin reconstruction within a specified time, the passage of a reasonable prescribed amount time is viewed as preventing re-establishment. See City of Myrtle Beach v. Juel P. Corporation, 337 S.C. 157, 173, 522 S.E. 2d 153, ___ (Ct. App. 1999)(quoting Gurganious v. City of Beaufort, 317 S.C. 481,490, 454 S.E.2d 912, 917-18 (Ct. App. 1995)), reversed, 344 S.C. 43, 543 S.E.2d 538 (2001).[18]

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prohibited occupancy. The only evidence of any substantial period during which no one was present at the property pertained to the period after the City prohibited "occupancy." The City also presented no evidence that furnishings did not remain in the house, or that no one spent time on the exterior of the property during the day.

[18]The Circuit Court incorrectly cites the South Carolina Supreme Court's Juel decision for the proposition that where a terminating provision "includes an objective time frame for vacancy, abandonment, or discontinuance," the objective time frame applies and there is no need to require "common law" constitutional abandonment for termination of vested rights. This ruling, however, was the ruling of the Court of Appeals. The South Carolina Supreme Court, rather, reversed this particular ruling.

The Circuit Court also uses a misplaced analysis of James to conclude that termination of a vested right through an ordinance keyed to passage of time does not require subjective intent to abandon. The Circuit Court states that James did not involve the question of whether there was an intent to abandon. On this assertion alone, the Circuit Court concludes that, therefore, no subjective intent to abandon is constitutionally required in South Carolina. However, James held unconstitutional, an ordinance which required termination of a nonconforming use within twelve months, without any regard for the intentions or actions of the landowner. James thus held a

In reversing, the South Carolina Supreme Court declined to reach the question of whether a property owner's intent is irrelevant when an ordinance specifies an objective time frame after destruction, after which a nonconforming use shall be deemed abandoned, stating, "We cannot harmonize the city's interpretation with our obligation to construe the ordinance strictly." 344 S.C. at 46-47, 543 S.E.2d at __.

The authority cited by the Court of Appeals for its reversed Juel decision is also without a real basis. The Court of Appeals quotes Gurganious, 317 S.C. 481, 490, 454 S.E.2d 912, 917-18. However, for the proposition quoted, Gurganious cites no actual authority. Gurganious cites with only a "see, e.g." signal, only Byrd v. City of N. Augusta, 261 S.C. 591, 201 S.E.2d 744 (1974). Byrd does not involve any issue of damage or destruction, nor any issue of a time limit on reconstruction after damage and thus does not support in any way, the proposition for which it is cited in Gurganious. Byrd does hold the zoning ordinance re-zoning the plaintiffs' property in that case unconstitutional.[19]

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bright-line time period, not involving intent of the landowner, unconstitutional. Juel applies the "common law" constitutional rule requiring abandonment to include subjective intent. See Juel, 344 S.C. at 48.

This rule used in Juel came from Conway. Id. (citing Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936)(stating with respect to abandonment of an easement "time is not an essential element of abandonment, and is of no importance except as indicative of intention")). It is thus absolutely clear that subjective intent is necessary for abandonment of a vested right in property. Neither a municipality nor any other jurisdiction can, by fiat, terminate a vested right when it has been neither destroyed nor abandoned.

[19]It may be argued that Gurganious changed South Carolina law, and that, contrary to James, Conway, and other precedent, even when there is little or no damage, or the ordinance provides no damage percentage threshold, intent to abandon is not required where the ordinance provides an objective time frame. For example, the Circuit Court cites Gurganious for the proposition that objective time limitations ignoring the owner's intent are valid. (Order dated 3-29-19 at 10-11, R.pp. 48-49.) However, as explained above, this has never been the decision of the United States Supreme Court or of the South Carolina Supreme Court. "The decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. Const. art. V, §9. Thus, a decision by the Court of Appeals, departing from the founding principles of the United States and established South Carolina case law, that providing municipalities heretofore unauthorized

Even under the proposition in the reversed Juel opinion, the termination of grandfathering is based, first, on a specified high percentage of destruction, and then on failure to reconstruct the use within a reasonable specified period. Here, the relatively small amount of damage had no part in the City's allegation that Dortch's use had been terminated or abandoned. The City based its assertion sheerly on a period of forced absence of occupancy, which the City asserted constituted "vacancy." This is unconstitutional, even under the reversed Juel decision. Being unconstitutional, § 17-202(e) provides no basis for prohibiting Dortch from continuing to own and use her house as a duplex, and the Circuit Court, BOZA, and the zoning administrator should be reversed, with instruction to issue Dortch a building permit and allow her to use the house as the duplex that it is.

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control over traditional vested South Carolina property rights would conform to trends in other states, was unauthorized.

Gurganious is also distinguishable by the fact that the case actually had numerous other sustaining grounds, making appeal of its dictum on this issue futile. Its dictum reasoning on this issue was concerned strictly with the context-neutral reasonableness of an "objective-standard" in the ordinance, and not with the constitutionality of an "objective standard" under the constitution of South Carolina.

