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SC Court of Appeals

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

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

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Frieda H. Dortch, .....Appellant,

v.

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

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APPELLANT'S PETITION FOR REHEARING

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## REQUESTS

A. Dortch respectfully requests that the Court of Appeals rehear and reconsider the appeal, and, regardless of the outcome, issue a published full decision. The Court of Appeals issued a one-and-a-half page, unpublished, per curiam, “memorandum decision” setting forth in four numbered paragraphs, the Court of Appeals’ disposition of the appeal, and affirmed the Circuit Court. The decision bears the all-capitals, bold-face header, “**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**” Dortch respectfully requests that a published re-issued decision address and rule on all, rather than some, of the dispositive issues conscientiously presented on appeal by Dortch.

B. Dortch also requests that the Court of Appeals review the Appellant’s Brief, Respondent’s Brief and Appellant’s Reply Brief, and such other briefs as the Court of Appeals may allow or direct, and change, as discussed further herein, this Court’s abbreviated summary rulings on the following issues as numbered and described in the Court of Appeals’ unpublished, per curiam, memorandum decision:

1. Whether any authority supports de novo review of the BOZA decision;
2. Whether the duplex lost statutory grandfathered status because evidence existed “that the duplex had been vacant for twelve months”;
3. Whether the Circuit Court erred in affirming BOZA’s denial of a variance; and
4. Whether language Dortch used in her appeal to Circuit Court was sufficient to preserve for review by the Circuit Court, the issue extensively briefed by her in this appeal, namely, Dortch’s constitutionally protected vested right to continue use of the property as a situs with a duplex.

## GROUND AND DISCUSSION

### A. Unpublished Abbreviated Opinion

The grounds for the request for issuance of a published formal decision are that the Court's July 20, 2022 unpublished, per curiam, abbreviated memorandum decision No. 2022-UP-307, whether changed in outcome or not, should present a description of the case, the issues actually raised in the context of that description, and the specific ruling of the Court of Appeals on each and all of the issues. Many are infrequent or novel issues. Some have never been ruled on before. The decision should then be published, regardless of outcome, so as to stand as law and precedent in other cases with other parties. Unpublished cases are declared not to be precedent and not to be citable in other cases.

In this event, Dortch will not be the only person affected by the Court of Appeals' rulings on the issues she actually presented. Dortch may therefore be able to obtain review by the South Carolina Supreme Court of the correctness of the decision, if still incorrect, as discussed hereinbelow.

The further grounds are that it is imprudent to issue unpublished opinions omitting identification of the actual issues presented for review, omitting ruling on the actual issues presented for review, or ruling on issues which are not accurately and fully described within the factual and legal context of the case and exceptions.

The further grounds for this request is that the S.C. Supreme Court is authorized to issue unpublished memorandum decisions, but the intermediate appellate court, the Court of Appeals, is not.

Further, the subject matter of the instant appeal and the issues addressed in the instant opinion do not fall even within the authorization, or the policy, of the S.C. Supreme Court to issue unpublished memorandum decisions.

The purpose of such a form of delivery is mainly to avoid restating frequently recurring settled issues which have already been routinely ruled upon by the appellate courts. The purpose is not to obscure and avoid further public and judicial review of appellate decisions that are poorly reasoned, to altogether avoid deciding issues squarely presented, to obscure decisions which are of uncertain fitness as precedent, or to avoid deciding undesirable or unpopular issues. Among other things, the issues which are actually presented in the instant appeal for decision are important, are not routine, and have not been repetitively decided by South Carolina appellate courts.

The issue of the abbreviated form of the decision and designation of the opinion as unpublished and as creating no precedent for other parties for other cases is further briefed later in this petition.

B. Not Addressing All Issues, and Ruling Incorrectly and Grossly Incompletely on Limited Issues Addressed

The particular points which were overlooked or misapprehended by the Court of Appeals are as follows, in the order numbered by the Court of Appeals in its unpublished, per curiam, memorandum decision:

1. De Novo Review and Different Standards of Review for Different Things. The Court of Appeals ruled that “no authority” supports de novo review of the BOZA decision, as opposed to more restricted and deferential review.

However, this is incorrect. There is authority. Dortch cited authority. The proposition for which the authority was cited is correct as well. As an aside, lack of case law, if there is such a lack, is not a legitimate reason for affirmance. If an issue is presented and is cogently argued on appeal, the appellate court can follow logic and reason if there is no case law neatly addressing the issue.

