THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, Circuit Court Judge

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

Frieda H. Dortch, ... Appellant,

v.

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

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. The primary issue is unconstitutionality.

Respondent City agrees that the central issue in Dortch's appeal is constitutionality. The City states, "The principal issue addressed by Appellant in the appeal to this Court is whether the application of the zoning ordinance unconstitutionally terminated her vested rights."[1] (Resp. Brief at 9.)

II. Despite distractions for irrelevancies and criticisms, basic facts pertaining to Dortch's vested rights are inescapable.

Among others, the following facts are not only uncontested by the City, but uncontestable and fully supported in the record:

1. Dortch owned and owns a duplex, configured as such with one dwelling unit up and one, down.

2. Long after the duplex was legally built, the City passed an ordinance, which the City contends only allows duplexes in the subject zoning district, if the lot is bigger than Dortch's lot.

3. A fire caused by at third party partially damaged the building.

4. The building was still occupied thereafter.

5. An occupant who was in the building moved out after October 12, 2005, likely on or around November 1, 2005.

6. The City posted the property on November 5, 2005, prohibiting occupancy.

7. Dortch thereafter applied for a repair permit (a building permit), but was denied permission to repair the building unless she physically transformed it into a single family residence.

III. Due process and other constitutional guarantees establish Dortch's vested right to continue the lawfully commenced use of a lawfully constructed duplex after a putative change in the zoning ordinance, unless the City shows a public nuisance which would be enjoinable at common law, without respect to the ordinance or its intent.

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[1]Accordingly, pursuant to the S.C. Supreme Court's Order dated June 6, 2019, the Court of Appeals is directed to transfer this case back to the S.C. Supreme Court.

Under the state constitution, "[a] landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480 at 498, 536 S.E.2d at 901 (quoting F.B.R. Inv'rs v. Cty. of Charleston, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991)). See also James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

Dortch and her predecessors therefore acquired a vested right to continue to own the structure as a duplex, and to continue to use it as one, unless a duplex would cause a "detriment" of the sort described.

IV. The type of detriment required in order to defeat a constitutionally grandfathered right to continue a use of property is one that rises to the status of an enjoinable outright public nuisance at common law.

To show such a detriment, "as it would be required to do if it sought to restrain [Dortch] in a common law action for public nuisance, [the City] must identify background principles of nuisance and Property law that prohibit the uses [Dortch] now intends in the circumstances in which the property is presently found." Lucas v. South Carolina Coastal Council, 505 U.S. 1003 at 1032 (1992). See also Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986). As shown in Dortch's Appellant's Brief, the duplex did not, and would not cause such a detriment. The denial of a repair permit was therefore a violation of Dortch's due-process rights under the constitutions to continue the use, her right to not be subject to an unconstitutional taking, and other constitutional rights.

The City largely ignores and postpones this issue.[2]

V. Despite distractions for irrelevancies and criticisms, further basic facts pertaining to Dortch's vested rights are inescapable.

First, the City argues over how Dortch presents the facts of the case. For example, the City argues over Dortch presenting the facts in the context of the somewhat convoluted legal and procedural issues before the court.[3] For example, undisputably, the fact is that no written reasons or even statutory references[4] were given to Dortch in 2007, 2008, or 2009 for anything she had to later appeal, but in this case, the City makes "issue preservation" arguments at every bend.

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[2]The City does not cite one single case by the United States Supreme Court, by the South Carolina Supreme Court -- or even by the court of another state, such as Ohio, having a state constitutional tradition similar to South Carolina's with respect to vested rights in real property – holding that it is constitutional to terminate by statute, an owner's lawfully commenced pre-existing overall use of real property inherent in its physical configuration, based on passage of time or on any other occurrence, failure, statutory scheme, or other factor, other than (i) the owner's intentional, volitional abandonment of the use in the sense of subjective intent to forever relinquish, as described in Conway v. City of Greenville, 254 S.C. 96 at 101, 173 S.E.2d 648 at 650 (1970), or (ii) its total destruction (if even then), or (iii) its constituting a hazard or problem that rises to the high level of a public nuisance which could be enjoined under common-law principles pre-dating and independent of the subject statute. James, Conway, Friarsgate, Vulcan, F.B.R. Investors, and Lucas, cited in Dortch's Brief, all state the contrary.

[3]See and compare Rule 208 (b)(1) (C), SCACR (referring to description of matters "that may have affected or may throw light upon the questions involved"). The City never "contests" the fact that the City itself simultaneously prosecuted Dortch for not making repairs, while denying her request for a permit to make them. Rather than contest this uncontested matter, the City complains that it is a "red herring." City Brief at 3, n.2. Other tribunals have wanted perspective on how this prosecution related to the procedural history. Dortch's counsel mentioned the prosecution to Judge Barber in the 2013 case in response to his questions. (Transcr. p.11, line 24-p.12, line 8, and p.14, line 20-p.15, line 24, R.pp. 61-64.) Dortch's counsel also mentioned it to Court of Appeals in Dortch's 2013 Brief at pages 2, 4, and 16 and in her Reply Brief at 1, 3, 5, and 6. Dortch's counsel also mentioned it to Court of Appeals in oral argument in response to the Court's questions. Dortch's counsel also mentioned it in the briefs to the Circuit Court. It is also mentioned by the BOZA "staff" in the minutes, as cited by Dortch in her Appellant's Brief and aknowledged in the City's Brief.

[4]Some time after Dortch was denied a repair permit, the building or zoning official filled out the top of a variance application given to Dortch, and therein referenced one ordinance, Ord. § 17-275, which was an ordinance relating to lot size. The City incorrectly refers to the official's handwriting as Dortch's.