Further confirming the nature of this point as mere dictum, the Court of Appeals also used reasoning inappropriate to determining the protections of South Carolina's constitution, which were the basis in James. The Court of Appeals, for example, observed that "other states," which have obviously not adopted South Carolina's constitution, had held certain measures in ordinances valid. South Carolina differs from other states in the protections of liberty afforded by its constitution. See Stone and James. See also the footnote above, discussing differences in due process clauses and other provisions in state constitutions even before the federal constitution was ratified.

The court also observed that the legislature had passed enabling legislation allowing adoption of zoning ordinances. The General Assembly cannot override the Constitution with a statute. Conway, 254 S.C. at 101.

It may be also be argued that under Maguire, subjective intent to abandon is not required where an ordinance purports to terminate vested continuation rights by using an objective time frame. However, Maguire does not actually turn on intent or lack of intent. Maguire was resolved without citation of any authority whatsoever in the whole majority opinion. The ruling in Maguire was that when one comes to a property the known previous nonconformity of which has reverted to a conforming use, and purchases the property, he cannot use the mental incompetence of the prior occupant, whom the record does not show to be the owner, to extend or reestablish the nonconforming use.

II. Dortch was not prohibited from having and using the house as a duplex because the statutes upon which the City based the prohibition do not apply or should be equitably tolled. (Issues 4-9)

Dortch presented to the Circuit Court in a brief, a reply brief, a proposed order, and a motion to reconsider, numerous reasons why the statutes advanced by the City as authority for prohibiting repair of her house do not apply. The Circuit Court either rejected or ignored all of them. These arguments follow briefly, being more fully stated in these materials in the record.

City Ord. §17-275 by its terms, allows Duplexes on lots of 5,000 square feet or more in RG-1 districts such as Dortch's district. This fact is explained supra at pp. 24-25.

If City Ord, §17-275 cannot be understood to allow a duplex on an RG-1 lot of less than 10,000 square feet, City Ord. §17-275 is unconstitutionally vague.

People of ordinary intelligence would necessarily think that if they had a lot in a district specifically zoned for duplexes, and the statute-chart had a specific footnote that second or other additional "detached" units required an additional 5,000 square feet of lot per detached unit, the chart would be referring only to detached units, not duplexes. However, the City would have the reader look for confusion elsewhere in the chart in order to develop doubt as to this straightforward meaning.

To explain that the chart is haphazardly constructed and haphazardly noted, with three different layers of notes and headings, requiring landowners to guess whether redundancy or exception is intended in a particular instance, in order to derive some other meaning or special meaning intended by the chart, is unacceptable under the law of the land.

For example, footnote "f" is used only once on the whole chart-ordinance, for the RD district, which is a more restrictive, lower density, district than Dortch's RG-1 district. Footnote "f" states, "A minimum lot area of 7,500 square feet is required for a duplex." However, the

"First Unit " column for an RD district already states a figure of "5,000," and the "Each Additional Unit" column for an RD district already states a figure of "2,500" and so at a glance, the footnote is redundant. In previous arguments, the City has stated that 7,500 square feet is also all that is required for a duplex in an RG-2 district, which is a less restrictive, higher density, district than Dortch's RG-1 district. The "Each Additional Unit" compartment for RG-2 also states "2,500." However, there is no redundant footnote "f" entered on the chart for the RG-2 district. The City has essentially argued that the reader is required to review all other districts and determine in which manner the footnotes contradict each other or the values stated in the cells of the chart, admit confusion, and then ask the zoning administrator. The City has thus argued that because the RG-2 district, like the RD district, is subject to a categorical rule of an overall note, requiring 5,000 square feet per detached unit for all districts regardless of what is stated "per unit" in the cell of the chart, and because the RG-2 district entry, like the RD district entry, inexplicably also bears footnote "g," allegedly imposing the exact same requirement of 5,000 square feet per detached unit, there is no need for a footnote "f": "Therefore, [for the RG-2 district,] two single-family dwelling units on a parcel would require 10,000 square feet of lot area, while a duplex would require only 7,500 square feet."

If this same reasoning is applied to RD districts, there is no explanation what additional information or requirement is provided by appending footnote "f" to the "Each Additional Unit" column for the RD district, and why footnote "f"is needed at all in any instance. To a person of ordinary intelligence, at a glance, footnote "f" would appear to simply clarify that the next higher, more restrictive, district than Dortch's allows a duplex on a lot smaller than Dortch's.

Construed to prohibit a duplex on an RG-1 lot of less than 10,000 square feet, §17-275 is vague and confusing to the point of constitutional defect. The requirement the City alleges

applies to Dortch's house makes no sense in the context of the zoning ordinance as a whole, which provides that Dortch's RG-1 district is a multi-family district which is allowed to have a higher density than an RD district. It makes no sense to allow a duplex on a smaller lot in an RD district than in an RG-1.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." City of Beaufort v. Baker, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for intolerable vagueness is the practical criterion of fair notice to those to whom the law applies. Huber v. South Carolina State Bd. of Physical Therapy Exam'rs, 316 S.C. 24, 446 S.E.2d 433 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. Toussaint v. State Bd. of Med. Exam'rs, 303 S.C. 316, 400 S.E.2d 488 (1991). Construed as the City has strained to do, § 17-275 is such a statute.

