ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-40-02159

Frieda H. Dortch, ... Appellant,

v.

City of Columbia Planning & Development Services/Zoning Division, ... Respondent.

APPELLANT'S BRIEF OF FRIEDA DORTCH

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4. Should the doctrine of res judicata be applicable at all to the public meetings of a nonjudicial appointed municipal board, and, if so, should the doctrine be applied categorically?

5. Was it error for the Circuit Court to fail to make findings on whether the case was "fully and fairly litigated" for purposes of applying the defense of res judicata where: the forum in the instant case was a public meeting of a nonjudicial appointed municipal board; neither a law license nor legal training of the members of the board was required; at the meetings, pro se public comment was invited and allowed; at meetings, rules of cross examination were not observed; before the meetings, the government party who made the adverse decision below was allowed to summarize the case and brief the board without serving the summary on the applicant; at the meetings, board members, without being sworn as witnesses or being subject to examination, were allowed to express any personal knowledge they had about the property, the

neighborhood, or putatively similar houses or neighborhoods; the proceedings were not governed by the Administrative Procedures Act; pro se applications and other pro se participation were common; and the proceedings were in additional ways, unlike "litigation," and unlike proceedings before a court of law or an administrative agency subject to the Administrative Procedures Act?

6. Where, subsequent to a proceeding four years earlier before the zoning appeals board, the City prosecuted Dortch for not making repairs for which the City denied her a permit, and Dortch spent substantial money on, and made repairs to, the exterior of the subject property, and the City made an outright confirmation that neither Dortch nor the City had the option to demolish the property, because the property is in a design preservation district, was it error for the Circuit Court, sitting as an appellate court on an appeal from a subsequent application to the zoning appeals board, to conclude that there had been no substantial change in circumstances between the first proceeding before the zoning appeals board and the second proceeding?

7. Did the record before the Circuit Court also reveal a high probability of error by the Board of Zoning Appeals and that the use sought by Dortch was either never intended to be prohibited under the ordinance in question or was so consistent with the character of the district as to be a negligible variance from the requirements of the ordinance?

SCOPE AND STANDARD OF REVIEW

Determinations of questions of law are reviewed de novo. Samuel v. Mouzon, 282 S.C. 182, 314 S.E. 2d 612 (Ct. App. 1984). An appellate court applies a de novo standard of review to determine whether an action is barred by res judicata. The application of the doctrine of res judicata is a question of law which the reviewing court resolves without deference to the decision of the lower court. Payne v. Cartee, 111 Ohio App. 3d 580 (1996).

STATEMENT OF THE CASE

The family home of Frieda Dortch was an up-and-down duplex. It had been built in the 1930s. It had been a duplex at the time Dortch's mother bought the entire house in the 1960s. It was physically configured as a duplex and was used as a duplex at the time Dortch's mother bought it and all the time Dortch grew up in it. It appeared to have been originally built as a duplex.

When Dortch's mother died, Frieda Dortch and her brother inherited the family home. At the time they inherited the duplex, it was in an "RG-1," "General Residential-1," zoning district, which specifically allowed duplexes, quadraplexes and other multi-family residential structures.

A fire damaged a small part of the home while Dortch's brother was living in it. Dortch bought her brother's interest in the home, continued to pay the mortgage and taxes, and applied for a permit to repair the fire damage.

In 2008, the zoning administrator of the City of Columbia denied any permit for exterior or interior repairs and informed Dortch that a permit could not be granted unless the house was physically transformed into a single family dwelling.

He advised Dortch to apply to the Board of Zoning Appeals ("BOZA") for a variance. She did, pro se. She was turned down. She also appealed, pro se, his determination that her house was no longer "grandfathered" from having to be physically transformed into a single family dwelling. BOZA voted to affirm his determination . (These two applications to the BOZA will hereinafter be referred to as the "first proceeding.")

Dortch appealed the BOZA's decisions to the Circuit Court for Richland County, pro se. She then secured counsel. 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, and never considered the merits

Dortch moved for reconsideration. At the time, Dortch was also being prosecuted by the City in Municipal Court for not proceeding with repairs for which the City had denied Dortch a permit. Dortch's motion for reconsideration in Circuit Court was never heard or decided.

Dortch eventually spent about $35,000 and made some substantial exterior-only repairs under an understanding with the City, including repair and construction of exterior rear stairs. In 2012, Dortch applied for a permit to do interior painting, and replace some floor coverings, and do interior repairs. The zoning administrator denied the permit unless it involved transforming the house physically into a single family dwelling. He advised Dortch to apply for a variance, and his office supplied Dortch with a form, partially filled in with information.

