

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Cricket Store 17, L.L.C. d/b/a Taboo,

Plaintiff,

v.

City of Columbia Board of Zoning Appeals,

Defendant,

and

City of Columbia Zoning Administrator,

Counterclaimant,

v.

Cricket Store 17, L.L.C. d/b/a Taboo,

Counterdefendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2016-CP-40-03478

RICHLAND COUNTY  
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SC Court of Appeals

### ORDER AFFIRMING ZONING BOARD DECISIONS

This case presents two appeals from decisions reached by Defendant City of Columbia Board of Zoning Appeals (the “Board” or “BOZA”). Plaintiff Cricket Store 17, L.L.C. d/b/a Taboo (“Taboo”) appealed the decisions to this Court, and the BOZA provided the complete administrative record of the April 12, 2016 hearing before the Board.<sup>1</sup> In October 2016, the parties submitted briefs on the appeals, and the Court heard oral argument. In January 2017, a transcript of the April 12, 2016 BOZA hearing was provided to the Court. Based on the record, and for the following reasons, the Court affirms both of the decisions reached by the Board.

<sup>1</sup> The Board’s July 2016 answer included a counterclaim by the City of Columbia Zoning Administrator seeking injunctive relief against Taboo, but that counterclaim is not the subject of this order.

## I. Procedural Background

In late 2011, Taboo obtained a general business license and opened its “adult superstore” at 4716 Devine Street. On December 29, 2011, the City of Columbia adopted a sexually oriented business licensing ordinance with location restrictions, and on November 13, 2012, adopted updated sexually oriented business zoning regulations. *Cricket Store 17, L.L.C. v. City of Columbia*, 996 F. Supp. 2d 422, 424-426 (D.S.C. 2014). Taboo did not conform to the location regulations, but was allowed to amortize its investment and move to a conforming location by December 31, 2013. *Id.* at 426; *see also Bugsy’s, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 97 (2000) (upholding similar amortization period for nonconforming uses); *Centaur, Inc. v. Richland County*, 301 S.C. 374 (1990) (same). Taboo applied to extend the amortization period, but an independent hearing officer held that Taboo failed to show that it had not reasonably recouped its investment, and denied the application. *Cricket Store 17*, 996 F. Supp. 2d at 426.

Taboo sued in federal court. In detailed orders, the federal court upheld the City’s ordinances, ruling against Taboo at the preliminary injunction stage, *id.* at 438, at summary judgment, *Cricket Store 17, L.L.C. v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015), and on post-judgment motions. *Cricket Store 17, L.L.C. v. City of Columbia*, No. 3:13-3557, 2016 WL 81807 (D.S.C. Jan. 7, 2016). On January 25, 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment. *Cricket Store 17, L.L.C. v. City of Columbia*, No. 16-1065, Doc. 48 (4th Cir. Jan. 25, 2017).

Meanwhile, on January 28, 2016, the Zoning Administrator provided a letter to Taboo stating that Taboo would be required to comply with the City’s sexually oriented business

regulations. (No. 16-010-AA\_0030). The letter indicated that Taboo would be cited for ordinance violations if it did not comply with the regulations. (*Id.*)

## II. Factual Background and BOZA Cases

This action concerns two separate cases heard by BOZA on April 12, 2016.

The first case (No. 16-010-AA) alleges that by issuing the January 28, 2016 letter, “the Zoning Administrator did err by ‘arbitrarily requiring Taboo to comply strictly with ordinance regulations . . . rather than to allow Taboo continued operation as a nonconforming use.’” Order on an Administrative Appeal, No. 16-010-AA\_007 (*see* 16-010-AA\_0023). Plaintiff’s sexually-oriented business is located within a C-3 (General Commercial) district. (16-010-AA\_0019 and 0020). Sexually-oriented businesses are not permitted in a C-3 zoning district. *Id.* City Code § 17-374(b). The Zoning Administrator conducted a site visit on January 28, 2016, took pictures inside the establishment, and concluded that Taboo met the definition of a sexual device shop. (16-010-AA\_0012 – 0019). After hearing the evidence, the Board concluded that “the decision of the Zoning Administrator made in his letter of January 28, 2016 was correct based on the facts.” (16-010-AA\_0009).

The second case (No. 16-011-AA) alleges “that the Zoning Administrator did err by: ‘refusing to accept Taboo’s application for special exception’” on the grounds that Columbia City Code § 17-374(a) prohibits the granting of a variance or special exception to a sexually oriented business. (16-011-AA\_0007, \_0009, \_0013-0015). South Carolina Code § 6-29-800(A)(3) states that the Board has the power “to permit uses by special exception *subject to the terms and conditions for the uses set for such uses in the zoning ordinance.*” S.C. Code Ann. § 6-29-800 (Supp. 2015) (emphasis added). Section 17-374(a) of the Columbia zoning ordinance states that no variance or special exception shall be granted for a sexually oriented business. (16-

011-AA\_0030). Thus, the Board concluded that “the decision of the Zoning Administrator to not process a special exception application for a sexually oriented business is correct.” (16-011-AA\_0007 – 0008)

### **III. Standard of Review**

South Carolina Code § 6-29-840(A) specifies that “[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.”

