

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate Case No.: 2017-000561

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SC Court of Appeals

Cricket Store 17, LLC d/b/a Taboo, ... Appellant,

vs.

City of Columbia Board of Zoning Appeals, ... Respondent,

and

City of Columbia Zoning Administrator, ... Counterclaimant,

vs.

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

RECORD ON APPEAL
VOLUME 2

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Admitted *pro hac vice*, admission challenged on appeal

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PARTIAL TRANSCRIPT OF
VIDEO RECORDING OF

BOARD OF ZONING APPEALS
City of Columbia
April 12, 2016



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1 0:18:33 - 1:32:00

2 **MR. COOK:** Thank you, Mr. Chairman. We'll move to
3 the regular agenda. We have no items under Old
4 Business. We'll move to New Business. The --
5 we have two administrative appeals that at --
6 are at the same address but they are separate,
7 individual appeals. Basically our rules of
8 procedure for conduct of hearing, I'll
9 introduce the case and the applicant will do
10 his presentation, then staff will do their
11 presentation and the appellant can rebut. The
12 applicant before you today is Case 16-010
13 Administrative Appeal, 4716 Devine Street, Tax
14 Map 13814-09-02. It's appeal of the Zoning
15 Administrator's determination regarding a
16 sexually oriented business. The applicant is
17 Thomas R. Goldstein, attorney for Cricket Store
18 70 -- 17, LLC, also known as Taboo Adult
19 Superstore. The applicant does allege in their
20 application for administrative appeal that the
21 Zoning Administrator did error by arbitrarily
22 requiring Taboo to comply strictly with
23 ordinance regulations or face immediate
24 penalties or fines and/or imprisonment rather
25 than (ph) should allow Taboo continued



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1 operation as a non-conforming use. The City is
2 electing to enforce a provision of the
3 Ordinance where a sexually oriented business,
4 despite Taboo's record of compliance,
5 incompatibility with the surrounding uses in
6 the vicinity of its property. Again, that was
7 verbatim from the applicant's application, and
8 the applicant is here and can state their case.

9 **MR. CHAIRMAN:** The applicant like to speak?

10 **MR. GOLDSTEIN:** My name is Tommy Goldstein. I
11 represent the applicant in this case. The
12 first case is an appeal from the -- what we
13 contend is the arbitrary decision of the Zoning
14 Administrator to shut down the business while
15 the case is on appeal. And ---

16 **PROF. HUBBARD:** May I ask you -- excuse me. What
17 case is on appeal?

18 **MR. GOLDSTEIN:** Well, there's a case pending in the
19 Fourth Circuit Court of Appeals from the grant
20 of summary judgment by Judge Terry Wooten.
21 That case is pending in the Fourth Circuit
22 Court of Appeals ---

23 **PROF. HUBBARD:** Okay. Did your client try to get a
24 preliminary injunction?

25 **MR. GOLDSTEIN:** Correct.



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1 **PROF. HUBBARD:** And what happened with that request?

2 **MR. GOLDSTEIN:** The district court denied it and
3 Fourth Circuit denied it.

4 **PROF. HUBBARD:** So there's no court order requiring
5 the City to withhold enforcement, is that
6 correct?

7 **MR. GOLDSTEIN:** That is correct. The ord- -- the --
8 -

9 **PROF. HUBBARD:** So why is it arbitrary to do what
10 they're allowed to do?

11 **MR. GOLDSTEIN:** The Ordinance -- the Licensing
12 Ordinance provides in Section 11-610,
13 subsection (b) -- and of course, you have a
14 copy of the Ordinance. If not, I'll be glad to
15 hand one up. If any court action challenging
16 a license decision is initiated, the City shall
17 prepare and transmit to the court a trial -- a
18 transcript of the hearing within 30 days after
19 receiving notice of the filing of the court
20 action. It then goes on to say upon the filing
21 of any court action to appeal, challenge,
22 restrain or otherwise enjoin the City's
23 enforcement of any denial, suspension or
24 revocation of a temporary license or annual
25 license, the Administrator shall immediately



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1 issue the respondent a provisional license.
2 Zoning administrators refuse to do that. The
3 provisional license shall allow the respondent
4 to continue operation of the sexually oriented
5 business or to continue ---

6 **PROF. HUBBARD:** Excuse me. Are you still quoting?