She sent in the application for variance, pro se. She then engaged counsel. The BOZA proceeded to hear the application. No one asserted that the application for variance could not be heard. At the BOZA meeting, a BOZA advisor confirmed that a house could not be considered single-family without interior stairs. (BOZA 008, R.p.102.) Another speaker confirmed that the house could not be torn down (BOZA 007, (R.p.101.) The BOZA turned her down. (This application to the BOZA will hereinafter be referred to as the "second proceeding.") The order denying Dortch relief in the second proceeding was also signed by the zoning administrator.

She appealed to the Circuit Court. The City moved to dismiss the appeal on the basis of the defense of res judicata. The Circuit Court dismissed the appeal.

The Circuit Court held that the doctrine of res judicata barred Dortch from having a second proceeding before the BOZA because Dortch failed to show a change of circumstances, and therefore the Circuit Court would not entertain an appeal from that second proceeding.

Written notice of the order of dismissal, dated August 19, 2013, was received September 12, 2013. On September 23, 2013, Dortch served a motion for reconsideration. Written notice of entry of the October 15, 2013 order denying reconsideration was received November 4, 2013. Dortch timely served notice of appeal on December 4, 2013.

ARGUMENT

I. Even in truly "judicial" proceedings in which res judicata is conventionally available, numerous requirements and elements must be met before the doctrine is available for application, and in the instant case, failure to assert the defense and preserve the issue in the second proceeding, and affirmative waiver of the issue in the second proceeding, preclude the defense from being asserted for the first time on appeal from the second proceeding. (Issue 1)

The Circuit Court focused its analysis on the serious issue of whether res judicata "applies to zoning board determinations" (see Order, p.3, R.p.6), but failed to consider requirements which must be met before applying the doctrine in any case, no matter what sort of tribunal is involved.

The doctrine of res judicata (bar or merger, and collateral estoppel) is not self-executing. It is not a jurisdictional issue. Mr. T v. Ms. T, 378 S.C. 127, 133, 662 S.E. 2d 413, 416 (Ct. App. 2008). A party prosecuting a cause does not have the burden of pleading or proving the absence of res judicata as an element of a cause. Res judicata is a defense to be raised or not, in the tribunal appealed from, by the party who would seek preclusion. Normandy Corporation v. S.C. Dept. Of Transportation, 386 S.C. 393 at 408, 688 S.E.2d 136 at 144 (Ct. App. 2009); Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985).

When the parties are in a real court, res judicata is an affirmative defense, which must be raised and pled as such in a responsive pleading such as the answer to a complaint. Rule 8(c), SCRCP; Wagner v. Wagner.

"Staff" of the BOZA researched the issue and concluded in the second BOZA proceeding

that there was no preclusion from pursuing a second application. (R.p.117.) The "Staff" thus not only identified the issue to the BOZA, but affirmatively waived the issue.

Namely, in the record of the BOZA meeting, the City's "staff" case briefing stated: "Though the applicant has previously appeared before this Board for essentially the same request, neither the Zoning Ordinance nor the Board Rules and Procedures prohibit this reapplication. As such, the application should be considered on its merits." (February 5, 2013 "Case Summary" at BOZA 023, R.p.117.) Dortch proceeded before the BOZA without any notice that facts or argument bearing on such a res judicata defense needed to be presented in the record.

A technical argument of preclusion cannot be raised for the first time on appeal. Normandy; Wagner; and see Duckett v. Goforth, 374 S.C. 446 at 465, 649 S.E. 2d 72 at 82 (Ct. App. 2007) (party cannot raise defense of collateral estoppel for the first time on appeal); S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (to be preserved for appellate review, issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

The Circuit Court sat as an appellate court reviewing the BOZA proceeding as if BOZA had been a trial court. Cf. Austin v. Board of Zoning Appeals of Hilton Head, 362 S.C. 29 at ____, 606 S.E. 2d 209 at 214 (Ct. App. 2004)(when circuit court reviews board's decision, the circuit court sits as an appellate court and "it would be error for the circuit court to adhere to the rules designed to govern the conduct of civil trial litigation while sitting in its appellate capacity"). The Circuit Court therefore erred in dismissing, on the basis of res judicata, Dortch's appeal from the second BOZA proceeding, when res judicata was not asserted in the proceeding below, the BOZA proceeding, and was asserted for the first time only in the appellate Court, the

Circuit Court.

The City might argue that the BOZA did not have the authority to raise res judicata or to refuse to hear what was presented to it. However, the BOZA would only allow Dortch to make a variance application and refused to hear Dortch's appeal. (Undated "minutes" of Feb. 12, 2013 Meeting at 2 (BOZA 004), R.p.98.) The BOZA thereby exhibited some ability to refuse to hear things it determined it could not hear or did not want to hear. Further, the unnamed "staff" did identify the matter in an unsigned briefing – and then both the BOZA and any unidentified adversary waived the defense by proceeding.