Either way, issues and the arguments presented on appeal should be addressed by the

appellate court, whether there is a case on the point or not.

Issues specifically identified by Dortch, for example (but not by way of limitation), were:

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?

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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?

(Brief pp. 1-2.)

Dortch both cited and argued authority on these issues.

She did so more extensively in the first version of her Initial Appellant's Brief, for which she made a request for leave to exceed the page limit, which was denied. She repeated the arguments in the substitute Brief she then filed in, among other places, her Brief at 20-23 and 38-42. She also addressed the matter in her Reply Brief at 6-7 and 20-24.

She cited the Administrative Procedures Clause of the S.C. Constitution as authority superior to cases cited in the Court of Appeals' decision as if they were the only authority, cited the S.C. Ambulatory Surgery Ctr. Ass'n case discussing the clause and its scope, presented analogous issues addressed by the U.S. Supreme Court and the State and federal Administrative Procedures Acts, discussed parallel questions of review of decisions of magistrate's courts, argued principles examined by the S.C. Supreme Court in a case overruling the previous standard of review applied in family court cases, discussed due process considerations applied in North Carolina to similar administrative proceedings, explained the invalidity of the statutes setting

forth the mode of procedure and scope of review, and argued matters of pure statutory interpretation and application which dictate that there must first be compliance with the requirements of the statute by the body reviewed as a precondition of the standard of review described by the statute, etc. She also discussed other differences and scope in even the heretofore conventional standards of review applied (such as reversal, as abuse of discretion, for decisions “guided by errors of law”), depending upon what was being reviewed and the circumstances.

The Court of Appeals neither identified nor discussed these issues, making the opinion read as if Dortch had presented no argument at all. As authority for its erroneous abbreviated assertion of “no authority,” the Court of Appeals merely cites the very authority which was the subject of Dortch’s arguments negating or distinguishing that authority.

In negating or distinguishing the authority cited by the Court of Appeals and the propositions which that authority putatively supports, Dortch cited other authorities for her arguments. This authority therefore exists, contrary to the Court of Appeals’ ruling.

I.e., there is indeed authority for de novo review and Dortch presented it, but the Court of Appeals simply did not address it and the form of decision does not reveal this omission because the decision does not set forth the facts of the case or the contentions Dortch presented in her appeal.

The Court of Appeals’ overlooking, or even disagreeing with, authority without identifying or discussing it in the decision is not the same as there being no authority in existence, or no authority being presented to the Court of Appeals. The statement that there is no authority is incorrect and misleading to any reader of the abbreviated unpublished per curiam decision.

The issue in question is also a serious one with large implications, not previously

routinely addressed in case law, and is a subject unfit for decision in an abbreviated unpublished decision. It is error to sweep the issue under the rug.

2. Statutory Grandfathering. The Court of Appeals ruled that the existence of mere evidence “that the duplex had been vacant for twelve months” was sufficient to answer the question of whether the duplex lost statutory grandfathered status. It was not sufficient. The Court of Appeals again overlooked and left out discussion of pertinent issues. This ruling begs many questions and does not rule on issues distinctly presented.

It matters, for example, whether, despite such putative “vacancy,” the statute mentioning such vacancy applied at all to curtail statutorily grandfathered status or to require a cessation of the “use.”<sup>1</sup>

It matters whether the statute which allegedly rendered the prior legal use “nonconforming” did not actually do so, or is unconstitutionally vague. These two issues were argued by Dortch but not ruled on by the Court of Appeals.

It also matters what “vacant” means, matters whether the statute applies when, as here, no independent event occurred which “disestablished” the nonconforming use, matters what the dates of the putative vacancy were, and matters who caused or required the putative vacancy.

These issues were specifically presented in Dortch’s Brief at 36 (discussing “vacancy”), 37 (discussing inapplicability of the time limit and the particular ordinance section to instances involving “reconstruction after damage”), and 37-38 (discussing equitable tolling of period beyond the control of the party affected by the period, particularly if caused by the party asserting the effect of the period, such as, here, where no part of the “12 months” was other than

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<sup>1</sup> There were at least three statutes eventually involved in the complex of denial of permission for Dortch to simply fix her existing house. The Court of Appeals did not identify any of them or discuss their applicability or interplay among them. They were City of Columbia Ordinance Section 17-275, Columbia Ordinance Section 17-202(e) and City of Columbia Ordinance Section 17-202(f).

a time in which the City prohibited occupancy).