As another matter of inapplicability, City Ord. § 17-202(e), if it applies at all, applies only to statutory grandfathering and does not affect the independent constitutional grandfathering of Dortch's property. This fact is explained supra at note 5.

Under a conservative interpretation of "vacancy," City Ord. § 17-202(e) by its terms, is also inapplicable when "vacancy" is not intentional and is not accompanied by subjective intent to abandon the use. This fact is explained supra at pages 29-31, in Dortch's 12-5-18 Brief at pp. 25-26, and in Dortch's 2-11-19 Reply Brief at p. 18, ¶¶ 17-19, pp. 25-27, ¶¶ 33(a)-(f), and p. 30, ¶ 33(m). Statutes impinging on vested rights under the constitutions are to be strictly construed. Juel (S.C. Sup. Ct. 2001). As a rule of construction, when the validity of an act of a legislature is

drawn into question, courts should first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. Crowell v. Benson, 285 U.S. 22, 62 (1932).

City Ord. § 17-202(e) by its terms, is also expressly inapplicable to situations involving reconstruction after damage. That is, § 17-202(e) states that it is inapplicable "where subsection (f) of this section applies." Section17-202(f), entitled "reconstruction after damage," does not operate based on vacancies at all, and addresses situations involving damage above, or below, a 75% threshold. Dortch's situation does involve reconstruction after damage. Section 17-202(f) therefore does apply, and § 17-202(e) therefore does not apply.

However, the damage was unquestionably below a 75% threshold. Under §17-202(f), a nonconforming structure shall not be rebuilt, altered or repaired as such after sustaining damage exceeding 75 %. Because § 17-202(f) does not terminate any prior nonconforming use with damage under a 75% threshold, Dortch's grandfathering continues.[20]

The Circuit Court also wholly failed to rule on, and does not mention, Dortch's argument that, at a minimum, equitable tolling should be applied to the putative 12 month period in § 17-202(e) because there had been fire damage, it was the City who prohibited occupancy, and repair

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[20]This scheme, valid or not, is in keeping with that described in the reversed opinion of the South Carolina Court of Appeals in Juel (Ct. App. 1999), in which a small degree of damage, accompanied by some periods of resulting vacancy, will cause neither a finding of wilful abandonment nor a finding of destruction of the use. See Juel, 337 S.C. 157, 173, 522 S.E. 2d 153, ___ (Ct. App. 1999). An alleged terminating statute is in derogation of constitutionally vested rights to continue a previous use of property and is to be construed strictly. Juel (S.C. Sup. Ct. 2001); Conway. Where, for example, a statute concerned with repair of damage does not provide a bright line rule as to the timing of the repairs in question or the termination of the use, there is no need to determine the constitutionality of the statute because there is simply default to the question of whether "common law abandonment" under constitutional principles occurred, which requires subjective intent to abandon. Juel (S.C. Sup. Ct. 2001). Where, as here, there is no such intent to abandon in such a situation, there is a constitutional right to continue the use. Juel (S.C. Sup. Ct. 2001).

Accordingly the Circuit Court, BOZA, and the zoning administrator should be reversed, and Dortch should be allowed to have, repair, and use the house as the duplex that it is.

had been prohibited. If the twelve continuous months of "vacancy" in §17-202(e) is not intended to mean "abandon permanently with intent to do so," equitable tolling of the vacancy period is required. The vacancy period was tolled starting on November 5, 2005 or earlier, when the City's occupancy prohibition and the minor fire damage prevented continued occupancy. Under such tolling, twelve months of vacancy have not elapsed.

Equitable tolling of a barring period may be employed where a party is prevented in some extraordinary way from asserting her rights. See 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). While particularly apt when, as here, the prevention is caused by the opposing party, the doctrine does not require wrongful conduct on the part of the opposing party, such as fraud or misrepresentation. Pelzer.

III. Dortch was entitled to a variance as a matter of law, Dortch was entitled to a variance under a de novo review of the facts, Dortch was entitled to a variance under the unconstitutional substantial-evidence and any-evidence standards, and the denial of a variance to Dortch was an abuse of discretion. (Issues 10-28)

A. Standard of Review. (Issues 10-12)

To the extent the Circuit Court applied a "substantial evidence" scope of review or an "any evidence" standard of review to BOZA's decision of Dortch's variance applications, the Circuit Court erred. Review of the decision of a municipal board of zoning appeals is, rather,

required under the State and federal constitutions[21] and the better policies of this State to be plenary and de novo, on matters of both fact and law.[22]

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[21]Adherence to the constitution, and striking down laws in conflict with it, are not reserved to the highest court of this state or country; every circuit judge and appellate judge in this state takes an oath upon assuming the post, to "preserve, protect and defend the Constitution of this State and of the United States." S.C. S. Ct. Admin. Ord. 2003-10-22-02.