It may be posited by the City that the lack of formal pleadings in which "claims" and "defenses" can be set forth, the lack of trial-like proceedings, and the lack of a disclosed adversary in the BOZA proceeding are a reason why the affirmative "defense" of res judicata did not have to be raised earlier. Yet, these attributes simply underscore the different, non-litigation, nature of a BOZA proceeding and why it is ordinarily unfitting to apply res judicata at all to the determinations of such a body. Such an argument would only highlight the almost farcical injustice of treating an uncourtlike inferior tribunal as a "court" for purposes of using res judicata to preclude a party's appeal, while abandoning the fiction and not requiring the inferior tribunal or the adverse party to observe court-like protocols below in order to invoke the doctrine.

Thus, the City may argue that the City was not really in "court" until the matter was appealed to the Circuit Court, a court of record, and that the issue of res judicata was being raised in a trial-level court at the first significant opportunity in which a judge and the Rules of Civil Procedure might be applicable. However, such an argument would simply reiterate the inadequacy of a municipal board proceeding to be considered as a form of fair "litigation." Res judicata would be inapplicable to the proceedings of such a body and it would be unfair to apply

the doctrine of res judicata to the proceedings of such a body.

The matter was before the Circuit Court as an appellate matter, not as a trial. There were no pleadings in the Circuit Court, such as a complaint or an answer. The Rules of Civil Procedure generally were not called into play. Austin. Therefore, the place to assert the issue, if at all, was in the tribunal which was supposed to be making factual findings, not in the appellate stage for the first time.

It was therefore error for the Circuit Court to dismiss the appeal on the grounds of res judicata when the defense was not asserted and preserved below, the Circuit Court should be reversed, and the matter should be remanded for the appeal of the BOZA proceeding to continue before the Circuit Court.

II. Even in truly "judicial" proceedings in which res judicata is conventionally available, numerous requirements and elements must be met before the doctrine is available for application, and in the instant case, the lack of a determination on the merits in the first proceeding and the lack of a final determination in the first proceeding preclude the defense of res judicata from being raised in the second proceeding. (Issues 2 and 3)

Not only did the Circuit Court err in applying res judicata without its having been asserted in the proceeding below, but the Circuit Court also erred in applying the doctrine to an instance in which the prior determination was not on the merits, and not final.

Res judicata requires three elements, the first of which is a judgment that is final, valid, and on the merits. Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 183, 437 S.E.2d 130, 132 (Ct. App. 1993). Because res judicata is an affirmative defense, see, e.g., Rule 8(c), SCRCP, the burden of proving it is on the party raising it; it was not the duty or burden of Dortch to negate the defense. The City presented information regarding the first BOZA proceeding. That information demonstrated that the issue of a variance was not determined on the merits. The appeal of the denial of a variance was determined based on a pro se appeal to the Circuit Court

being a day or two late. This is not on the merits.

Additionally, even this non-merits determination of the first BOZA proceeding was not a final order. Dortch timely moved for reconsideration of the Circuit Court's non-merits disposition of the first proceeding. (See Sept. 17, 2010 letter of transmittal of motion to clerk of court, to counsel for City, and to Circuit Judge, R.p.245.) The city failed to present a final order ruling on the motion. For res judicata to apply, the first action must have culminated in a final judgment. Griggs v. Griggs, 214 S.C. 177 at 184, 51 S.E. 2d 622 at 626 (1949).

Therefore, for the additional and independent reason that the first of the three elements required for the defense of res judicata were not established by the City, it was error to dismiss the appeal. Because the first proceeding was neither concluded on the merits nor concluded, the Circuit Court should be reversed and the matter should be remanded for the appeal before the Circuit Court to continue.

III. Res judicata was not applicable to the first proceeding before the appointed municipal board and was therefore not available as a defense in the second proceeding before the appointed municipal board, because there was not a full and fair opportunity in a judicial or appropriate quasi-judicial forum to "litigate" a "claim." (Issues 4-7)

Traditional statements of the elements of res judicata require the presence of a prior, final adjudication by a "court." A zoning board is not a court.

It is not a lower court. It is not a state or federal agency subject to the State Administrative Procedures Act or the federal Administrative Procedures Act.

It is a panel of nonjudicial municipal appointees who conduct public meetings to consider often pro se applications.[1]

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[1]The BOZA is a board appointed by the Columbia City Council. City of Columbia Ordinance §17-111(a) (hereinafter "Cola. Ord.") BOZA hearings, being municipal matters, are not governed by the procedural protections of the State Administrative Procedures Act. See S.C. Code Ann. §§1-23-10 (1) (defining "Agency" or "State agency") and 1-23-310 (2) (defining

In these applications, "public input," with no adherence to rules of evidence, is solicited, there is no right to cross examination of witnesses, and board members are oriented to conclusions in the cases before them based on initially ex parte briefings by City employees not identified to the applicant or the public.[2] To the extent the zoning administrator is an adversary, the adversary is then allowed to sign the decision before it is shown to the applicant. (See Order,

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"Agency") Compare S.C. Const. art. I, §22, (providing that "[n]o person ... shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly"). The BOZA does not follow a mode of procedure prescribed by the General Assembly. See S.C. Code §6-29-790 (allowing the board to adopt its own rules of procedure pursuant to a municipal ordinance, and making no reference to discovery, rules of evidence, or right to cross examination). The BOZA is also not a "court" subject to oversight under, or the rules of procedure promulgated for, the "unified judicial system" referenced in S.C. Const. art. V, §§1 and 4.