Further, unquestionably, an irregular, deficient, and noncompliant record was filed by the City ten years late, and BOZA relied on a file – complete with an ex parte brief – not given to Dortch, and in the 2013 proceeding, relied on the facts of other proceedings at which Dortch was not present. Yet, the City, in charge of that record, argues it is the only source of material for review.[5] Further, the fact is that grandfathering is a result of constitutional protections, but may also be a result of statutory provisions and this distinction is necessary in following the facts, issues, arguments, and rulings. Yet, the City frequently confuses the two types of grandfathering[6] and BOZA was not in a position to consider or rule on the constitutional issue.

The City also argues over some absence of record citations for facts which are set forth in the statement-of-the-case section of the Brief, not in the argument section of the Brief, i.e., there are not record citations for all facts in the statement of the case, which are assumed to be uncontested by the parties and to require no citation.[7] Further, at various points, the City argues over words chosen to describe the facts, such as whether someone persuaded under likely threats

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[5]In its Brief, the City now makes reference to putative "Transcripts" which were not included in the putative 2009 and 2013 "records" filed in Circuit Court, which were not filed in Circuit Court, and which were never presented to nor considered by the Circuit judge. It is unknown by Dortch's counsel by whom these documents were prepared, what level of fidelity is reflected and what certification accompanies them. They and all references to them should be disregarded.

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

[7]See and compare Rule 208 (b)(1) (C), SCACR (directing that the statement of the case "not contain contested matters") and see Rule 208(b)(4) (referring to facts "alleged," impliedly those alleged in different portions of the brief, in which facts are alleged and argued, such as the Rule 208(b)(1)(D) facts, which "may contain contested matters"). At the writing of Dortch's Brief, none of the facts in her statement of the case were contested by her or thought to be contested by Respondent after over ten years in court on the matter. It does not appear that any are seriously contested now.

of prosecution is "forced" to leave a place,[8] or is merely persuaded, and such as whether, by using the same "reestablish" language as the building or zoning official and BOZA used to discuss her matter, Dortch truly meant, contrary to reality, that her building no longer existed.

With all the foregoing criticisms and misplaced emphases, the City never actually contests those facts that matter; these remain uncontested. Among others, the following additional facts are not only uncontested by the City, but uncontestable and fully supported in the record:

8. When the building or zoning official denied Dortch permission to repair the building, Dortch was not given the detailed reasons.

9. She was not given a decision in writing, and no written decision or written explanation for the denial of permission to repair the building appears in the Record, other than the building or zoning official's writing on the top of a variance application form she was later given. It mentions the lot size ordinance referred to above (Ord. §17-275), but no other ordinance.

10. She appealed the decision to BOZA and she separately also asked BOZA for a variance.

11. There was no evidence of twelve continuous months of lack of occupancy of her building until after November 5, 2005. From November 5, 2005 on, the City prohibited occupancy. To the extent BOZA ever based any decision to deny Dortch's requests in any proceeding in this case based on lack of occupancy, BOZA based the decision only on lack of occupancy during the period the City prohibited occupancy. In Respondent's Brief, the City acknowledges positive and uncontroverted evidence in the Record showing that Wayne Hatten was in the property on October 12, 2005 and stated on October 12, 2005 that he would be out by November 1, 2005.

12. BOZA affirmed the building or zoning official and denied Dortch a variance.

13. In neither instance did BOZA comply with the statutory mandate that BOZA set forth

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[8]Regarding whether Hatten was "forced" to leave, the City argues in its Brief at 15, that there is no evidence that "repairs could not have been performed earlier." The argument is incorrect and impertinent. No one asked Dortch about making repairs earlier. The only inquiries of BOZA were directed to the question of occupancy. Nevertheless, at various points, Dortch has explained that it took her some time to acquire her brother's interest in the property, and she stated in an affidavit that at some earlier stage, she was first refused a permit because she did not reside at the property.

It makes no difference whether Dortch could have applied for a building permit earlier than November 5, 2005; the issue with respect to November 5, 2005 is whether the property was continuously unoccupied for a twelve-month period before then, not whether it was damaged.

BOZA's findings of fact and conclusions of law, and in neither instance did BOZA provide an explanation of its basis for the decision, other than a remark with respect to the variance that there were no exceptional circumstances.

14. Dortch thereafter appealed BOZA's decisions to the Circuit Court.

15. Approximately ten years later, while the appeal to Circuit Court was still pending, the City filed the ostensible "record" of the BOZA proceedings, which contained references to another statute pertaining to "vacancy" (Ord. §17-202(e)) and references to things BOZA considered in making the unexplained written decisions. Later still, the City provided BOZA's Rules.

VI. The standards of review for constitutional questions and other matters include de novo review for some matters and other standards broader than the City recites; some of these broader standards are traditional, common law standards overlooked by the City and some are mandated by the constitutions.

Also before addressing the constitutional issue, the City states one and only one standard of review, and erroneously argues that one and only one standard of review is applicable to all "decisions made by zoning boards" under all circumstances. (See Resp. Brf. at 8.)[9] The City then largely only applies part of that standard, arguing for the most part that, if there is "evidence

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[9]The City recounts only the "any evidence" standard derived from S.C. Code Ann. §6-29-840(A), which assumes, and is completely dependent upon, compliance with accompanying statutes, which require the officer from whom the appeal to the board is taken to immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken, which require filing the certified record of the BOZA proceedings within 30 days of appeal to Circuit Court, which require that the record so filed include a transcript of the sworn testimony taken, which require the record so filed to include a copy of the board's written decision, and which require that the written decision of the board separately state the board's findings of fact and conclusions of law. See S.C. Code §§6-29-800(B) and 6-29-830(A).

