

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Dec 06 2022

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Walton J. McLeod, Circuit Court Judge

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

Frieda H. Dortch, Petitioner,

v.

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

**REPLY OF DORTCH TO CITY'S RETURN TO PETITION FOR A WRIT OF
CERTIORARI AND FOR A WRIT OF MANDAMUS**

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I. Summary of general themes of Dortch's Petition and the City's Return

In her petition, subject to page limit established by rule, Dortch carefully outlined how she diligently and intelligibly raised and outlined her contentions at every stage for years. She outlined how she did this despite lack of notice provided to her of the basis of decisions against her, lack of written decisions by the building and zoning department, insufficient decisions by BOZA, ex parte briefings received by BOZA from her adversary, and the legal or factual impossibility of raising certain issues any earlier, such as equitable relief or constitutional issues a board of zoning appeals could not determine, or the scopes of review that should be used for different issues or aspects of the decision being reviewed.

Dortch presented to this Court a petition for both certiorari and mandamus and presented them in the same petition and within one page limit. The petition for mandamus arises from a matter arising only as of the time of the decision by the Court of Appeals and was presented squarely to the Court of Appeals, but the Court of Appeals did not address it at all by name or by issue or by concept. The Court of Appeals ignored the issue, stating only that the Court of Appeals had not overlooked anything.

Thus, the issues in the current Petition are now numbered at 40, lest the City next argue that they were not presented particularly enough or using the words that would raise those issues.

The City's theme now with regard to numerous discrete issues on which cogent argument was offered and authorities were cited but which were completely omitted from decision and neither mentioned nor decided is that they were "not raised and not preserved." If this was the reason, why did the Court of Appeals or even circuit court not say so?

There is no mention or ruling by the Court of Appeals that the squarely presented issues are not being decided because not raised and preserved. As a backstop reason to excuse not

deciding or mentioning issues, the City offers the secondary argument that the 25 or more nondecided issues were all “manifestly without merit.” If there was a reason for not deciding, it cannot be both these reasons. We cannot know what the reason was because the Court of Appeals rendered a defective and deficient form of decision in which that court neither stated that an issue was not raised nor stated that it was manifestly without merit.

These problems underscore the need to either grant mandamus and require an actual published decision, or to correct the decision, rule on the issues, and also decide the much-avoided issue presented of whether the Court of Appeals is authorized by statute to not answer questions presented on appeal and not publish its decisions.

II. Dortch raised vested rights.

The question is whether what Dortch said can be interpreted in favor of her having sufficiently raised the issue of whether she was denied due process by a decision or an ordinance which prohibited her continuing a “use”¹ – that is to possess, own, maintain, etc. – of her property in its configuration as an up and down duplex as she and her predecessors had done before an ordinance purporting to change that right was passed.

The Court of Appeals did not discuss what the question or standard for issue preservation was at all. The court did not cite a single case stating such standards. The City impliedly argues now, however that the standard is whether the words used by Dortch to state the issue she was contesting could have been interpreted by the City or the court to mean something else when

¹ “Use” as a noun is not the same as a nounified version of “use” the verb. That is, a nonconforming “use” can be a use to which a property is devoted, but it can also simply be a status, configuration, or feature, which is allowed or disallowed, whether or not actually in “use” or “used” for the purpose suggested by the status or configuration. An example would be a transmission tower not “used” as a transmission tower, but which is nevertheless, still, a transmission tower. Or a 5000 square foot lot that is not “used” at all but is still 5000 feet, a “use” which may be prohibited or allowed under ordinances governing the subdivision and

there was no such misinterpretation or misunderstanding whatsoever. The test, as Dortch adduced case law to support, is not whether the adverse party can conjure harebrained other interpretations of the words, despite that party's clear understanding of them. What Dortch contended was not misunderstood by anybody. Ignored, but not misunderstood.