There is no requirement that "staff" of the zoning administrator, the zoning administrator himself, or members of the BOZA be lawyers. The Rules of Professional Conduct, Rule 407, SCACR, also do not uniformly apply in BOZA matters; they apply only to the extent they apply to particular participants who happen to be lawyers.

The BOZA's members are not considered "judges." The Code of Judicial Conduct, Rule 501, SCACR also does not apply. The Code of Judicial Conduct does not define "judge." The context indicates this term refers to a member of "the judiciary." Canon 1(A) provides, "An independent and honorable judiciary is indispensable to justice in our society."

[2]It was the practice in the BOZA proceedings, at some point at or before the public meeting, for the "staff" to brief the BOZA on the application. See, e.g., "Case Summary" with "Staff Comments" prepared on 8/20/08 for September 9, 2008 BOZA hearing, attached to the City's July 24, 2013 Memorandum as "Exhibit C." (R.pp.197-198.) And see "Case Summary" with "Staff Comments" prepared on 05 February 2013 for February 12, 2013 BOZA hearing, submitted in the City's Return and marked with page numbers BOZA 022 to BOZA 039. (R.pp.116-133.) The "staff comments" in such briefing include "advice" on applicable statutes and other legal attributes, and conclusions reached on factual matters and attributes. A preliminary ex parte briefing and other administrative assistance by the adverse party ordinarily would not be allowed in a court of law or even in an "agency" proceeding. Although Dortch is required to file her application by submitting it to the zoning official for transmittal to BOZA, there is no indication that the "staff" briefing papers were served upon or provided to Dortch at the same time they were provided to the BOZA. There is no evidence in the record as to whether additional in-person summarizing of the case to the BOZA or its members is done in advance of the hearing. The Zoning Administrator also signed the order which decided the application. Apparently, a shorter, incomplete version of the briefing is available as a handout at the meeting to the applicant and other persons attending the meeting for other matters. If the applicant knows to ask for the briefing upon arriving at the public meeting, the applicant gets a short copy.

BOZA 002, R.p.96.) It is unknown what other input is provided privately by the zoning administrator at this stage.

Decisions may rely on facts outside the record, such as what a board member did with his own house a full five city blocks away (e.g., January 8, 2013 Minutes at BOZA 006, R.p.100), in which space at least three other districts encroach at various points, or such as what the board did or observed with respect to some other house on the other side of King Park in some other hearing the instant proponent did not attend. (E.g., id. at BOZA 005, R.p.99.)

The information presented by the City regarding the first BOZA proceeding pertains to a different, separate, application made four years earlier. It was not the same application by Ms. Dortch. The first application was not a "cause of action" or claim. No one was being "sued." Rather, the application was handled in a "meeting" to determine whether to grant a variance from a restriction enforced by an administrative person. The "meeting" also considered an appeal of the administrative person's interpretation and enforcement of an ordinance.

As noted, the applicant/appellant in such a meeting often proceeds without a disclosed adversary. At least there is no advance notice of an opposing position on the variance application.

"The doctrine of res judicata is that an existing [1] final judgment [2] rendered on the merits, [3] without fraud or collusion, [4] by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies." Griggs, 51 S.E. 2d at 626. Additionally, application of the doctrine requires that there be identity of "cause of action" between the prior and the subsequent "action." Pye v. Aycock, 325 S.C. 426 at 432, 480 S.E.2d 455 at 458 (Ct. App. 1997).

The required elements of a "court" in Griggs and a "cause of action" and "action" in Pye

indicate that application of the doctrine is traditionally suited to civil suits, between litigants, in court. As stated in Pye, "[t]he 'subject matter of the action,' within the res judicata rule, is a matter or thing concerning which a wrong has been done, which is ordinarily property, contract or other thing involved, or main primary right from the breach of which a remedial right arises." 325 S.C. at 432, 480 S.E. 2d at 458 (emphases added) (citing First National Bank of Greenville v. United States Fidelity & Guar. Co., 207 S.C. 15, 35 S.E. 2d 47 (1945)).

It would appear that the Roman origins of the doctrine, preventing a person from "getting sued a second time," did not include a concern for administrative proceedings or a confidence that the doctrine could be fairly or intelligibly applied to them. However, South Carolina courts and courts of other states have applied the doctrine to administrative determinations with procedural safeguards and with court-like attributes. See and cf. Earle v. Aycock, 276 S.C. 471, 279 S.E. 2d 614 (1981)(after first determining the merits of the matter in a de novo review, holding additionally that the unappealed decision of the State Grievance Committee supported the application of res judicata).