Many of these matters were addressed again in Dortch's Reply Brief at 9-10, but none were addressed in the Court of Appeals' truncated and partial decision.

Thus, simply ruling that BOZA was correct in finding loss of statutory grandfathered status because of evidence "that the duplex had been vacant for twelve months" begs the question of the significance and legal effect, if any, given to that "evidence."

The Court of Appeals also cited the Gurganious case as establishing categorically that a City of Beaufort ordinance, not a City of Columbia ordinance, applied to a situation of interruption or discontinuance of use in Beaufort, which is entirely beside the present point.<sup>2</sup>

3. Denial of the Variance. The Court of Appeals decided that the Circuit Court did not err in affirming BOZA's denial of a variance. But the reason given by the Court of Appeals only addresses one of two facets of the error Dortch argued. There are two facets and appellate remedies for Dortch's argument that BOZA should be reversed on its denial of the variance.

One is that BOZA should be reversed because the variance should be granted. The other is that BOZA should be reversed and the case should be sent back to BOZA with instructions on the correct application of the law including the applicable procedure. This would be the case even if the appellate court cannot determine for itself that the variance should have been granted.

The Circuit Court did err in affirming BOZA's denial of a variance. The Court of Appeals' unpublished per curiam comments again beg the question of the argument specifically addressed to this issue. The Court of Appeals merely conclusorily cites a "burden of proof" of showing exceptional circumstances and ambiguously states that Dortch did not meet it.

This comment obscures the analysis even more because it does not read as a comment

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<sup>2</sup> Dortch had in fact discussed Gurganious in the different context of unconstitutionality of prohibition of vested rights, which is not pertinent to the other issues of applicability of the Columbia city ordinance and the instant misapprehension of the Court of Appeals.

sustaining the Circuit Court or BOZA by applying a standard of review. It reads more like a finding directly by the Court of Appeals (violating the standard of review otherwise “sustained” by the Court of Appeals) that the burden was not met. This finding is not, however, accompanied by any discussion of the arguments or evidence Dortch presented in trying to meet, and in fact meeting, that burden.

The Court of Appeals’ comment thus already suffers from having begged the question of scope of review described in point 1 above. Dortch additionally argued that even under the abuse of discretion standard, BOZA was guided by numerous legal errors.

By definition, if this occurs, an abuse of discretion is found and the lower tribunal should be reversed. Yet, the Court of Appeals overlooks all such legal errors presented and discussed by Dortch with citation of authority. Instead, the Court of Appeals erroneously perceived the question as one of simply stating that Dortch did not meet her “burden.”

The Court of Appeals appears to actually imply that it has found as a fact or as a matter of law that there were no exceptional or extraordinary conditions. Yet, the Court of Appeals does so without addressing Dortch’s contentions regarding how those conditions are defined and BOZA’s errors in defining them.

The Court also does not discuss Dortch’s argument that such conditions were present and the evidence she supported these arguments with.

Further, the Court of Appeals cites a completely inapplicable provision of law as sustaining the Circuit Court and BOZA, namely, that a variance cannot “allow the establishment of a use not otherwise permitted in a zoning district.” This citation by the Court of Appeals actually demonstrates the error in the tribunal below. Not only did Dortch specifically present argument on BOZA’s misunderstanding and misapplication of this proposition, but other parts of of Dortch’s brief presented actual instances of BOZA, granting, in writing, as a stated matter of

routine policy, the very type of variance Dortch sought.

The Court of Appeals did not understand and overlooked the fact that the use Dortch sought was residential – specifically two family residential – and was therefore a use specifically allowed in the zoning district Dortch was in, namely a zoning district intended for multifamily dwellings. This was not a “use not permitted in her district,” as ruled by the Court of Appeals. Again, the Court of Appeals did not discuss or rule upon the argument.

The Court of Appeals did not determine at all, Dortch’s arguments concerning legal errors which guided BOZA in its decision on the variance and direct evidence of arbitrariness in BOZA’s policy of routinely granting similar variances to people other than Dortch without exacting even the requirements Dortch clearly met. Regardless of what standard of review is used, these errors would require reversal of BOZA, but the Court of Appeals did not address them and did not rule on them.