III. The Court of Appeals ignored and did not decide the vast majority of germane and dispositive issues.

In Dortch's Petition at 7-20 (13 of 25 allowed pages), Dortch discussed the error of the Court of Appeals in not identifying or ruling upon the issues presented (ruling on 4 issues recast in insufficient and nondispositive form, instead of 29). The four are not a consolidation of subissues. Dortch explained how, regardless of the ruling of the Court of Appeals on its statement of issues, other issues explicitly raised would have been dispositive. In the words of Rule 220(b), these were issues "necessary to the decision of the appeal." Dortch further discussed the detrimental effect of making such a ruling unpublished and not citable and declaring it by fiat not to be precedent applicable to other people.

In her Petition, Dortch explained by the factual and legal context, several issues which were dispositive of the appeal, but which were neither identified by the Court of Appeals nor ruled upon, and which were not comprised in the only four issues the Court of Appeals decided.²

It is easy to decide a hard issue if you first redefine the issue to make it easier to decide or even to suggest its own answer.

IV. The analysis, such as it is, of the four is insufficient and wrong.

allowed platted size of lots.

² As to those four, some were not the issue or the dispositive issue, and others – e.g., issue preservation – were decided wrong, without discussion of either facts, the record, or the applicable law.

As to these issues, the City' Return discussed the question as to whether the Court of Appeals erred in determining that the Circuit Court correctly determined the "standard of review." This is stated in the singular, as only one standard for all zoning board determinations.

Off on the wrong foot, the City overlooks that there is not one standard of review. There is a standard for factual findings. There is a standard for legal questions, for example, interpretation of statutes. Dortch cogently argued that the standard for factual findings also varies, depending upon what type of proceeding is being reviewed, the circumstances of the proceeding, and the type of issue being decided, particularly if the issue is not being reviewed, but is being properly raised for the first time, such as an issue of constitutionality or equitable relief a lower tribunal was not empowered to grant.

Rather than use up page limits presenting again, all these arguments already briefed by Dortch below – which refute, distinguish, explain and discuss all the generalized points the City presents in its Return -- but which were not actually discretely addressed and ruled upon, Dortch has drawn this Court's attention to what the City does not address: that the Court of Appeals did not address these arguments. Dortch is here having argue the points over and over to courts which do not decide them other than by the overall effect of an oblique adverse decision that does not discuss them.

V. The City's account of the case is wrong.

As a preliminary, but fundamental, matter, what the City includes in its Statement of the Case as uncontested facts are not uncontested and are not facts.

Rather, they are legal errors which are some of the things challenged on appeal, which the Court of Appeals did not address and did not decide. Perhaps, it, too, assumed they were "true," but Dortch does not have a meaningful opportunity to review that or even know what the

Court of Appeals thought, because of the defective form of its opinion omitting issues and not providing any discussion or decision of them.

For example, the City states, as if a fact, “the zoning ordinance requires 5000 square feet.” This is not a fact and is not true. Interpretation of a statute is a question of law.³ To be clear, the City states, as if a fact, that the lot was “not large enough.” This is a contested issue in the appeal. The lot is actually plenty large in that it actually has comfortably contained a duplex for about 60 years and still does. The question is what the ordinance means and that is a question on appeal which was neither addressed nor decided. It does not suffice to state as a given factual premise what is actually a legal conclusion which is the actual subject of appeal.

In the same vein, the City states in its Statement of the Case at 4 that Dortch “did not approach the City in an attempt to obtain a permit to perform repairs to the structure until sometime in 2007.” This, too, is contested and certainly neither an agreed nor found fact. The Record shows that Dortch made previous attempts to get a permit, which were denied for a different reason.

The City also states in its Return at 4 that Petitioner Dortch “noticed her appeal to the Court of Appeals.” She did not. She noticed it to this Court, the S.C. Supreme Court, pursuant to statute.

In its Return at 5, the City states that Dortch “hardly identifies the remaining issues,” namely, the issues not decided by the Court of Appeals. To be clear, they are not even the “remaining” issues, because the issues framed by the Court of Appeals were generally not the issues presented by

³ Additionally on the subject of scope of review, issues of law are always reviewable de novo, contrary to the Town’s argument and the Court of Appeals holding that there is only one scope of review and that it is essentially that a zoning board can do anything it wants to, however it wants to. In its Return at 6, the City states that the Court of Appeals was “absolutely correct in finding that no authority supports de novo review of the Board’s decision.” Perhaps there is some explanation that the City means something else by this statement but on its face it is legally incorrect as was the Court of Appeals. Again the form of the Court of Appeals’ decision simply compounds the problem with reviewing such a statement. All decisions of law are reviewed de novo.