Even when a prior proceeding occurs in a real court of general jurisdiction, allowing the determination in that proceeding to form the basis of a res judicata defense in a subsequent proceeding requires deliberation and caution.

Whether a prior proceeding before a minor administrative person or board should form the basis of a res judicata defense in a subsequent proceeding is an even more serious question.

Res judicata is based on the judicial policy that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991)(emphases added). A contrary rule "would, as a general matter, impose

unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." Id. at 107-08 (emphasis added).

Nevertheless, "[b]ecause res judicata may govern grounds and defenses not previously litigated," thereby "blockad[ing] unexplored paths that may lead to truth," it should be invoked "only after careful inquiry." Brown v. Felsen, 442 U.S. 127, 132 (1979). "The ease and efficiency of res judicata as a means of quickly avoiding an evaluation of the merits of a plaintiff's claim does not imply that the decision to apply the doctrine should be either facile or hasty." Purter v. Heckler, 771 F.2d 682 at 690 (3rd Cir. 1985).

Although federal administrative agencies are not courts, the doctrine of res judicata may, under certain circumstances, apply to their decisions. In Astoria, the U.S. Supreme Court explained that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." Astoria, 501 U.S. at 107 (emphases added)(quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)).

However, the Court cautioned that "[a]lthough administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures." Astoria, 501 U.S. at 109-10.

Courts, in interpreting Astoria, have held that an agency acts in a "judicial capacity" when it provides all the following safeguards: (1) representation by counsel, (2) pretrial discovery, (3) the opportunity to present memoranda of law, (4) examinations and cross-examinations at the hearing, (5) the opportunity to introduce exhibits, (6) the chance to object to evidence at the

hearing, and (7) final findings of fact and conclusions of law. Reed v. AMAX Coal Co., 971 F.2d 1295, 1300 (7th Cir. 1992) (per curiam); In re Kaiser Aluminum Corp., 365 B.R. 447 (D. Del. 2007); Durko v. OI-NEG TV Products, 870 F. Supp. 1278 (M.D. Pa. 1994); Buckley v. U.S., 51 Fed. Cl. 174 (Fed. Cl. 2001); see also Maryland State Dep't of Educ. v. Shoop, 704 A.2d 499 (Md. Ct. App. 1998) (in holding that the Maryland State Department of Education was not acting in a "judicial capacity" when it suspended a vocational instructor for violating tool security policies, Maryland Court of Appeals explained that the hearing was not conducted by a judicial officer, the proceedings were not recorded in any way, and no rules of evidence or trial procedure were recognized); and Delamater v. Schweiker, 721 F.2d 50, 53 (2d Cir. 1983) (per curiam) ("An action taken by an administrative agency to grant or deny a benefit is not an adjudicated action unless the agency has made its decision using procedures substantially similar to those employed by the courts").

In this case, the City has not contended, and the Circuit Court never concluded, that the safeguards described above were present during the variance application process that ultimately led to a "vote" against allowing Dortch a variance. Failure to make findings and conclusions on this issue was itself reversible error.

The BOZA certainly did not provide the seven safeguards necessary to have been considered to be acting in a judicial capacity. For example, there was no pre-trial discovery; Dortch was subjected to surprise and lack of information with which to spontaneously respond to "staff" and boardmember positions taken at the meeting. While Dortch may have been allowed to present a memorandum, she was not timely served with the "case summary," which was the equivalent of an adverse memorandum stating, as fact and law, propositions with which Dortch takes issue. (See "Staff Comments" regarding "re-establishing" duplex, period of "vacancy,"

requirements of an RG-1 district, "intent of the Zoning Ordinance," etc., BOZA 022-023, R.pp.116-117.) There was no direct examination or cross examination of witnesses. See Cola. Ord. §17-111 (devoid of reference to manner of examination or rules of evidence). There was neither a procedure for "offering" items into evidence, nor a designated opportunity to object to the admission of evidence in a public meeting format. See id.

Notably, the BOZA also refused to hear certain legal arguments, including constitutional concerns, even though they were asserted to be relevant to the variance application. (See Minutes, BOZA 004 and 005, R.pp.98-99.)

Two notable cases hold that the doctrine of res judicata can be applicable in cases of agency decisions, Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971) and S.C. Dep't of Social Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). In Leviner, the plaintiff filed an application seeking disability benefits. His application was denied, without a hearing, on the basis that his disability was not present at the time his insured status had expired. The plaintiff did not request reconsideration of the denial decision, but subsequently filed a second, third and fourth application for benefits. All of his ensuing applications were denied. On appeal of the denial of the plaintiff's fourth application, the Fourth Circuit held that the doctrine of res judicata "may apply" in cases where no administrative hearing was requested or held. Leviner, 443 F.2d at 1343.