These errors included BOZA’s consideration of inadmissible materials, hearsay within hearsay, witnesses unqualified under the statute, and various grossly prejudicing references to other proceedings and personal experiences of BOZA members to which Dortch was not privy. The many, many errors also included BOZA’s misunderstanding of the definition of the “character of the district” as referring instead to “the neighborhood,” the aforementioned misunderstanding of the definition of a use “not permitted in the district,” and misunderstanding of standards to be applied. One such latter misunderstanding was a tautological and legally fatal determination that because the zoning code disfavored variances, all variances should be denied under the variance provisions of the zoning code, because one consideration in granting a variance is the intent of the zoning code.

Another watershed legal issue not touched on by the Court of Appeals is BOZA’s brightline, outcome determinative, error in failure to understand that the existing improvements

already on the land are part of the property for purposes of determining exceptional or extraordinary conditions. Dortch cited law on this, again not addressed by the Court of Appeals.

Dortch thus made numerous outcome-determinative arguments which were required to be considered regardless of whether there is “evidence in the record” or not in the record. The Court of Appeals did not consider or address any of them in its unpublished abbreviated decision. A decision involving a determination of question of fact that is guided by a legal error is “abuse of discretion,” and is reversible for same.

4. Violating Dortch’s Vested Constitutional Right to Continue Using Her Property as It was Used Before the Offending Statute Was Enacted. This central issue of constitutionality was argued as the first issue by Dortch in her Brief, but was listed fourth by the Court of Appeals in its unpublished, anonymous, abbreviated decision. The Court of Appeals entirely declined to address the issue.

Without stating – for readers of the opinion -- what the language was, the Court of Appeals ruled that the language Dortch used in the very first paper she filed pro se in Circuit Court to communicate the unconstitutional nature of the denial of permission to repair her house was insufficient to preserve the issue. Impliedly, the Court of Appeals also ruled that the language used subsequently on such issue, before any consideration by the City or the Circuit Court, was also insufficient to preserve the issue for review by the Circuit Court, and, in turn, the Court of Appeals.

As discussed more fully in her briefs, Dortch had asserted to the Circuit Court that the actions and prohibitions to which she had been subjected – which had not even been explained sufficiently to her in a written decision -- were “fundamentally unfair and denial of due process of law.” She promptly thereafter fully expatiated on the breadth of this topic and the various names by which the law refers to it. All this was additionally without the benefit of a record of

the proceedings of BOZA, which was not provided until years later.

The Court of Appeals did not analyze the timing, context, language, or substance of what Dortch stated in her appeal to Circuit Court. The Court of Appeals instead flatly ruled, without comment or analysis, that she did not raise the issue and therefore did not preserve it. The issue of whether she raised and preserved the issue was itself an issue raised and presented on appeal to the Court of Appeals.<sup>3</sup>

The Court of Appeals, however, engaged in no analysis or consideration whatsoever of the flexibility the law allows and requires in the rules of issue preservation.

The Court of Appeals rules only that the central issue in this appeal after years of litigation and argument over it was not preserved for appeal, on the basis that Dortch did not state in her very first paper filed pro se in the Circuit Court, in certain specific words, that “she had a constitutionally vested right to continue using her duplex.”

The Court of Appeals overlooked and failed to address authority cited by Dortch that issue preservation does not depend on use of specific words. Issue preservation was fully addressed in Dortch’s Brief at 19, 21, 23, and 24 and Reply Brief at 10 and 16-20. The Court of Appeals neither addresses nor discusses the words Dortch did use, e.g., “fundamentally unfair and denial of due process of law” to deny repair of the duplex, in conjunction with her appeal to BOZA concerning “denial of grandfather status.”

The Court of Appeals also did not discuss the flexibility of issue preservation rules, despite the merely general authorities on the subject y cited by the Court of Appeals.

FURTHER DISCUSSION OF THE LACK OF AUTHORITY OF AN INTERMEDIATE APPELLATE COURT TO ISSUE SUMMARY UNPUBLISHED UNCITABLE DECISIONS, PARTICULARLY ON NONREPETITIVE NONROUTINE ISSUES.

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<sup>3</sup> Dortch actually did not appeal to the Court of Appeals. Dortch appealed to the S.C. Supreme Court pursuant to statute.

The foregoing discusses some, but not all, of the novel, nonroutine and important issues which should have been fully addressed by decision of the Court of Appeals. The sweeping sequence of errors below on distinct and important legal principles presents an acute need for a prohibition against designating the Court of Appeals' opinion as "unpublished." This is particularly important when something as vital as preserving a family home is involved. Rehearing should be granted.