The oath each judge takes to uphold the constitution is among the primary bases for judicial review of the validity of legislative and other state action. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)(explaining that the Constitution is actual "law," not just a statement of political principles and ideals, and that denying the supremacy of the Constitution over the legislature's acts would mean that "courts must close their eyes on the constitution, and see only the law"). In Marbury, John Marshall reasoned that without judicial review, the legislature would be omnipotent, since none of the laws it passed would ever be invalid.

[22]See S.C. Const. art. I, § 23 (clarifying that provisions of the Constitution are mandatory and prohibitory); Id. art. I, § 9 (stating that that a person with a wrong sustained shall have a remedy in a court and that remedy therein shall be speedy); Id. art I, § 22 (assuring that no one shall be "subject to the same person for both prosecution and adjudication); Undisclosed rules provided by the City December 11, 2018, § I(2) (making the zoning administrator "secretary" of BOZA); S.C. Code Ann. § 1-23-360 (2013)(disallowing ex parte communications between decisionmakers and any party or his representative as to matters of fact or law, directly or indirectly, and providing criminal penalties for violation); 5 U.S.C. §557 (d)(1)(A)(stating similar prohibitions); Goldberg v. Kelly, 397 U.S. 254 (1970)(requiring in a proceeding to terminate federal financial aid, a pre-termination hearing, requiring timely and adequate notice of the basis of proposed termination, requiring an ability to confront adverse witnesses, requiring an ability to present evidence, requiring the ability to retain counsel for a hearing held before termination, requiring the decisionmaker to state the reasons for his determination and indicate the evidence he relied on, and requiring the decisionmaker to be impartial and to have not participated in making the determination under review); Marshall v. Jerrico, 446 U.S. 238, 242 (1980)("The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."); Schweiker v. McClure, 456 U.S. 188, 195 (1982); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)(resolving through statutory construction, a substantial problem posed when the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his); Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 470-71, 202 S.E.2d 129, 137-38 (1974)(Sharp, Justice)(summarizing due process requirements under the North Carolina Constitution in quasi-judicial proceedings on special and conditional use permits, variances, and appeals of staff determinations); United States v. Abilene & Southern Railway, 265 U.S. 274 (1924)(considering questionable due process of the practice of taking official notice of administrative records not introduced into evidence during the hearing and holding that due

Some of the provisions of S.C. Const. art. I, § 22, variously cited above, were addressed in S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Compensation Comm'n, 389 S.C. 380, 699 S.E.2d 146 (2010).[23] Not only is review de novo, but, once in "court" for the very first time,

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process is violated when evidence is treated as such without being introduced – concluding annual reports filed with the Interstate Commerce Commission and not introduced into evidence could not support a finding since the carriers had no notice that they were being confronted by such evidence until after the finding); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937)(holding that "fundamentals of a trial were denied" by the Ohio Utilities Commission because the commission considered certain price trends that were not in the administrative record: "This will never do if hearings and appeals are to be more than empty forms."); S.C. Const. art. I, § 22 (mandating that no person shall be deprived of property unless by a mode of procedure prescribed by the General Assembly); S.C. Code Ann. § 6-29-790 (violating S.C. Const. art. I § 22 in allowing the municipal or county council to adopt its own rules of procedure for the board); Id. § 6-29-840 (setting forth one standard of review of the express factual findings of a board of zoning appeal, without having specified at all, the mode of procedure of the board, nor having prohibited medieval incidents of trial); S.C. Const. art. I, § 22 (mandating that in all instances of "quasi-judicial decision of an administrative agency" such as the board of zoning appeals or the building department, a citizen of South Carolina "shall have the right to judicial review."); S.C. Const. art. V, § 5 (indicating in the context of defining appellate jurisdiction, that "review" means reviewing the findings of fact as well as the law); Stoney v. Stoney, 422 S.C. 593, 813 S.E.2d 486 (2017)(analyzing the constitutionally required de novo scope of review of both facts and law in domestic relations cases, and contrasting the same with the "abuse of discretion" standard often theretofore applied); S.C. Code Ann. § 18-7-170 (providing, with respect to another inferior tribunal which, like BOZA, is not a court of record, that the Circuit Court may review the Magistrate's Court fully for errors of law or fact); Hadfield v. Gilchrist, 343 S.C. 88, 92-93, 538 S.E.2d 268, 270 (Ct. App. 2000) (confirming plenary review); and S.C. Code Ann. § 1-23-380 (setting forth a mode of procedure before state Agencies which includes an order for the taking of additional evidence, remand for irregularities of procedure not shown in the record, and reversal or modification on any of six grounds).

[23]The majority in S.C. Ambulatory Surgery Ctr. Ass'n equated the rights conferred by S.C. Const. art. I, §22 upon a party to a matter already subject to the State Administrative Procedures Act to the rights conferred by the state and federal due process clauses. Justices Hearn and Kittredge dissented, disagreeing with the proposition that the rights guaranteed under art. I, §22 are no more than those classically protected under the due process clauses of the state and national constitutions.