However, the court also noted:

> In Grose v. Cohen, supra, we said that the doctrine [of res judicata], as applied to administrative decisions, "is not encrusted with the rigid finality that characterizes the precept in judicial proceedings." We added that "practical reasons may exist for refusing to apply it" and "when traditional concepts of res judicata do not work well, they should be relaxed or qualified to prevent injustice."

Id. at 1342 (quoting Grose v. Cohen, 406 F.2d 823, 824-825 (4th Cir. 1969)) (internal citations

omitted). The court further held that a prior administrative determination should not be res judicata "where new and material evidence is offered which is of sufficient weight that it may result in a different determination." Id. at 1343. Ultimately, the court chose to remand the case to the district court for it to decide whether the evidence proffered in support of the plaintiff's fourth application could be deemed "new and material evidence" sufficient to result in a different determination. Id.

The decision in Leviner, a Fourth Circuit case, to allow the defense of res judicata to be raised based on a prior agency decision, is not binding on this court. However, even if it were binding, it merely holds that res judicata is not categorically unavailable as a defense. It would still require that "practical reasons" be considered for refusing to apply res judicata to nonjudicial, nonadversarial proceedings of inferior municipal boards.

Here, practical reasons exist for refusing to apply res judicata. In the first proceeding, Dortch proceeded pro se, and ended up with a decision which she contended was manifestly unjust. Her appeal was not determined on the merits, but was dismissed based on its being a day or two late under the still later affidavit of a City employee in the absence of a certificate of mailing done contemporaneously with the alleged time of mailing. (See Order at 2-3, R.pp.175-176). The City also prosecuted Dortch while she was seeking to get the issue of repair of the home resolved. (Tr. at 11:24 - 12:08; 14:20 - 15:24, R.pp.21-22 and 24-25.) This is not a case of someone wanting to add on to a home or expand it and not being allowed to; Dortch is essentially being commanded to make affirmative alterations.

Courts have refused to apply administrative res judicata in cases where there is manifest error in the record. See, e.g., Oubre v. District of Columbia Dep't of Employment Servs., 630 A.2d 699 (D.C. 1993); Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969); Purter, 771 F.2d 682;

Perkins v. Kramer, 198 P.2d 475 (Mont. 1948); see also Wright v. Marlboro County School Dist., 317 S.C. 160, 452 S.E.2d 12 (Ct. App. 1994) (res judicata does not apply in cases where an administrative tribunal is asked to judge allegations of its own wrongdoing).

Here, there are large errors on the face of the record that would profoundly and shockingly affect the practicalities and justice in this case. It clearly appears that the BOZA did not properly understand the four criteria it was charged with applying, and did not consider the matter against the backdrop of duplexes being specifically contemplated in the character of the district in question.

For example, parroting the vexing tautology in the lay-prepared ex parte briefing (see R.p.63), the BOZA stated that it considered "the intent of the ordinance" to be to "discourage continuation of nonconforming uses," despite specific inclusion in the ordinance, of provisions for variances to allow continuance of nonconforming uses. (Order, BOZA 002, R.p.96.) This one finding proves the arbitrary and capricious nature of the BOZA's process, for every variance is sought because a nonconforming use is sought, and therefore no variance would ever meet the criterion deployed against Ms. Dortch.

The BOZA also failed to consider whether a variance allowing a duplex in a district specifically defined as a district for multi-family dwellings would be consistent with the character of the district, and instead, as additional legal error, considered a neighboring property owner's comments about the number of duplexes in the immediate neighborhood as relevant to the statutorily defined character of the district. (R.p.96.)[3]

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[3]City of Columbia Ordinance Section 17-275 is the section cited for the requirement of 10,000 square feet of lot to support a duplex in an RG-1 district, such as Dortch's. Section 17-275 is presented as a schedule or chart in the form of a matrix, accompanied by footnotes. With the exception of footnotes to the numerals and alphabetic codes entered on the chart, Section 17-275 does not speak in sentences, and is simply a chart.

A review of the footnotes and the full context indicates that a requirement of 5000 square

The BOZA's acting chairman also gave his legally erroneous observation that the application of Dortch was asking for a variance tantamount to moving the property a whole zone down, when, instead, the property would have been in virtual conformity with the zone a whole zone "up" – more restrictive, with no homes containing more than two attached units. (Minutes, BOZA 006, R.p.100.)

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feet "per unit" applies in an RG-1 district when each unit is a "detached single-family unit." Section 17-275, Note; Section 17-275 fn. g.

That is, in a "General Residential-1" district, such as Dortch's, two freestanding houses on one lot require 5000 square feet of land, each. However, there is at least some ambiguity or silence regarding the requirements and policy for a duplex. In a duplex, such as Ms. Dortch's, the two units are in one building and are not detached from one another.