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

1. Error for the Court of Appeals to designate the opinion as unpublished and uncitable.

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

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

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

The South Carolina Constitution and political custom recognize legal and judicial tradition based on precedent, equal application of laws, and limits on judicial lawmaking or abrogation of law. The Constitution specifically contemplates the publication of the decisions of the Supreme Court and Court of Appeals. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. I, § 3, S.C. Const. Art. I, § 23, *id.*, Art. I, § 9, *id.*, Art. I, § 8, *id.*, Art. I, § 7, and *id.*, Art. V, § 25.

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

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

Only memorandum opinions can be unpublished opinions. Rule 220(a), SCACR.<sup>4</sup> Only unpublished opinions are declared by rule to be without precedential value. Rule 220(b)(1),

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<sup>4</sup> “The appellate court shall make its decisions in writing by published opinions or memorandum opinions.” Rule 220(a) (emphasis added). An “unpublished” decision can be defined as a memorandum decision which, while possibly available on the internet, is not published in “the Official Reports” or designated for inclusion in a hard-bound volume. See Rule 220(a), SCACR, and S.C. Code Ann. §§ 14-3-810, 820 and 830.

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

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

The opinion in the instant case in no way qualified under Rule 220(b)(1) to be a memorandum opinion.<sup>5</sup> It was therefore error for the Court of Appeals to designate the opinion as unpublished and uncitable. Not only should the error be corrected by the Court of Appeals, but the re-issued opinion, regardless of outcome, should be regarded as precedent in other cases and should be ordered published.

2. Error for the Court of Appeals to not identify and decide all the issues distinctly numbered and presented.

All judges in this state swear to preserve, protect and defend the Constitution of this State and of the United States, uphold the integrity of the judiciary, rule after careful and considerate deliberation, and seek justice, and justice alone. Rule 502.1, SCACR.

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

<sup>5</sup> The Court of Appeals was not allowed to issue a memorandum decision pursuant to Rule 220(b)(1). In South Carolina, only the Supreme Court can issue memorandum decisions. Rule 220(b)(1), SCACR. By its own convention, in 1993, the Supreme Court issued memorandum decisions only sparingly, even in the limited instances in which it was authorized to do so. In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). The Court of Appeals defended its issuance of unpublished decisions in Lanham v. Blue Cross and Blue Shield, 338 S.C. 343, 526 S.E.2d 253 (Ct. App. 2000), on the basis, stated in a footnote, that it had been issuing unpublished decisions. I.e., the Court of Appeals justified the challenged practice on the basis that the court engaged in the practice.

“In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.” Rule 220(b), SCACR; S.C. Code Ann. §18-9-280 (1985); *id.*, §14-8-250 (Supp. 1992).

The Court of Appeals’ opinion did not identify for its readers, all of the several points involved. The Court of Appeals failed to identify and decide, among other things, the issues on appeal numbered “1” (unconstitutionality of retroactive application in violation of constitutionally grandfathered rights), “3” (preservation of error) “4”-“9” (inapplicability, invalidity and equitable tolling of statute), “10” (constitutional prohibition of “any evidence” standard at administrative or inferior tribunal level), “11” (inapplicability of statutory standard of review when tribunal reviewed does not first comply with duties under the statute), “15” (whether a nonconforming use legally could be, and, here, was, an exceptional condition, and BOZA’s misunderstanding of this), “16” (error in determining that the intent of the zoning ordinance foreclosed the possibility of any nonconforming use by anybody ever getting a variance), “18” (error in failure to understand the legally lighter standard applicable to “area variances,” as opposed to “use variances”); “21” (abuse of discretion in relying on *ex parte* briefings and other materials from the party from whose decision Dortch was seeking relief); “28” (error in considering speculation on propensity for rental, which is legally irrelevant); etc.

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

The Court of Appeals' decision violates Rule 220(b) in all three particulars – (i) it does not disclose all the issues raised on appeal, (ii) it does not decide the skipped issues, and (iii) it obviously does not provide reasoning on the skipped issues. In this manner, the opinion tends to further evade review.