None of these things are present or were done for Dortch's 2009 appeal to Circuit Court. There is no copy of the building or zoning official's decision stating his reasons or statutes. (The same is true for the 2013 case.) The record was not filed within 30 days; it was filed ten (10) years later. (No certified record was ever filed for the 2013 case; some papers were attached to a motion to dismiss.) The record was not properly certified. (The papers in the 2013 case were not certified.) The record did not contain a transcript when filed ten years later. (The 2013 "papers" also contained no transcript.) There was zero sworn testimony in opposition to Dortch in the record. (The same was true for the 2013 case.) The record did not contain the decisions of BOZA. (The same was true of the 2013 case.) The decisions of BOZA, retrieved from other sources, contained no separately stated findings of fact and conclusions of law. (The 2013 BOZA decision contained findings of fact not germane to the merits to be decided, i.e., it contained no findings of fact on the elements to be considered for a variance.)

in the record," BOZA must be affirmed in all it does – constitutional violations and errors of law included. The City ignores the part of its own cited standard allowing independent appellate determination of questions of law, and the part requiring reversal when the board's decision is guided by an error of law or is otherwise arbitrary or capricious.[10]

The City thus never addresses the standard of review again when later addressing the constitutional question, questions of statutory interpretation, or other matters of pure law challenged on appeal, other than to assert there is "evidence in the record." These questions are all traditionally subject to de novo review. As set out in Dortch's Appellant's Brief, the state and federal constitutions,[11] statute law, and common law call for different standards of review in circumstances including, but not limited to, constitutional challenges, appeals of other pure questions of law, challenges to the legality of actions of local officials, and challenges to decisions made without explanation of reasons and without statutorily mandated findings of fact and conclusions of law. Dortch presented these standards as four distinct issues on appeal and argued them.

VII. The constitutionality of the building or zoning official's action was raised and preserved by Dortch.

Also before addressing the constitutional issue, the City asserts that the constitutional issue was not raised below. This assertion is simply incorrect and to the extent the City

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[10]The City also completely fails to address what scope of review an appellate court should adopt when the issue presented to the appellate court is one the zoning board may have had no power to decide or apply, such as the constitutional invalidity of a statute, or the manner of its application, or an equitable principle providing relief. Similarly unaddressed is the scope of review for questions on these and other issues, requiring facts the decision of which requires facts not available or presentable to the zoning board.

[11]The South Carolina Constitution, as opposed to the federal constitution and the constitutions of many states, has an Administrative Procedures Clause, guaranteeing judicial "review," included in the Declaration of Rights. See S.C. Const. art. I, §22.

putatively supports its assertion with anything, the City does so only by pointedly not discussing the places Dortch cited in the Record where Dortch raised the issue. Dortch addressed the issue in her Brief.[12] Dortch stated in her petition that prohibiting her prior lawful use of her property was "a violation of due process of law." This raises the due process issue. She then proceeded to extensively argue it to the Circuit Court, and then argued it again in a Rule 59 motion.

VIII. Whether or not the City was correct in applying statutory provisions in order to terminate statutory grandfathering, statutory provisions are not effective to terminate constitutional grandfathering unless those statutes and their application under the circumstances are both constitutional, i.e., a statute cannot authorize or excuse a violation of the constitution.

Also before addressing the constitutional issue, the City argues at length that BOZA was correct in determining that certain ordinances – which were never cited in a written decision of the building or zoning official, or of BOZA -- terminated Dortch's statutory grandfathering. This statutory grandfathering is provided by statute, independently from or in addition to the aforementioned grandfathering provided by the constitution. A statute cannot authorize violation of the constitution. Conway.

IX. Even under the narrowest scope of review, where the tribunal under review makes an error of a question of law, no amount of "evidence in the record" cures a legal error.

Prior to addressing the primary question of unconstitutionality, in its argument instead addressing the applicability of statutes to termination of any statutory (as opposed to constitutional) grandfathering, the City confuses law with fact. The City erroneously seeks

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[12]The City takes the audacious position that a government entity should be able to deny substantial rights without giving written reasons therefor and then the citizen must present every reason why the government is wrong with detail of microscopic precision and surgical exactitude, all while repeating magic language in order to invoke fundamental constitutional protections. The City completely ignores, and therefore does not contest, the abject failure of BOZA to make findings of fact on the issues pertinent to deciding the matters before it. This failure is a failure to comply with statutory mandate.

affirmance of a legal error on the basis that there is "evidence in the record" that the property was "vacant" after November 5, 2005, and that this fact somehow erases all legal error.

Once the parties finally got into the thick of Dortch's appeal to Circuit Court, the City began to argue an ordinance never cited in the decisions of the building or zoning official or BOZA, Ord. §17-202 (e). This ordinance (or "statute") was mentioned by name or principle in the file of BOZA which was provided to Dortch ten years after Dortch filed her appeal to Circuit Court. This is the statute the City contends allows the City to terminate Dortch's statutory (and constitutional) grandfathering. The City argued this statute allowed the City to terminate Dortch's rights in her property if the property was "vacant" for more than twelve continuous months.

To this, Dortch responded in Circuit Court that the statute was not applicable.[13] Dortch set forth numerous reasons why the statute was inapplicable, including the following:

1. The statute does not terminate or unestablish the right to continue a prior legal use. The statute, by its terms, only deals with circumstances for "re-establishing" a use which has been terminated by operation of some other statute or principle. It is uncontested that Dortch's use had not been terminated by any other statute or principle.