7 **MR. GOLDSTEIN:** Yes.

8 **PROF. HUBBARD:** And the sexually oriented business
9 language shows up in the license provision?

10 **MR. GOLDSTEIN:** Correct.

11 **PROF. HUBBARD:** Okay, thank you.

12 **MR. GOLDSTEIN:** It's in 11-610- ---

13 **PROF. HUBBARD:** Uh-huh.

14 **MR. GOLDSTEIN:** --- subsection (b). Now, let me
15 read to you what Judge Wooten said about this.
16 The City did not appeal Judge Wooten, so let me
17 read you Judge Wooten's order at page 46, and
18 I'll be glad to hand up a copy of that as well.

19 **MR. COOK:** Mr. Chairman, if I may, just to -- and --
20 to speak on the section that was quoted. He's
21 quoting the Business License Ordinance, which
22 the Board of Zoning Appeals is, you know, not
23 tasked (ph) enforcing, you know, the appeals of
24 the Business License Ordinance. Chapter 17
25 would be where we would need to be focused on,



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1 which is the Zoning Ordinance.

2 **PROF. HUBBARD:** Okay (ph).

3 **MR. CHAIRMAN:** So noted. Thank you, Brian.

4 **PROF. HUBBARD:** Thank you.

5 **MR. GOLDSTEIN:** Let me ---

6 **PROF. HUBBARD:** Would you mind responding to that
7 then? Why are you ---

8 **MR. GOLDSTEIN:** Well, actually, I kind of do mind
9 'cause that's like I'm being ---

10 **PROF. HUBBARD:** Well ---

11 **MR. GOLDSTEIN:** --- cross-examined. I'd like to
12 make my point then I'll respond to it if I may.
13 Can I continue with my point?

14 **PROF. HUBBARD:** You may finish your point ---

15 **MR. GOLDSTEIN:** All right (ph).

16 **PROF. HUBBARD:** --- and then I hope you will then
17 tell me why you ---

18 **MR. GOLDSTEIN:** Sure, I'll be glad to ---

19 **PROF. HUBBARD:** Thank you.

20 **MR. GOLDSTEIN:** Judge Wooten ruled, and this is the
21 law of the case now 'cause nobody's appealed
22 this. I think I cited the wrong page number.
23 I did. I cited page 46. I meant 43. Taboo
24 has asserted that the Ordinance acts as a prior
25 restraint violation of the First Amendment. A



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1 license ordinance is -- for sexually oriented
2 business is not an unconstitutional prior
3 restraint as long as it avoids unbridled
4 discretion, so on. He says the City ordinances
5 meet that standard. Please note the plural
6 ordinances meet that standard. He's talking
7 about zoning and licensing. The City may deny
8 a license based only on reasonably objective
9 non-discretionary criteria unrelated to the
10 content of the expressive materials. Judge
11 Wooten then goes on to say the ordinance
12 provides for prompt judicial review. And
13 that's the second case we're gonna get to in a
14 minute, which is the answer to his question.
15 The Ordinance (sic) provide for prompt judicial
16 review, providing that the applicant appeals a
17 hearing officer. The hearing officer denies
18 the license. That's what's happened in this
19 case. The applicant may appeal the decision to
20 a court of competent decision. That's what
21 we're doing. That's why we're here today. And
22 the hearing officer's decision does not become
23 effective until the 30th day after it's
24 rendered. Furthermore, the ordinances provide
25 that if any court action is initiated to



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1 appeal, challenge, restrain or otherwise enjoin
2 the City's enforcement of any license, denial,
3 suspension or revocation, the City is required
4 to issue the applicant a provisional license
5 that allows the applicant to operate until the
6 court issues a judgment on the matter. Now,
7 Professor Hubbard -- I know you're a professor.
8 I read your published comments on the Board of
9 Zoning Appeals and I'm grateful for that 'cause
10 it -- it helps it -- when presenting a case.
11 Clearly the case is on appeal. Clearly the
12 review ---

13 **PROF. HUBBARD:** Mr. -- may I come back to my
14 question now?