While not an issue decided in the case, both the majority and the dissent in S.C. Ambulatory Surgery Center Ass'n refer to the state and federal due process clauses as interchangeable, while it is not necessarily the case. The State constitution is not co-terminous with the federal constitution, and this state may interpret, and has interpreted, its own constitution to provide greater personal protections than the federal. Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964)(holding attempt of the dairy commission to prevent sales of milk below cost of production thereof amounted to a taking of property without due process of law

Dortch should also be allowed to supplement the record, and to amend or supplement her grounds for appeal, and have a true remedy in "court."

De novo review is additionally required by S.C. Const. art. I § 22 for the reason that, since the statutory scope of review presupposes that the decision under review is made in the context of procedures complying with accompanying statutes, complete noncompliance with accompanying statutes vitiates the statutory scope of review.[24]

Additionally, Section 6-29-840 (A) only limits the review of findings of fact by the board which are indeed separately stated as such and properly identified as such pursuant to S.C. Code Ann. § 6-29-800(F). Here, BOZA either made no findings of fact at all identified as such, or

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and was a denial of the equal protection of the law under the South Carolina Constitution); and see James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955) (holding unconstitutional, under the due process and takings clauses of the S.C. Constitution, zoning statute attempting to terminate vested right to continue prior nonconforming use after one year). The court stated in Stone, "We are fully cognizant that the right of a State to control the prices at which milk may be sold has been sustained by the Courts of many States and by the United States Supreme Court. However persuasive these decisions may be they are not binding upon and do not control us in the interpretation of our own Constitution, under which the issue here arises." 244 S.C. at 540-541; see also State v. Weaver, 374 S.C. 313, 649 S.E. 2d 479 (2007)(holding that by articulating a specific prohibition against invasions of privacy in the state constitution, the people of South Carolina have indicated a higher level of privacy protection than the federal constitution).

[24] That is, as noted above, Title 6, Chapter 29 provides, in violation of S.C. Const. art. I, § 22, that procedure before the board is left to be decided by a municipal or county council. See S.C. Code Ann. § 6-29-790. In violation of § 6-29-790 itself, the City delegated to the board itself, the power to adopt its own mode of procedure. See City of Columbia Ord. § 17-111(b)(1) ("Each board shall adopt rules necessary to the conduct of its affairs in accordance with the provisions of this article").

The board, in turn, adopted a procedure which does not even mention the making or stating of findings of fact. The board adopted rules simply providing that decision shall be by motion, that the motion "may" show the reasons for the board's determination, and that the decision of the board be "by majority vote." See and compare S.C. Code Ann. § 6-29-800(F) ("All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board"), with "Rules and Regulations of the Zoning Board of Adjustment, Columbia, South Carolina (Revised 2/11/97)," §V(1), attached to City December 11, 2018 Brief in 2009 Case as "Exhibit 1." (R.p. 516.) This seems to explain why BOZA made no findings of fact.

made findings only about facts not germane to the issue, like the street address of the property or the fact that notice was given.

Aside from the seldom-raised foregoing considerations of unconstitutionality of a restrictive standard of review and abject noncompliance with statute, the courts have agreed that even the general "deferential standard of review does not mean a zoning board can never be reversed." Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018) and see Bannum, Inc. v. City of Columbia, 335 S.C. 202, 205, 516 S.E.2d 439, 440-41 (1999)(reversing City of Columbia BOZA's denial of a permit for an exception as arbitrary, finding the zoning board "either discounted or disregarded every single bit of evidence put up by" the appellant and "[i]nstead, it based its holding on the four factors submitted by" the opponents to the exception).

Even under the conventional (but mistaken) standard, this Court may reverse a board of zoning appeals "'because BOZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony.'" Boehm at 184, 813 S.E.2d at 881 (quoting Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012)).

"A decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (quoting Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). Accord, McCrowley v. Zoning Board of Adjustment, 360 S.C. 301, 599 S.E. 2d 617 (Ct. App. 2004).

"'Abuse of discretion' does not mean any reflection upon the presiding Judge [or nonjudge], and it is a strict legal term, to indicate that the appellate Court is simply of the opinion

that there was commission of an error of law in the circumstances." State v. Gregory, 171 S.C. 535, 548, 171 S.E. 692, ___ (1934) (citing Barrett v. Broad River Power Co., 146 S.C. 85, 143 S.E. 650, 654 (1928)). Accord, Bishop v. Bishop, 164 S.C. 493, 162 S.E. 756 (1932).[25]

B. Dortch was entitled to a variance as a matter of law, Dortch was entitled to a variance under a de novo review of the facts, Dortch was entitled to a variance under the unconstitutional substantial-evidence and any-evidence standards, and the denial of a variance to Dortch was an abuse of discretion. (Issues 13-29)

There is nothing "conclusory"[26] about Dortch's testimony, given on personal knowledge, uncontradicted by any other evidence, (1) that a house her family members lived in since the 60s was always a duplex, (2) that it still was structurally configured as a duplex, i.e., she was not proposing a prospective creation of a duplex, (3) that physically transforming the up-and-down duplex structurally into a single family dwelling would be very expensive, and much more so than repairing minor damage or renovating the structure as presently configured, (4) that the

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[25]When an actual "court" hears a case, under an "any evidence" standard of review, the reviewing court still should not address the sufficiency of the evidence supporting the lower tribunal's findings, when the "[lower] court's findings are so tainted by errors of law as to require [reversal]." Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005).