Dortch. As for identifying them, they are listed and numbered in the Brief to the Court of Appeals and, they described in page after page of the Petition for Rehearing. They are listed and numbered in the Petition for Certiorari under the heading for “Issues Presented.” They are also listed and numbered in footnote 7 of the Petition at page 17.⁴

Further, the larger illustrative issues – each being independently dispositive – are discussed seriatim and in logical progression, in the Petition at 21-25.

VI. Issues of law are always reviewed de novo and under an abuse of discretion standard, errors of law matter because being guided by error of law undermines the entire exercise of discretion, rendering it not an exercise of discretion.

Further seeming absurdity follows in the City’s return at 6, where it states, “There is no authority that an entire zoning appeal should be reviewed de novo simply because it is alleged the decision is incorrect as a matter of law.” Yes, there is. It is the law. Dortch briefed it to the Court of Appeals, among others, and it was ignored. Ignoring it or saying it away does not mean it does not exist.

VII. Saying Dortch did not raise vested rights does not make it so.

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

In its return at 7, the City further states in coincidentally concatenated excerpts, what Dortch stated in appeal to the Circuit court and flatly asserts that what she stated did not raise the issue of vested rights. Yet, it did.

VIII. Austin should be revisited on the facts and the Court of Appeals did not do so.

As an aside, to the extent that Austin categorically prohibits an amended petition (something the Court of Appeals did discuss under these facts in any way), Austin was wrongly decided. Again the defective form of decision to the Court of Appeals compounds problems with review and, as here, requires the unfortunate party to ask for review, and risk not responding to hypothetical reasons for a decision of almost nothing. It is only in a very gloomy fantasy world that a party who is not even provided a basis for decision in writing is held to the standard of punctiliously articulating the details of the errors involved – and doing so in magic words not even yet revealed in this proceeding -- before even understanding the nature and putative basis of the decision. Here, we refer to the decision of BOZA, not the decision of the Court of Appeals, but similar principles apply. BOZA’s decision did not even cite the statute given by the City in Circuit Court for termination of Dortch’s rights to continue to own and maintain her property as it was then constituted. BOZA was briefed on Dortch’s matter without Dortch having that briefing until long after she met the deadline to file her appeal in the Circuit Court. She expressed her contention of what was wrong in common sense terms expressing the gravamen of what was wrong with the decision appealed. She stated that BOZA had disregarded “due process of law” in denying a request for continuation of “grandfather status” of a prior longstanding use of property rendered “nonconforming” by an ex post facto change in the zoning. That sounds like a denial of vested rights with constitutional dimensions. If it did not

sound that way to this State's appellate court of first resort, the rest of the State and the Country should know.

IX. The general intent of an ordinance is not a blank check for a zoning administrator, a zoning board, a circuit court, or an appellate court.

In its Return at 9, the City cites the intent of a City ordinance that it is not to “encourage” survival. The issue before BOZA and the Court is legal authority, proper statutory interpretation, compliance with the constitution, proper procedure, proper review, and proper reasoning, not a vague and standardless general intent of an ordinance or set of ordinances.

A statement of lack of “encouragement” does not authorize overt acts to terminate, arbitrary and selectively applied requirements not found in law, or issuance of vague decisions with undisclosed, if not secretive, reasoning or decision-making process.

X. Vulcan requires a noxious condition actionable as nuisance at common law and other cases are not properly characterized by the City or the Court of Appeals.

In its Return at 10, the City argues through juxtaposition of citations. The implication cannot be stated outright, because it is legally incorrect. The City implies that “detraction from the public purpose [of eliminating nonconformities] to be achieved by the plan,” as referred to in one case, is the equivalent of “detrimental to public health, safety or welfare,” as described in Vulcan. It is not. Dortch already briefed this issue and squarely addressed it. The Court of Appeals did not. The two standards are not the same. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). It is cited in Dortch's Petition at 12, Appellant's Reply Brief at 2,3, 12, and 13, and Appellant's Brief at 27, n.14.