Rules 220(b)(1) and 220(b)(2) provide limited exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a “memorandum opinion.” Rule 220(b)(1) provides an exception only when the entirety of the five-member “Supreme Court,” “in unanimous decision,” “determines” two things. First, the five justices must determine unanimously that “a published opinion would have no precedential value.” Second, the five justices must unanimously determine that at least one of four circumstances are present. The exception is not for use of the intermediate Court of Appeals.<sup>6</sup> Rule 220 and the applicable statute therefore required that the Court of Appeals state its reasoning on each issue.<sup>7</sup>

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<sup>6</sup> In 1993, the Supreme Court of South Carolina issued an order regarding issuance of memorandum decisions by the Court of Appeals. See In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). However, the order did not arise from an advocated appeal. Nor was the order listed in the Court Register pursuant to S.C. Code Ann. § 14-3-940(a), nor was the order submitted to the legislature pursuant to S.C. Code Ann. §§ 14-3-940(b) and 14-3-950.

In the order, the Court advised of its opinion as to what level of detail was sufficient to prevent a Court of Appeals decision from constituting a “memorandum opinion” disallowed by both statute and rule. In Re Memorandum Decisions by Court of Appeals. The order required at least an identification of all the issues by number, and required reasoning allocated to each issue.

In the instant case, the opinion of the Court of Appeals did not even purport to be a memorandum decision, as it discussed some issues in summary fashion without context, but completely omitted others.

As to both the issues discussed and not discussed, the opinion did not meet the standards set out in the Supreme Court's order.

Even if the Court of Appeals were unwisely to be considered eligible to invoke the Rule 220(b)(1) exception to the requirement of issuing a “published opinion,” the unanimous “determination” would fail in this case, and a “published opinion” would still be required.

The determination that the opinion would have no precedential value would hinge on presenting the opinion in a manner so as not to discuss important issues actually raised. Next, one of the following four circumstances would need to be determined to exist: findings of fact in a bench trial, JNOV, findings of fact of administrative agencies, and complete absence of error of law. Rule 220(b)(1), SCACR; S.C. Code Ann. §18-9-280 (1985). The requirement of a

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

Depriving an appellate decision of publication and precedential effect by judicial fiat is outright destruction of stare decisis. In this case, it is a denial of justice. South Carolina's constitutionally and statutorily recognized judicial tradition of written appellate decisions, followed for all people as legal precedents, was already in the vanguard of governmental transparency and responsibility before fairly recent measures taken by the United States Supreme Court with related issues in the federal appellate judicial system.<sup>8</sup>

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

Objections to uncitability and deprivation of precedential value in other jurisdictions

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“unanimous determination of the Supreme Court” is difficult to measure, as no record of a vote or actual determination has been provided -- only an indication that the three-judge panel of the 9-member court (not, as with the S.C. Supreme Court, the entire Court of five Justices) “concur” with an opinion impliedly written by someone else.

<sup>7</sup> Both Rule 220(b)(2) and the applicable statute provide one exception which is available to the Court of Appeals. The limited exception is made for “a point which is manifestly without merit.” Rule 220(b)(2), SCACR; S.C. Code Ann. § 14-8-250 (Supp. 1992). None of the twenty-nine distinct points presented by Dortch to the Court of Appeals were identified by the Court of Appeals in its decision as manifestly without merit – they all presented precedent and arguments of error by the Circuit Court.

<sup>8</sup> See Federal Rule of Appellate Procedure 32.1 (abolishing, in the wake of over a decade of protest, the uncitability of unpublished decisions from 2007 forward). Quick references, with links, for the background and status of Fed. R. App. P. 32.1 are currently available at the URL, <http://www.nonpublication.com/32.1.HTML> . Protest over the practice of allowing obscure or oblique staff-generated summary opinions, and not requiring them to be published, not allowing citation of them, and not regarding them as law applicable to others has generated more writing than can be conveniently cited, including over 150 presentations, law review articles and journal articles. These include 155 resources, which even in a readable footnote, would require about twelve pages to list; these can be directly accessed by links found at the URL, [www.nonpublication.com/ARTICLES.HTML](http://www.nonpublication.com/ARTICLES.HTML) .

have been based on First Amendment grounds, due process grounds, violation of Article III powers, pure logic, public policy, and loud outcry.<sup>9</sup>

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

## **CONCLUSION**

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

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

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<sup>9</sup> One citizen formed his own organization, Committee for the Rule of Law, and commented as follows:

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

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

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

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

Respectfully submitted,

s/M. Baron Stanton

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FRIEDA H. DORTCH

Date: 8/4/22

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Aug 04 2022

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Walton J. McLeod, Circuit Court Judge

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

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Frieda H. Dortch, .....Appellant,

v.

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

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CERTIFICATE OF SERVICE

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

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

s/M. Baron Stanton  
M. Baron Stanton

Date: 8/4/22