In a more restrictive, lower density district than Dortch's, the land footage requirement is different, depending on whether the dwellings are freestanding or attached. According to the chart in Section 17-275 and an explicit footnote, in the more restrictive, lower density, RD district, "a duplex" only requires 5000 square feet for the first unit, and a total of 7500 square feet is needed for "a duplex." Inexplicably, there is no "duplex" footnote for RG-1 districts, such as Ms. Dortch's, which are higher density districts.

There is only a chart requiring 5000 square feet of land for the "first unit" and 5000 square feet for "each additional unit," and a footnote referring to "detached" single-family units. According to the footnote, "g," as well as the general "Note" preceding all the footnotes, additional "detached" single family units require an additional 5000 square feet of land. Here, the two units are not detached.

Whether a requirement of an additional 5000 square feet for a duplex in the less restricted, significantly higher density, RG-1 district such as Dortch's was ever intended is called into question by examining the requirements for the much more restricted "RD" district. An RG-1 district, the type of district in which Dortch's house is located, specifically allows not only single family units and two-family units, but also four-family and other multi-family units, Sections 17-235 and 17-258, whereas the RD district only allows single family units and two-family units, Sections 17-234 and 17-258.

According to the chart and footnote "f" in Section 17-275, in the RD district, "[a] minimum lot area of 7,500 square feet is required for a duplex." It seems absurd to interpret the plain language of the chart and footnotes in a manner requiring 10,000 square feet of land for a duplex in the higher density, less restrictive, multi-family RG-1 district, while only requiring 7,500 square feet of land for a duplex in the lower density, much more restrictive, two-family, RD district.

If Dortch needed a variance at all, she would not have been out of character with the multi-family character of her district, and she would have been very close to meeting the ancillary restrictions applicable to the next stricter district designation, rather than the next more lenient one. If res judicata is applied here, it will operate as a blockade to a path to the truth, justice, and common sense.

He also made the erroneous proclamation regarding the history of the district, that it had been designated RG-1, because the City Council wanted a "drop in density." (BOZA 008, R.p.102.) It is multi-family.

The BOZA failed to even recognize the leniencies accorded to "area" variances, as opposed to "use" variances. A use variance would allow the applicant to undertake a use that the zoning ordinance prohibits, while an area variance would merely allow deviation from restrictions which relate to a permitted use, such as height, size, lot size, or other physical characteristics of the lot or building itself. Boccia v. City of Portsmouth, 151 N.H. 85 (2004). Some of the tests applied to use variances are inappropriate to apply to area variances. Id.; Vigeant v. Town of Hudson, 151 N.H. 747 (2005); Harrington v. Town of Warner, 152 N.H. 74 (2005).

Errors such as those above should cause grave concern about avoiding the merits, as well as about affording the actions of such a body preclusive effect.

Like Leviner, Winyah cautions against the application of res judicata in agency, commission, and board proceedings. In Winyah, the agency involved was the Department of Social Services (DSS), an actual state agency subject to the procedural fairness precautions of the Administrative Procedures Act. DSS brought an action against a corporate nursing home and several of its officers, directors and shareholders to enforce a final agency decision that found the nursing home liable for medicaid overpayments. The final agency decision sought to be enforced by DSS had been made by DSS after an adversarial "fair hearing." The decision had not been appealed by the nursing home.

In the trial-court action to enforce the final agency decision, DSS raised res judicata. The nursing home's principal shareholder sought to raise issues that could have been, but were not,

raised at the fair hearing. There is no indication that the appropriateness of the "fair hearing" forum or its procedural safeguards were questioned. On appeal of the matter, the Court of Appeals held that the doctrine of res judicata precluded the raising of those issues, concluding that "the unappealed DSS decision bound the Nursing Home and its privies on all issues that were or could have been addressed at the fair hearing." Winyah, 282 S.C. at 563, 320 S.E.2d at 468.

In this case, Respondent has not contended that anything resembling a "fair hearing" under the Administrative Procedures Act was held. Dortch's 2008 pro se application was denied in 2009 at a BOZA public meeting in which there was no disclosed adversary and which was not governed by the Administrative Procedures Act. Accordingly, Winyah does not dictate the application of res judicata here.

Some courts have discerningly held that res judicata generally does not apply to variance applications before town zoning boards. RICO Corporation v. Town of Exeter, 787 A.2d 1136 at 1143-44 (R.I. 2001).

The Circuit Court relied principally on Price v. City of Georgetown, 297 S.C. 185, 375 S.E.2d 335 (Ct. App. 1988) as perhaps the only South Carolina case allowing the application of the doctrine "in the zoning context." (Order, pp. 2 and 4, R.pp.5 and 7.) Price was not a variance case or an appeal from a zoning administrator's decision. Price did not allow the doctrine of res judicata and reversed the circuit judge for applying it. Price was a rezoning case, rather than a variance application or appeal to a zoning board.