"An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Lewis v. Lewis, 392 S.C. 381, 390, 709, S.E.2d. 650, ___ (2011) (citing Eason v. Eason, 384 S.C. at 479, 682 S.E.2d at 807 (2009)). Accord, State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (citing State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)), and State v. Hatcher 392 S.C. 86, 708 S.E. 2d 750 (2011).

Perhaps as bad as any instance is one in which the lower tribunal does not exercise discretion because, under an error of law, the lower tribunal did not know it had the discretion to exercise. An abuse of discretion occurs when the body appealed from is vested with discretion to grant relief to the appealing party, but its ruling reveals no discretion was, in fact, exercised. Fontaine v. Peitz, 291 S.C. 536 at 538-39, 354 S.E.2d 565 at ___ (1987)(reversing because trial judge's belief he could not permit additional testimony was erroneous).

[26]See the Circuit Court Order at 6. Additionally, the characterization of Dortch's plans to repair and renovate the interior and exterior of the property just as it was as being just as difficult and costly as re-designing and physically transforming the property is without any foundation in the record, in fact, or in common sense experience.

house was not only legally a duplex to begin with, but was also in a district still zoned specifically for duplexes and multifamily buildings, (5) that there were other duplexes in the same neighborhood, and (6) that it was an emotional affront and disturbance to her to be commanded under threat of fine or jail to destroy her childhood home as she knew it and waste huge amounts of money on it to transform it into something she did not want. This testimony established the elements needed for a variance as a matter of law and under any standard of review.[27] BOZA should be reversed, and the variance, granted.

Legal errors distracted BOZA from these facts and from the significance of these facts, and thus controlled BOZA's decisions, which requires reversal as an abuse of discretion. These errors were briefed to the Circuit Court. They were so numerous that they can barely be listed and briefed in the number of pages allowed.[28] BOZA's misunderstanding of the law pertaining

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[27]"Under Ord. §17-112(3), "[i]t shall be the duty of the board to authorize upon appeal in specific cases, a variance," id. §17-112(3)(a) (emphasis added), where there is a finding that the following conditions have been met:

(1) "There are extraordinary and exceptional conditions pertaining to the piece of property," id. §17-112(3)(b)(1)(i);
(2) "These conditions do not generally apply to other property in the vicinity," id.,§17-12(3)(b)(1)(ii);
(3) "Because of these conditions, the restriction in question would effectively prohibit or unreasonably restrict the utilization of the property," id.,§17-112(3)(b)(1)(iii);
(4) Granting the variance "will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed," id.,§17-112(3)(b)(1)(iv); and
(5) Granting the variance 'will be in harmony with the general purpose and intent of this article [III, Zoning, §§17-51 to 17-424] and will not be injurious to the neighborhood or otherwise detrimental to the public welfare," id., §17-112(3)(b)(7).

The first four factors are also set forth in the state enabling legislation, S.C. Code Ann. § 6-29-800(A)(2).

[28]They include (1) concluding that a nonconformity could not, and did not, constitute an exceptional condition, (2) concluding that the intent of the zoning ordinance to discourage continuation of nonconforming uses foreclosed the granting a variance to Dortch, or to anyone else on the planet, but denying a positive finding on this factor only to Dortch, and not to others, such as the owner of the Butler Street properties, (3) concluding in the 2013 written decision that a forced transformation of Dortch's building posed no impracticality or hardship based upon

review of another matter, on another date, at which Dortch was not present, (4) ignoring or being oblivious to the lighter standard applied to mere area variances such as the one sought by Dortch, (5) concluding that the "character of the district" was to be determined by unsworn, nonexpert, opinion testimony of a testimony-barred nonlandowner that the "neighborhood" was predominantly single-family, rather than that the character of the district, as established by the ordinance, was "multifamily," (6) allowing and relying heavily upon letters or verbalizations from people who were (i) not sworn, (ii) not qualified to give opinion testimony, (iii) offering only hearsay, and (iv) were, as people not shown to be owners of neighboring property, prohibited under BOZA's 2/11/97 Rules provided in 2018 from being considered, (7) allowing and relying upon letters not only not under oath, not showing qualification for opinion testimony, and not showing required ownership, but also purporting to speak for groups or mobs of anonymous, absent unsworn other people, e.g., "neighborhood associations," (8) receiving and relying on ex parte briefs from the zoning administrator provided in advance of the hearings, (9) relying on other hearsay material provided by the zoning administrator which was not disclosed to Dortch nor ever formally admitted into evidence, (10) allowing the zoning administrator to privately sign, and, impliedly, draft or comment upon, the decision in the 2013 proceeding, before sending an order to Dortch, (11) jumping to conclusions of law in the written decision of the 2013 proceeding while actively withholding any factual findings on the actual factors for considering a variance (instead, for example, finding only that "notice of the hearing was given," that the house occupied the address given, that Dortch "testified" to a fact (with BOZA evasively neither accepting or rejecting the plain uncontested fact as a finding), etc.), (12) making neither findings of fact nor conclusions of law in the 2009 decision, (13) considering the unsworn mistaken legal opinion of the acting chairmen and two others in the 2013 proceeding that Dortch's application was the equivalent of downzoning by one level, when, instead, the next higher, more restrictive, zone allowed a duplex on lots smaller than Dortch's, (14) "traditionally" finding positively on all five factors for, and granting with alacrity, variance applications with the same attributes as Dortch's (without even inquiring about cost of conversion), while failing to find for her on even one, (15) purporting to consider "density," without identifying one scintilla of evidence on density from a sworn, qualified, nonhearsay source, and (16) while purporting to consider "density," actually only considering objections from unqualified sources purely on the subject of possibility of rental, which is not legally relevant to the issue to be decided, just as rental to, or occupancy by, African Americans is not a legally relevant factor and speculation about the possibility of rental to college students is not a legally relevant factor.