2. The statute, by its terms, does not apply to situations involving repair after damage, regardless of whether the damage is small or large. It is uncontested that Dortch's situation involves repair after small damage.[14]

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[13]Dortch also responded that if it were applicable, and were applied to prohibit the repairs she sought, the statute and its application to her were a violation of due process and an unwarranted taking under the state and federal constitutions.

[14]The City asserts in its Brief at 25 that this issue was not raised by Dortch in her petition to the Circuit Court. Without BOZA having even cited a statute in its decision, Dortch stated in her petition that whatever the basis on which the City relied in denying her right to repair the property, it was error to deny the permit. She later filed an amended petition as well as an affidavit. Under the circumstances, this was compliance with the requirement that she file a petition stating what was wrong with BOZA's decision. She in fact added that BOZA's decision was devoid of any explanation or citation. She articulated her arguments more fully as she discovered the various bases postulated by the City for the uninformative written decisions of BOZA.

3. The term "vacant" is not defined and, particularly if the foregoing did not preclude application of the statute, Dortch's building was not "vacant" at any time for purposes of the statute. Statutes in derogation of the common law are to be strictly construed, and absent manifest contrary intent, should not be presumed to be intended to push the constitution to its limits. By its context in the phrase, "vacancy, abandonment, or discontinuance," the term "vacancy," under noscitur a sociis, is intended to mean the same thing and level of resoluteness as "abandonment" and "discontinuance." See Maguire v. City of Charleston, 271 S.C. 451, 247 S.E.2d 817 (1978) (Rhodes, Justice, dissenting)(discussing cases in which "discontinuance" meant the same as "abandonment"). Since "vacancy, abandonment or discontinuance" legally means intentionally abandoned in the sense defined in Conway, and it is uncontested that the facts do not support Conway abandonment here, the statute does not apply.

4. The term "vacant" is not defined and, particularly if the foregoing did not preclude application of the statute, Dortch's building was not "vacant" at any time for purposes of the statute. "Vacancy" should still be narrowly construed to apply to apply to a building intentionally emptied of all things. The only evidence on the subject related to occupancy by people. There is no evidence in the Record that the building was empty.

5. The term vacancy was never intended to refer to lack of occupancy during a period during which occupancy is prohibited by the City – the very party asserting a change of rights based on "vacancy." If this was intended, it is fundamentally unfair, a violation of state and federal substantive due process and state equal protection, and is additionally a condition against which the Circuit Court should have given relief under the doctrine of equitable tolling.[15] There is no evidence of a continuous period of nonoccupancy before the City prohibited occupancy. There is uncontested affirmative evidence of occupancy just days before.

"Evidence in the record," that the building was not occupied during the period the City prohibited all occupancy, does not answer the foregoing questions of law.

X. Dortch does challenge the sufficiency of the evidence concerning the City's attempt to use Ord. §17-2020(e) or any other ordinance to terminate Dortch's right to continue her previous lawfully commenced use of her building; the ordinances, properly interpreted, require different evidence than what the City focuses on and there is no evidence to support application of the ordinances when properly interpreted.

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[15]The City asserts in its Brief at 25 that this issue was not raised by Dortch in her petition to the Circuit Court. Without BOZA having even cited a statute in its decision, Dortch stated in her petition that whatever the basis on which the City relied in denying her right to repair the property, it was error to deny the permit. She later filed an amended petition as well as an affidavit. Under the circumstances, this was compliance with the requirement that she file a petition stating what was wrong with BOZA's decision. She in fact added that BOZA's decision was devoid of any explanation or citation. She articulated her arguments more fully as she discovered the various bases postulated by the City for the uninformative written decisions of BOZA.

In a related vein, although Dortch sets forth in her Statement of Issues on Appeal,[16] and argues in her Appellant's Brief, various reasons why certain ordinances did not apply to preclude her continued ownership of her duplex as such, the City argues in its Brief at 11 that Dortch "has abandoned any appeal concerning the sufficiency of the evidence concerning the finding of the loss of grandfather status." This is flatly incorrect.

First, "loss of grandfather status" is not a fact to be found. It is a conclusion of law to be reached after finding underlying facts to support application of a statute or legal principle resulting in that conclusion. As a question of law, whether Dortch's grandfathered status was "lost" (or destroyed) is freely reviewable, i.e., de novo.

Dortch argued and explained why, as a matter of law, the statutes urged by the City do not result in the legal conclusion that Dortch "lost" her grandfathered status. (See Appellant's Brief at 34-38.) Under these arguments and explanations, different evidence than that solely relied upon by the City for a legal conclusion of "loss of grandfather status" is necessary. As pointed out above, there is no evidence to support the City's conclusion and the evidence in support of Dortch's conclusion is uncontested.

The City never addresses at all, some arguments and explanations Dortch makes, such as that Ordinance §17-202(e) does not apply at all in situations involving repair after damage, which the instant case does involve. The City also expressly declines to address Dortch's argument that the Circuit Court, and this Court, as courts of equity, should apply equitable tolling to avoid the caustic and unnecessary burden placed on Dortch. This Court should.

XI. The City's ranging arguments that Dortch was not deprived of her vested rights are unavailing.

When it finally comes to the constitutional issue, the City merely recites as its

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[16] Viz., Issues 4, 5, 6, 7, 8, and 9.

justification and authority for violating Dortch's constitutional rights, the very statutes the City contends allowed it to do what it did.[17] Here, in its Brief at 19, the City literally argues that Dortch "misapprehends" the law of vested rights, and that Dortch fails to understand that Dortch has no vested right under the constitution if an ordinance passed by the City of Columbia, here, Ord. §17-202(e), says she does not. That is, among other things, the City erroneously argues that the constitution is not violated if the statute causing the violation authorizes the violation and if there is evidence in the record supporting application of the statute. (Resp. Brf. at 19-20.) To the contrary, Conway, cited in Dortch's Appellant's Brief, clarifies the obvious proposition that a statute cannot authorize a violation of the constitution. The City's argument has no merit.