Section 6-29-840 is very deferential to a zoning board’s findings of fact as it equates them to a jury’s findings. *Williams v. Lexington County Bd. of Zoning Appeals*, 413 S.C. 647, 652 (Ct. App. 2015). In other words, the court must not disturb the board’s findings of fact unless there is no evidence reasonably supporting the board’s decision. *See Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 479-480 (2005) (“[A] factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury’s findings.”). “Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances.” *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 465 (Ct. App. 2004), *aff’d*, 372 S.C. 230 (S.C. 2007). A court will not substitute its judgment for that of the reviewing body, even if it disagrees with the decision. *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216 (1999).

### **IV. Law and Analysis**

Taboo sued the City in federal court at the end of the amortization period set forth in the City’s zoning ordinance. After the federal district court ruled against all of Taboo’s claims against the ordinance, the Zoning Administrator personally visited the site, took pictures of a

multitude of sexual devices, and issued a letter on January 28, 2016, notifying Taboo that it would need to come into compliance with the zoning ordinance. Taboo appealed to the Board, but failed to provide evidence that the Zoning Administrator's January 28, 2016 letter was erroneous or arbitrary based on the facts.

Indeed, Taboo's entire argument was that it was being required to *comply* with the sexually oriented business zoning regulations, rather than continuing to operate in violation as a nonconforming use. (16-010-AA\_0030). But the federal court rejected Taboo's challenges to the City's application of its ordinances to Taboo, and the Fourth Circuit has recently affirmed that ruling. That final judgment in federal court is *res judicata* to Taboo's claims against the City's enforcement of the ordinance against its sexual device shop.

"[R]es judicata[, which] is more commonly referred to simply as claim preclusion . . . bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated." *Catawba Indian Nation v. State*, 407 S.C. 526, 537 (2014) (citations omitted). Taboo was not entitled to continue operating a nonconforming sexually oriented business in violation of the zoning ordinance, and it was not entitled to a special exception from the zoning ordinance's requirements. Those claims have already been litigated, or could have been litigated, in the prior federal action that resulted in a final judgment adverse to Taboo.

In the first appeal, 16-010-AA, the Zoning Administrator presented evidence that Taboo was not in compliance with the City's regulations. The Zoning Administrator informed the Board that he delivered a letter to Taboo on January 28, 2016. (*See* DVD of Board hearing starting at time marker 42:50; 16-010-AA\_0030). The Zoning Administrator presented facts, which were considered and accepted by the Board, showing that Taboo was operating as a sexual device shop on January 28, 2016. The Zoning Administrator described the inventory displayed in

Taboo during his site visit of January 28, 2016, and he presented to the Board photographs showing that inventory as it was displayed in Taboo on January 28, 2016. (16-010-AA\_0012 – 0017; Apr. 12, 2016 Hrg. Tr. 29:10-23; 30:11-31:11.)

Because evidence in the record supports the Board's decision—which is entitled to substantial deference—and because Taboo has shown no error of law, the Court affirms the Board's decision upholding the Zoning Administrator's determination.

At the Board hearing, Taboo sought to invoke a section of the City's sexually oriented business *licensing* ordinance that provides for a provisional license, (Apr. 12, 2016 Hrg. Tr. 4:11-5:5), but that section of the City Code has no relevance here. First, the licensing ordinance is not within the jurisdiction of either the Zoning Administrator or the Board of Zoning Appeals. Second, that section applies only to a business that is lawfully operating as a sexually oriented business on the date that it files an application for a sexually oriented business license. But Taboo was not lawfully operating a sexually oriented business on January 28, 2016 (more than two years after its amortization period expired), nor did Taboo apply for, or suffer the denial of, a sexually oriented business license. Thus, the Board correctly refused to entertain an issue that was (1) outside of the zoning ordinance and the Board's jurisdiction, and (2) unsupported by any record evidence.

In the second appeal, 16-011-AA, Taboo attempted to apply for a special exception to operate a sexually oriented business. The application was returned to Taboo as unprocessed by the Zoning Administrator because the City's zoning ordinances do not allow a special exception to be granted regarding any of the requirements of the sexually oriented business regulations. (16-011-AA\_0021; 16-011-AA\_0030). Taboo asserted that the Zoning Administrator erred by refusing to accept the application for special exception.

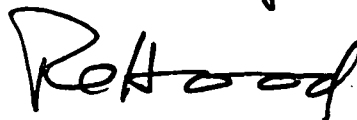
The Board denied Taboo's appeal and correctly found that the Board was not permitted to grant special exceptions for sexually oriented businesses. The Board's determination was correct because the zoning ordinance authorizes the Board to hear only the applications for special exceptions that the Board is specifically authorized to pass upon by the terms of the zoning ordinance. (City Code § 17-112; 16-011-AA\_0032) The Board's enabling statute provides that a board of zoning appeals has the authority only to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance. S.C. Code Ann. § 6-29-800(A)(3) (Supp. 2015). The City, through its zoning ordinances, has decided not to give the Board the authority to permit special exceptions for sexually oriented businesses.

Therefore, the Board correctly applied the City's zoning ordinances to uphold the Zoning Administrator's decision to return the special exception application as unprocessed.

**V. Conclusion**

For the reasons stated in the Board's written orders, and for those stated herein, the Court affirms the orders below.

SO ORDERED, THIS 1 DAY OF February, 2017.



Judge Robert E. Hood