With regard to this last error, i.e., considering letters and unsworn spoken comment explicitly rooted solely in a desire to discourage rental, rather than owner-occupancy, Dortch posits that such matters are not only entirely speculative and in fact contrary to her intentions stated in the record, but also legally irrelevant to the "character of the district." The character of the district is high density, multi-family. Rental is not a zoning concern, district descriptor or criterion found anywhere in the zoning code, City of Columbia Ord.§§17-51 to17-460, other than in defining things like hotels or boarding houses. BOZA's legal error in considering objections on such a basis was compounded by a BOZA member remarking that the ordinance states a requirement of owner-occupancy. (BOZA 2009 rec. p. V-000030, R.p. 408.) It does not.

Despite "what everyone knows" about BOZA proceedings, no level of deference afforded to a zoning adjustment body will allow public or community comment alone to serve as a basis for denial of a permit application, where the record indicates no investigation and admissible

to constitutional grandfathering (discussed above), misunderstanding of the law pertaining to exceptional circumstances, misunderstanding of the law pertaining to harmony with the zoning ordinance, misunderstanding of the lighter standards to be applied to area variances, and arbitrary decisionmaking in an application with no just distinction from others which were granted, are but a few.

The Circuit Court echoed BOZA's 2013 erroneous determination "as a matter of law" that because the property did not meet the lot size requirements and "lost its nonconforming status," the property could not meet the requirements for a variance. The Circuit Court simply declared categorically that a nonconforming use of a structure cannot be an "extraordinary or exceptional condition" pertaining to the piece of property for purposes of a variance. (Order at 6 and see similar statement at 12-13, R.pp. 40 and 50-51.) Both these erroneous determinations rely on a total fiction that the house can be erased, and is not still there and part of the property, and that only the topography of an empty lot with a proposed use is being considered. A nonconforming structure not only can be, but also, here, as a matter of law, is, an exceptional condition. A house already legally built in a nonconforming manner is no less peculiar a property than a vacant lot that is legal to own, but slightly too small to build a practical house on without violating one setback or another.

BOZA's 2009 decision, although it stated no reasoning whatsoever, appears to have been controlled by this same error of law. The fact was that physically, in reality, the structure was

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evidence and findings as to the validity of the concerns voiced. Wadsworth Construction, Inc. v. West Jordan City, 2000 UT App. 49, 999 P.2d 1240 (Ct. App. 2000)(reversing summary judgment in favor of city, where sole bases for two findings of adjudicative tribunal were concerns raised by neighboring property owners, and holding that the city's denial of a conditional use permit was arbitrary, capricious, and without sufficient factual basis).

still there and was still, undeniably, a duplex. BOZA's laboring under this error makes BOZA's decisions reversible as an abuse of discretion. Fontaine v. Peitz.

When the nonconforming use is a nonconforming structure, as opposed to a conforming structure which may house either a conforming use or a nonconforming use, the condition is all the more extraordinary or exceptional, because the use is permanently embodied in a physical characteristic of the property. This is even more so when the alleged nonconformity of the structure is a mere area requirement, rather than a use which is prohibited in the zoning district. That is, when a mere "area variance," rather than a "use variance," is sought, the variance should be granted under the more lenient standard of "impracticality."[29] The failure of BOZA to apply this light impracticality standard was an additional controlling legal error mandating reversal as an abuse of discretion.

A permanent improvement to land, e.g., a house, is part of the real estate. It is part of the "property" described in the variance statute. Clerics of St. Viator, Inc. v. D. C. Bd. of Zoning Adjust., 320 A.2d 291, 294 (D.C. 1974)(discussing authorities and concluding, "It makes no practical difference whether the inability to use property in accordance with zoning regulations stems from topographical conditions of the land itself or from the existence of a structure on the land"). Logically, when the structure itself has a characteristic which generally does not apply to other property in the vicinity, the property itself is generally different from other property. Id. ("property generally includes permanent structures existing on the land").