Further, the City cites no controlling authority contradicting James, Conway, Friarsgate, F.B.R. Investors, Vulcan, and Lucas, discussed in Dortch's Appellant's Brief. Instead, the City incorrectly posits in its Brief at 20, that the "public policy of zoning laws," the "intention" and "purpose" of "zoning laws," and enabling legislation, can be used to override a vested right guaranteed by the constitution. This is incorrect. Conway.

On the same page 20, the City juxtaposes two citations to advance the completely untenable suggestion that because "it is generally recognized" that a nonconforming use may "detract" from the "public purpose" of a zoning plan, this "detraction" rises to the level of an enjoinable public nuisance for the purpose of an exception under Vulcan which would defeat vested rights. Compare Vulcan (recognizing vested right to continue previous lawfully

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[17]The City thus extends its repetitive illogic of citing statutes which Dortch asserts to be unconstitutional in order to refute the argument that they are unconstitutional. To avoid cumbersome repetition and lengthening this Reply, Dortch will, from time to time, use the term "unconstitutional" with respect to a statute to mean that the statute is either unconstitutional on its face, or unconstitutional if it is interpreted as the City interprets it, or is unconstitutional as interpreted and applied to Dortch on its own or in conjunction with related statutes. Unless otherwise stated, Dortch also means under both the state and federal constitutions.

commenced use absent a "showing" by the government that the continuance of the use "would constitute a detriment to the public health, safety or welfare"). The detriment has to rise to the extraordinary level of a common law public nuisance. Lucas; Friarsgate.

Not only is the rule suggested by the City in no way conveyed by these cases it cites together, but the proposition itself is preposterous, as was the analogous reasoning of BOZA on variance questions discussed later hereinbelow. If vested rights can be defeated upon the government showing a detriment, and the government could show a detriment by merely reciting the policy of zoning laws to discourage continuation of previous lawfully commenced uses later disallowed by zoning (a/k/a nonconforming uses a/k/a grandfathered uses), then the government could defeat all vested rights and there would indeed be no "vested rights," no "nonconforming uses," no "grandfathered uses."[18]

Equally lacking in merit is the City's suggestion in its Brief at 24 that the Record contains evidence of subjective intent of Dortch to forever abandon the property as a duplex and change it into a single family home. After over 12 years (as of this writing in 2020) since repairs were prohibited by the City, the building is still sitting on the lot physically configured as a duplex, with separately metered utilities, a kitchen up and a kitchen down, no internal stairs, etc. No one intending to abandon a use pursues preservation of the use in court and otherwise for over ten years.

The City's arguments attempting to distinguish or explain the James, Conway, Juel and Gurganious cases cited in Dortch's Appellant's Brief were fully anticipated in Dortch's Brief,

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[18]By the City's reasoning, the single family home of the City's counsel or any member of the court could be rendered nonconforming by passage of an ordinance placing the entire structure six inches over a newly established setback line. There would be no vested right to resist a demand that the entire structure be demolished or moved, because the resulting nonconformity, per se, would be a "detriment" to public welfare, as "detracting" from the purpose of the zoning plan.

which accurately cites and explains them and refutes the City's descriptions to the extent contrary.

In its Brief at 23, the City cites New York and Iowa cases, but not any from Ohio, whose constitution is likely most akin to South Carolina's on the issue of property rights, particularly vested rights, distaste for ex post facto laws pertaining to property ownership, "takings," "nonconforming uses," "grandfathering," and other concepts all involving the same principles.

The City also appears to argue in its Brief at 23 that lack of occupancy is the equivalent of discontinuance of use as a duplex, which is a physical attribute of the property itself. The City does so only in the context of a case in which a separate noncomplying fence on a property was totally destroyed and not replaced within a year, and in the context of cases from other jurisdictions.

In the 1950s, some other states either began interpreting their own constitutions to allow a slide further down the slippery slope of allowing laws putting a timer on existing uses, or they began to anticipate a direction they thought the U.S. Supreme would take in countenancing more overbearing government power in due process and takings analyses on the subject. For example, Los Angeles v. Gage, 127 Cal. App.2d 442, 274 P.2d 34 (1954) found valid a time limit for an existing use of land for not more than a short time after a new ordinance was enacted, referring to this diminution of the privilege of the landowner as "amortization." Id., and see Comments, The Cost of Amortizing Non-Conforming Uses, 26 Univ. of Chicago L.Rev. 442 at 442 (1959)(citing Gage and similar "recent" cases in Kansas in 1957, Maryland in 1956, and New York in 1958). However, as discussed in Dortch's Appellant's Brief, the U.S. Supreme Court did not follow suit, and its recent cases suggest a different direction. See, e.g., Craig A. Peterson and Claire McCarthy, Amortization of Legal Land Use Nonconformities as Regulatory Takings: An

Uncertain Future, 35 Wash. U. J. Urb. & Contemp. L. 37 at 59 and 79 (1989) (available at: https://openscholarship.wustl.edu/law_urbanlaw/vol35/iss1/3)(noting absence of Supreme Court rulings on amortization of nonconformities and the suggestion that amortization ordinances might be found unconstitutional under developing standards). Further, even at the time of the mid-1950s liberalization, in some states, of government ex post facto powers over private property, South Carolina's high court and state constitution disagreed. See Comments, The Cost of Amortizing Non-Conforming Uses, id. at 442 (citing James (1955) and similar contrary cases in Ohio in 1953 and Texas in 1953). South Carolina has continued a tradition of protecting vested rights, absent a noxious circumstance shown by the government to amount to public nuisance.