In its Return at 10, the Town's discussion of James confuses the fact that the constitutionality of or unconstitutionality of a government act does not depend on whether a city ordinance authorizes or calls for the act. A statute cannot authorize a violation of a

constitutional right or override a constitutional protection, just as “lack of encouragement” may be a legislative intent, but not a goal of the constitution.

The Town also cites the Gurganious case thoroughly analyzed by Dortch as to what it actually held, the pedigree and actual applicability of the cases it relied upon, the quality of the reasoning in the case (e.g., relying on what other states have held regarding matters of state constitutional law), and other aspects, but it was not analyzed by the Court of Appeals at all on these matters and was not relied upon for the principles argued by the City in its Return at 10. Instead, the Court of Appeals cited Gurganious for a reason that was beside the point.

In its Return at 13 the City scoffingly recites that Dortch argues that BOZA made legal mistakes which guided the decision to deny a variance. However, the City addresses none of these arguments, providing nothing which requires a reply.

XI. The Court of Appeals was not allowed to issue an unpublished decision and was required to decide and provide reasoning on all issues necessary for decision of the appeal presented.

Regarding the issue of whether the Court of Appeals was allowed to issue an unpublished decision, the City simply makes the same argument at 17 that the City made to the Court of Appeals. The City argues that Rule 220(a) is to be read in a vacuum, independently of Rule 220(b), even though the City’s reading renders Rule 220(b) meaningless. This argument has no merit.

The City adds that the Court of Appeals issuing unpublished decisions has been “the practice for decades.” It is the same practice which Dortch has shown is not allowed and which should end, regardless of how long it has been going on. I.e., it is the practice that is being challenged in Dortch’s motion for a writ of mandamus.

The City misquotes Rule 220(b). The City states that the Rule authorizes issuance of an unpublished decision as long as the decision addresses “every point distinctly stated in the case which is necessary to the decision of the appeal.” This is not so. The Rule is exactly the opposite. Rule 220(b) provides that every decision must “state in writing,” “with the reason for the court's decision,” “every point distinctly stated in the case which is necessary to the decision of the appeal.” No provision is made for not publishing such opinions. Rule 220(b) states that the exception to this requirement is a memorandum decision, which may be unpublished. Rule 220(b) makes no other exception to publication.

Rule 220(b) then clarifies that a memorandum decision is one the Supreme Court is authorized to issue if the Supreme Court decides that the opinion would have no precedential value. Rule 220(b) further confines the issuance of memorandum decisions by the Supreme Court to four special varieties, of which the Town apparently at least appears to concede the present case is not.

XII. As addressed above, the arguments as to not raising issues are unfair and incorrect.

In its Return at 18, the Town states that City Ord. §17-275 not requiring 10,000 square feet was an issue “not raised in the petition to the circuit court.” This is incorrect. It is raised in the Record at 192, along with an objection that BOZA cited no statutes as the basis of its decision. She cannot be expected to negate by pinpoint reference, a statute not even cited: “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 action taken.” (Petition for Appeal, R.p. 192.) She stated that “[i]t was error to deny the Permit.” This was sufficient.

In its Return at 19, the Town similarly now says that arguments concerning City Ord. §17-202(e) were not raised in the petition to the circuit court. Yet, the ordinance was not cited in

Boza's decision, which she appealed, stating the decision was unsupported by law or code references, and she addressed the more specific citations as soon as they were raised and became apparent. No one was prejudiced and no one was unaware of the issues by the time Dortch got the circuit court to actually hear her arguments after years of nonmerits delay for nonmerits defenses raised by the City.

In its Return at 20, the City argues that equitable tolling was "not raised" to the circuit court. This is no reason not to decide it. The issue could not have been raised to BOZA, and was not decided by BOZA, but was raised to the Circuit Court as soon as the record of the BOZA proceedings and what BOZA reviewed was obtained and the incongruent and conflicting bases for BOZA's decisions were examined. But the Circuit Court did not decide it and did not hold that it had not been raised. It was then raised to the Court of Appeals and the Court of Appeals not only did not decide the issue, but did not even mention it.

Respectfully submitted,

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