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[29]See, e.g., Jonathan E. Cohen, A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls, 22 B.C. Envtl. Aff. L. Rev. 307 at 331-341 (1995)(available at http://lawdigitalcommons.bc.edu/ealr/vol22/iss2/5)(discussing historical rationale of the "use variance" as a safety valve to prevent unconstitutional taking of property and the distinctly lighter standard applied in the case of mere "area variances"). Numerous authorities for applying less stringent standards to area variances were briefed by Dortch to the Circuit Court in her Brief at 27-30, R.pp. 495-498.

When the property meets this condition, it is an exceptional condition. See, e.g., Draude v. Board of Zoning Adjustment, 527 A.2d 1242 (D.C. Ct. App. 1987)("On the other hand, existing structures on the land are part of the 'property' and may be 'exceptional conditions' for variance purposes"); accord Draude v. Board of Zoning Adjustment, 582 A.2d 949 (D.C. Ct. App. 1990)(considering continued use of the "valuable asset of the pre-existing Burns Building," and unreasonableness of requiring respondent "to convert a valuable resource, that is, the existing Burns Building"); see also Clerics of St. Viator, Inc., 320 A.2d 291 at 294 (concluding board erred in finding absence of exceptional condition when building's grandfathered nonconforming use as a seminary was an exceptional condition which, owing to the size and multiple occupancy use of the existing building, needed to be changed to nursing home of similar size and multiple occupancy use prohibited by zoning, because of drop in seminary enrollment); and see 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 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). BOZA's failure to grasp the law in this area was an abuse of discretion.

Another resounding legal error apparently controlling BOZA's decisions, was the tautology that, because the intent of the zoning ordinance was to discourage nonconforming uses, therefore Dortch could not satisfy the fifth factor in the zoning ordinance for granting a variance for a nonconforming use, i.e., the factor requiring a finding that the variance does not conflict with the intent of the zoning ordinance.[30] Such a legal or factual proposition renders all variances

[30]The variance criteria of Ord.§17-112(3) -- calling for self-guided lay determinations of broad, legally-infused concepts like extraordinariness of conditions, exceptionalness of

ungrantable and all variance provisions meaningless. Such a farcical justification for denying Dortch's application proves the decision was arbitrary and capricious and is reversible on that basis.

Contrary to BOZA's misapprehended impression of the intent of the ordinance, the ordinance contains provisions for, and thus intends for there to be, both multi-family zoning districts and variances for nonconforming uses. A variance is described as a right the board has a "duty" to recognize in a complying case, in order to be fair and avoid unconstitutionality, just as was done in the applications for the Butler Street properties. There, the City admitted that BOZA traditionally grants this type of variance to everybody except Dortch.[31] The zoning

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conditions, generalness of applicability of conditions, the "vicinity," causation of "unreasonable restriction" by conditions, substantial detrimentalness to "the public good," harmony with the "general purpose and intent" of the entire zoning code, and detrimentalness to "the public welfare" -- are, on their face, dangerously vague and so general and lacking in specific standards that they militate toward different arbitrary and capricious interpretations in every case.

This roulette wheel provides no predictability or reviewability of result, particularly when lacking any meaningful procedural or substantive safeguards. This roulette wheel, as we have seen, incorporates the likelihood of decisions stating no findings of fact on the issues presented, delayed preparation of the record of proceedings, flawed records of proceedings, ex parte written briefings to BOZA prior to BOZA hearings, unauthorized submission of additional unsworn loose-leaf materials by the zoning "staff" directly to BOZA which are not provided to the applicant, unauthorized submission of unsworn statements, unauthorized submission of "public comment," and a gauntlet of scopes of review stated according to the predilection of the reviewing court. Accordingly, Ord. §17-112(3) is also unconstitutionally vague, and in any event, is an overall denial of procedural and substantive due process when applied to Dortch.

The violation is not lessened because the variance statute is not a prohibition, but, rather, a statute putatively remedying the effects of prohibitory statutes in the zoning code. Coupling an otherwise illegally overreaching prohibition with putative discretionary relief from the prohibition, when the relief is illusory or is itself unconstitutionally vague, does not save the overall prohibition from unconstitutional vagueness or overreaching.

[31]In the proceedings on the Butler Street properties, no further evidence on the "exceptional conditions" factor or any of the other four variance factors was required for recommendation. It sufficed that (i) the duplex had been legal at the time of creation, (ii) the lot size was allegedly now too small, and (iii) every single structure in the neighborhood was not also a duplex with a lot that was allegedly too small. There were even more exceptional conditions pertaining to Dortch's property than to the Butler Street properties, and Dortch was being told to either spend $100,000 to create something she did not want, or go to jail.

administrator's briefs of the cases for the Butler Street properties establish that the decisions of Dortch's applications were arbitrary and capricious as a matter of law.

CONCLUSION

This Court 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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Date: 6/22/20

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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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 AND RULE 211 (b) COMPLIANCE

I, M. Baron Stanton, do hereby certify that I have, on 6/22/20, 2020, served the foregoing Appellant's Brief of Frieda Dortch upon the Respondent by causing a copy thereof to be mailed with proper postage to the address indicated below and do further certify that the brief complies with Rule 211(b):

Peter M. Balthazor, Esquire
P. O. Box 11412
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s/M. Baron Stanton
M. Baron Stanton