XII. BOZA abused its discretion under any standard of review in denying a variance, by among other reasons, being guided by more errors of law than can be succinctly recounted, and engaging in a discriminatory, arbitrary and capricious decision that has been documented by the BOZA staff's own brief in the Butler Street property cases.

Finally, the City also argues that BOZA was correct in denying a variance although BOZA ignored the statutory and due-process mandate that BOZA set forth findings of fact on the issues necessary for decision, and conclusions of law based on those facts. The City does so while ignoring Dortch's distinct, valid arguments under the constitutions and statutes, for a de novo scope of review.

Concurrently, in failing to redeem the still ubiquitous[19] abuse of discretion inherent in BOZA's decision, the City erroneously adopts, as correct, the mistakes of applicable law which also guided BOZA into such abuse of discretion. These included, as only a few of many presented, not understanding that, as a matter of law, the characteristics of a building on a piece

[19]Dortch's Brief at 44-46 sets forth a nonexclusive list of sixteen (16) significant legal errors apparently guiding BOZA in its decisions. The City partially addresses two.

of land are part of the real property and therefore are to be considered in assessing "exceptional circumstances" and "unnecessary hardship."[20]

These also included not taking into account, the legal differences in the circumstances giving rise to the nonconformity, when assessing these factors. Namely, BOZA ignored the differences between, on the one hand, a request to allow an activity or purpose for a property which is not ordinarily allowed in a zoning district (a "use variance") and, on the other hand, a mere request to allow a divergence in mere size, setback, or dimensions for a property the activities on which and the purposes of which are common and usually permitted in the zoning district.[21]

XIII. The City misapprehends the purpose and application of the rules of issue preservation.

As previously noted, the City's factual and legal arguments that the issues of unconstitutionality, inapplicability of Ord. § 17-202(e), and equitable tolling were not raised in Dortch's appeal from BOZA to the Circuit Court are wrong. The purpose of the rules of issue preservation is to give the court whose decision is under review the opportunity to make a decision on the issue which is appealed. The Circuit Court had that opportunity.

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[20]The City's legal argument in its Brief at 28-29, unsupported by citation of authority, that the physical characteristics of a building legally built and already in existence cannot be an "exceptional condition" creating "undue hardship," is wrong. Dortch's Appellant's Brief provides authority on this point at pp. 46-48. The City's persistence in arguing this erroneous principle, demonstrates that BOZA, too, was guided by this legal error in making its variance decisions, and that as a matter of law, an abuse of discretion, requiring reversal of BOZA, occurred.

[21]The City's legal argument that the same standard is used to determine a use variance and an area variance because separate standards are not mentioned in the statute is wrong; the two standards are different standards for applying the the same statutory language to variance types which have recognized, different underlying characteristics and require a different analytical framework, but which are sought pursuant to the same statutory language. Dortch's Appellant's Brief provides authority on this point at p. 47.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) (internal quotes omitted) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. Id. (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict)). See also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue). "A party need not use the exact name of a legal doctrine in order to preserve [an issue], but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A party' s wording can change between court and a Rule 59(e) motion without jeopardizing preservation of the issue. Conits v. Conits, 422 S.C. 74, 77, 810 S.E.2d 253, 254 (2018). A party who properly invokes a rule of civil procedure without referencing it by name has preserved arguments based on closely related provisions. Patton v. Miller, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) (noting that "the Rules were never intended to trap a party simply for not using the proper words or rule number to describe the applicable legal principal").

South Carolina appellate courts "are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." Herron, 395 S.C. at 470, 719 S.E.2d at 644.

Certain concerns, such as the inability to raise an issue earlier, can provide exceptions to the preservation rules. For example, because the ALC is part of the executive branch, it lacks authority "to pass on the constitutional validity of a statute or regulation"; thus, such challenges "present an exception to [the] preservation rules and should be raised for the first lime on appeal to the circuit court." Travelscape, LLC v. South Carolina Dep't of Rev., 391 S.C. 89, 108-09, 705 S.E.2d 28, 38 (2011).

Where an issue presented to the trial court is not explicitly ruled on in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appeal. McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504 n.3, 719 S.E.2d 660, 662 n.3 (2011) ("[T]he circuit court's ruling did not specifically address those grounds, and Appellants failed to make a Rule 59(e), SCRCP, motion. Accordingly, those issues are not preserved for review, and we do not address them.")(citing Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000)); Great Games, Inc. v. South Carolina Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000) (holding that, because circuit court failed to rule on constitutional issue and appellant did not raise omission in its Rule 59, SCRCP, motion, the issue was not preserved for appellate review). Here, Dortch raised the Circuit Court's omission of the subject issues in a Rule 59 motion.

Once the issue has been properly raised by a Rule 59 motion, it is preserved for appeal even if the trial judge does not rule on it. Sierra Club v. South Carolina Dep't of Health and Envtl. Control, 387 S.C. 424, 433-34, 693 S.E.2d 13, 17-18 (Ct. App. 2010) ("[B]ecause the Sierra Club properly filed a Rule 59(e) motion with the ALC, we believe these issues are preserved even though the ALC did not specifically rule on them.")(applying Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006)). See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments

to trial court and attempt to obtain a ruling). A party need not "request additional conclusions of law" from a hearing officer in order to preserve his issues for appellate review where the officer has ruled in favor of the opposing party and rejected the party's argument. South Carolina Dep't of Motor Vehicles v. Brown, 406 S.C. 626, 636-37, 753 S.E.2d 524, 529 (2014).