In Price, the zoning ordinance in question had been amended to expressly clarify that successive rezoning applications were allowed. The Court of Appeals held that res judicata had therefore been legislatively abolished in that jurisdiction "insofar as it might relate to any year-

old ruling of the zoning board of the City." 297 S.C. at 188 (emphasis added).

Thus, the remainder of the court's analysis or observation was not used to resolve the issue, was dictum, and is not precedent. In its dicta, the Court of Appeals in Price did not, and had no real need to, discuss the history and essential elements of the doctrine, the important observations of the United States Supreme Court in Astoria and federal courts applying them, and the attributes of nonadversarial and often pro se public "meetings" of appointed municipal "boards" which are not governed by rules of civil procedure, rules of evidence, or any administrative procedures act.

The Circuit Court also cited Kreisburg v. Scheyer, 808 N.Y.S. 2d 889 (N.Y.Sup.Ct. 2006) as persuasive of the proposition that the doctrine of res judicata "applies" to zoning board determinations. Kreisberg was an opinion of a trial-level court of comparable jurisdiction to the South Carolina Circuit Court. There, the court determined that res judicata did not apply, and based its determination on the fact that the applicants were not the same in the two proceedings, and that the relief sought was different.

The remainder of the decision in the lower level court in Kreisberg is, like the decision in Price, dictum as to what would or might be the case under other circumstances. Kreisberg's discussion regarding what "would" otherwise be the result, 808 N.Y.S. 2d at 892, was based on how the matter would be governed by the provisions of a statute not applicable here, entitled "Town Law," 808 N.Y.S. 2d at 892, which provided for handling "second applications for similar relief" and "the same applicant applying for identical relief." Kriesberg therefore does not provide authority which can comfortably be applied to this case or any other South Carolina case.

The Circuit Court also cited as inferential persuasive authority, Callowhill Center

Assocs., LLC v. Zoning Bd. of Adjustment, 2 A.3d 802 (Pa. Commonw. Ct. 2010), noting that Pennsylvania will apply res judicata to variance requests if four elements are present. Callowhill involved a sign as big as the side of a building.

In fact, the request at issue was for a variance to put a "building wrap" sign on the side of a Philadelphia building. The court indeed confirmed that Pennsylvania courts apply res judicata "narrowly," 2 A. 3d at 809, in zoning matters, because "the need for flexibility outweighs the risk of repetitive litigation," id. Callowhill went on to establish various elements which must be met and considerations to be made. South Carolina courts, too, if they were to apply the doctrine at all in zoning board cases, would be required to apply the doctrine narrowly under the circumstances.

The only other authority cited by the Circuit Court was Rossow v. City of Ravenna, 2002 WL 480061 (Ohio Ct. App. 2002), which indeed does state that, in Ohio, subject to some exceptions, res judicata can be applied to variance applications. There, the court affirmed the lower court's determination that res judicata deprived the zoning board of "jurisdiction." In South Carolina, res judicata is not a jurisdictional question. Mr. T v. Ms. T.

Based on the consensus of well reasoned authority, the doctrine of res judicata should not be applied at all to most variance proceedings before appointed municipal boards of zoning appeal, nor to appeals to such boards from the decisions of zoning administrators. The rights at stake can be significant, and the procedures are not adequate to safeguard against the probability of a lasting erroneous determination or a determination which is not even on the merits or which has a horrible scope of review. The fairly infrequent possibility of repeated applications does not justify the judicial imposition of heightened probabilities of permanent injustice.

Even if the doctrine were determined to be available in variance matters in a proper case,

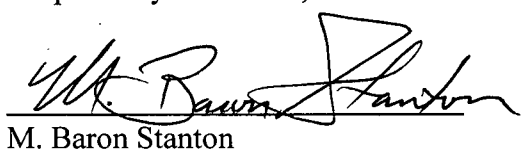
the same considerations stated above which caution against availability also serve as cautions against categorical application in such matters.

In the instant case, Dortch suffered, pro se, an adverse determination in a highly informal, unsafeguarded forum, and experienced further significant changes in circumstances, and should not be precluded from pursuing the matter again after a lapse of years and under both new and better advocated circumstances. She did not sue anybody and she did not even seek to change her house; she sought, and still seeks, to fix it like it was.

CONCLUSION

For the reasons stated hereinabove, the Circuit Court should be reversed and the matter should be remanded so that Dortch may proceed with her appeal of the BOZA decision to the Circuit Court.

Respectfully submitted,



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Date: October 15, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Case No. 2013-CP-40-02159

Frieda H. Dortch, ... Appellant,

v.

City of Columbia Planning & Development Services/Zoning Division, ... Respondent.

CERTIFICATE OF SERVICE AND 211(b) COMPLIANCE

I, M. Baron Stanton, do hereby certify that I have, on October 15, 2014, served the foregoing final 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):

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