The issue may also arise with respect to issues omitted by a respondent. For example, if a respondent does not file a brief, the appellate court may take such action as it deems appropriate, including reversal for that reason alone. Robinson v, Hassiotis, 364 S.C. 92, 93 n.2, 610 S.E.2d 858, 859 n.2 (Ct. App. 2005) (citing Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 282 S.E.2d 858 (1981)).

Where an argument is neither clearly preserved nor clearly unpreserved, courts should resolve this dispute "in favor of preservation." Johnson v. Roberts, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018).

An appellate court might address other unpreserved issues which it could raise *sua sponte*. See, e.g., Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 520 (2010) (noting that, although a party's references to "appellate court rules regarding error preservation" were generally correct, such rules were "inapplicable" to the issue of "enforc[ing] an illegal contract"—an issue which other courts had raised *sua sponte*).

An appellate court may also address an unpreserved issue "for purposes of judicial economy." Bell v. Prog. Direct Ins. Co., 407 S.C. 565, 582 n.9, 757 S.E.2d 399, 407 n.9 (2014); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) ("Regardless of any preservation problems we address this issue in the interest of judicial economy. The first time this case was tried, it ended in a mistrial. This appeal involves the second trial, and based on the unappealed rulings of the Court of Appeals, this case will be tried

for a third time.").

There are other instances in which judicial economy and the practicalities of the case counsel against slavish adherence to a rigid preservation rule. Normally, "[e]ven in the context of juvenile criminal matters, South Carolina courts have applied the general error preservation rule." State v. Bonner, 400 S.C. 561, 565 n.3, 735 S.E.2d 525, 527 n.3 (Ct. App. 2012) (aggregating cases). However, a party can properly argue an improper sentence for the first time on appeal in at least two instances: (1) where "the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"; or (2) where "there is a 'real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue [PCR].'" Id. at 566, 735 S.E.2d at 527.

Dortch fairly raised all present issues to the Circuit Court, and pursued a ruling when the Circuit Court did not rule on them.

XIV. The scope of review for all matters on appeal from a board of zoning appeals is not the same; the City does nothing to address the issues Dortch discretely raises on appeal, including constitutional, statutory, common law, and policy reasons for applying a different scope of review than that urged by the City, even in the circumstances in which it has been applied by the courts.

In the statement of issues on appeal in her Appellant's Brief, Dortch listed the following:

> 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?
>
> ***
>
> 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?

These issues were argued in Dortch's Appellant's Brief[22] at 20-23 and 38-43. Respondent does not address these arguments at all.

It has been stated that the decision of a board of zoning appeals on a variance application[23] is subject to only a "substantial evidence" scope of review, or even an "any evidence" scope of review. See, for example, the Circuit Court's March 25, 2019 Order at 3, citing, inter alia, S.C. Code Ann. § 6-29-840 and Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004).

The danger in categorically using such generalized propositions as an expedient for a decision is that they violate the state and federal constitutions. They also do not apply when the board and others associated with the respondent do not comply with statutory prescriptions for conduct of the proceedings. It is also error only to pay lip service to the traditional exceptions stated as part of these propositions – that the board will be reversed when it is guided by errors of law in "finding" facts or is operating in another manner that amounts to abuse of discretion. Not stating any reasons, for example, is an indicium of arbitrariness.

Other considerations may dictate the ability of the appellant to supplement the record, and

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[22]They were argued more extensively and with more separation in the initial Appellant's Brief first filed by Dortch. Dortch filed a motion for leave to exceed pages limits in her Appellant's Brief, and two days later filed the brief instead of waiting for a ruling on the motion. The City objected to allowing additional pages and some months later, the Court of Appeals, to which the appeal was conditionally referred by the S.C. Supreme Court, denied the motion, and thereupon, Dortch filed a substitute, more truncated initial Appellant's Brief.

[23]Board decisions reviewing the action of a city employee, rather than decisions on variances, are subject to a broader review. Brock v. Board of Adj. & Appeals, 308 S.C. 539, 419 S.E.2d 773 (1992). Of course, where the matter under review is a question of law determined by the city employee, the matter is freely reviewable, de novo, by the Circuit Court, Court of Appeals and Supreme Court. See Hagood (stating questions of law are freely reviewable).

affect the ability of the appellant to amend or supplement her grounds for appeal.

Under the Administrative Procedures Clause of the South Carolina Constitution, as well as the due process clauses and other protections of the state and federal constitutions,[24] review of the decision of a municipal board of zoning appeals is required to be plenary and de novo, on matters of both fact and law. The provisions of the South Carolina Constitution, including the Declaration of Rights in Article I, are not "merely directory"; they are "mandatory and prohibitory." S.C. Const. art. I, § 23.

Art. I, § 9 of the South Carolina Constitution mandates that a person with a wrong sustained shall have a remedy in a court. A nonjudicial inferior administrative tribunal subject to no meaningful judicial review of facts is not a court. The remedy in the "court" shall be speedy. Id. Providing a remedy only in a nonjudicial inferior tribunal with sparse procedural protections and providing nearly nonexistent judicial review later does not provide a speedy remedy in "court."

Art I, § 22 also mandates that no one shall be "subject to the same person for both prosecution and adjudication." While this provision may be directed primarily to criminal or quasi-criminal matters, it is obviously based on the venerable due-process requirement -- also applicable to civil matters -- of having important rights, including property rights, be decided by "a neutral, detached judicial officer." See Goldberg v. Kelly, 397 U.S. 254 (1970)(requiring in a proceeding to terminate federal financial aid, a pre-termination hearing, requiring timely and

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[24]See and cf. S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Compensation Comm'n, 389 S.C. 380, 699 S.E.2d 146 (2010) (equating the rights conferred by S.C. Const. art. I, §22 upon a party to a matter already subject to the State Administrative Procedures Act to the rights conferred by the state and federal due process clauses) and id. (Hearn, Justice and Kittredge, Justice, dissenting)(disagreeing with the proposition that the rights guaranteed under art. I, §22 are no more than those classically protected under the due process clauses of the state and national constitutions).

Ambulatory Surgery Center Ass'n is discussed in Appellant's Brief p. 40 n.23.

adequate notice of the basis of proposed termination, requiring an ability to confront adverse witnesses, requiring an ability to present evidence, requiring the ability to retain counsel for a hearing held before termination, requiring the decisionmaker to state the reasons for his determination and indicate the evidence he relied on, and requiring the decisionmaker to be impartial and to have not participated in making the determination under review).[25]

As discussed further in Appellant's Brief, BOZA follows a practice of receiving ex parte briefings called "case summaries," including advice, by the persons statutorily outside of BOZA, from whose decisions relief is being sought. Yet these persons are treated as, and literally identified to the BOZA members as, "staff," meaning the staff of BOZA itself. The undisclosed rules provided by the City December 11, 2018 make the zoning administrator "secretary" of BOZA. (Id., § I(2).) An applicant or appellant to BOZA is therefore largely having his or her appeal guided, if not decided, by a person from whose decision relief is being sought.[26] In one of the BOZA decisions in the instant case, the adverse party even went so far as to actually sign BOZA's decision (R.p. 244) , obviously having been given, if not the opportunity of authorship itself, an advance look and opportunity privately to provide input. No deference whatsoever and no reticency in review, should therefore be afforded the body's decision.

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[25]"The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Marshall v. Jerrico, 446 U.S. 238, 242 (1980); see also Schweiker v. McClure, 456 U.S. 188, 195 (1982).

For a summary of due process requirements under the North Carolina Constitution in quasi-judicial proceedings on special and conditional use permits, variances, and appeals of staff determinations, see Humble Oil & Refining Co. v. Board of Aldermen, 284 N.C. 458, 470-71, 202 S.E.2d 129, 137-38 (1974)(Sharp, Justice).

[26]Similar practices in proceedings before State Administrative Agencies and federal agencies are prohibited by the State Administrative Procedures Act and the federal APA.

Art. I, § 22 of the Declaration of Rights in the South Carolina Constitution further mandates that no person shall be deprived of property unless by a mode of procedure prescribed by the General Assembly. A board of zoning appeals, more so than many other tribunals, deals with deprivation of rights in property. In violation of art. I, § 22, the General Assembly has not prescribed the procedure of the Columbia Board of Zoning Appeals.

Rather, in violation of art. I, § 22, the General Assembly, in S.C. Code Ann. § 6-29-790, allows the municipal or county council to adopt its own rules of procedure for the board.

Art. I, § 22 of the South Carolina Constitution also mandates that in all instances of "quasi-judicial decision of an administrative agency" such as the board of zoning appeals or the building department, a citizen of South Carolina "shall have the right to judicial review." S.C. Const., id. "Review," in this context, means the full "review" of both facts and law which is intended when defining "appellate jurisdiction." For example, under S.C. Const. art. V, § 5, the court, having appellate jurisdiction in a matter, "shall review the findings of fact as well as the law." See also Stoney v. Stoney, 422 S.C. 593, 813 S.E.2d 486 (2017)(analyzing the constitutionally required de novo scope of review of both facts and law in domestic relations cases, and contrasting the same with the "abuse of discretion" standard often theretofore applied). This same scope of review of administrative decisions is intended by art. I § 22. Limited judicial review of a non-judicial tribunal employing an unauthorized procedure is tantamount to no review and is prohibited by art. I, § 22.

Review therefore is de novo. Further, Dortch, once in "court" for the very first time, should also be allowed to supplement the record, and to amend or supplement her grounds for appeal, and have a true remedy in "court."[27]

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[27]This principle is in accord with the necessary due process treatment given to appeals from other inferior tribunals. In magistrate's courts, for example, which are not "courts of

CONCLUSION

For the reasons stated in Dortch's Appellant's Brief and herein, the relief requested in Dortch's Appellant's Brief should be provided.

Respectfully submitted,

s/M. Baron Statnon
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Date: 6/22/20

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record," In re: Richland County Magistrate's Court, 389 S.C. 308, 699 S.E.2d 161 (2010), similarly to in the circumstances before a board of zoning appeals, rules are relaxed, parties are often pro se, and the judges are not required to have a law degree. Under S.C. Code Ann. § 18-7-170, the Circuit Court may review the Magistrate's Court fully for errors of law or fact. See also Hadfield v. Gilchrist, 343 S.C. 88, 92-93, 538 S.E.2d 268, 270 (Ct. App. 2000) (confirming plenary review). This is so, even though a Magistrate's Court can presently only deprive a civil litigant of $7,500, whereas a board of zoning appeals may, as here, deprive a person of a whole house.

Similarly, there is a statutory wide scope of available judicial correction of matters before state Agencies. Thus, without a proper perspective on the scope and standard of review, a license to sell beer receives more procedural and appellate due process protection than a person's home.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Walton J. McLeod, Circuit Court Judge

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

Frieda H. Dortch, ... Appellant,

v.

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

CERTIFICATE OF SERVICE AND RULE 211 (b) COMPLIANCE

I, M. Baron Stanton, do hereby certify that I have, on 6/22/20, served the foregoing Initial Appellant's Reply 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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M. Baron Stanton