15 **MR. GOLDSTEIN:** Sure.

16 **PROF. HUBBARD:** Court of competent -- we are not a
17 court. We are a board established by the City
18 of Columbia by action of the City Council ---

19 **MR. GOLDSTEIN:** That is incorrect.

20 **PROF. HUBBARD:** --- and ---

21 **MR. GOLDSTEIN:** That is not correct. With all --
22 and I know -- I know it's a rare privilege to
23 be allowed to lecture to a law professor, but
24 let me disabuse you of that notion, and let me
25 tell you the authority that I'm relying on is



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1 the zoning comments published by Professor
2 Patrick Hubbard. This is the document I'm
3 relying on. As you point out in this document
4 ---

5 **PROF. HUBBARD:** I'm flattered you think that's
6 authority for anything ---

7 **MR. GOLDSTEIN:** It is authoritative.

8 **PROF. HUBBARD:** I don't even -- that was written so
9 long ago, I don't even remember what I said.
10 So let's move on.

11 **MR. GOLDSTEIN:** Okay.

12 **PROF. HUBBARD:** This is not a court.

13 **MR. GOLDSTEIN:** I disagree.

14 **PROF. HUBBARD:** Whatever you have interpreted
15 something, it's not a court.

16 **MR. GOLDSTEIN:** It's a quasi-judicial body by
17 statute.

18 **PROF. HUBBARD:** That's not a court. Now, the quote
19 you gave -- again, I don't have the language in
20 front of me from Judge Wooten's order, but it
21 appeared to be he said court of competent
22 jurisdiction. We are not said court of
23 competent jurisdiction. If you think your
24 client has a problem with what's happened with
25 Licensing and you can -- and you're



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1 uncomfortable that it's a final order, either
2 go to the circuit court or the federal court.
3 We are not a court who does this. We don't sit
4 -- it might be fun to have such a power, or
5 scary -- I'm not sure which -- but we are not
6 the one. And if you want an, you know, if you
7 feel you have to have a say that we will not
8 consider what you say about a licensing so that
9 you have done whatever you want to do to have
10 a final order to go to court, then perhaps we
11 will do that, but that -- unless you've got
12 something to say why we're able to wander
13 through other parts of the City and tell other
14 parts of the City what to do, our jurisdiction
15 is set out in the State Enabling Act and in the
16 Ordinance of Columbia, and nowhere does it say
17 that we can go over and tell Licensing what to
18 do. I'd like to tell other parts of the City
19 what to do. I've had a disagreement with
20 people about -- the City about the tree in my
21 front yard recently. We don't have that power.

22 **MR. GOLDSTEIN:** Well, licensing and zoning on an
23 adult business are -- you can't drive a wedge
24 between the two. One is necessarily dependent
25 on ---



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1 **PROF. HUBBARD:** The two what?

2 **MR. GOLDSTEIN:** Licensing and zoning. The ---

3 **PROF. HUBBARD:** I just did. Again, if you think I'm
4 wrong, go to a court.

5 **MR. GOLDSTEIN:** Well, then if -- what you're saying
6 is ---

7 **PROF. HUBBARD:** You're wasting our time. That's
8 what I'm saying ---

9 **MR. GOLDSTEIN:** Okay. If you're saying I'm wasting
10 your time ---

11 **PROF. HUBBARD:** I'm saying that if you want a final
12 order, we will say we do not talk about
13 licensing, we don't review licensing. And then
14 if you want to appeal our decision to a circuit
15 court, or federal court -- perhaps I'm wrong,
16 perhaps we're wrong, but what you're saying is
17 so extraordinary, it's hard to believe that we
18 do have such a power. And you have not pointed
19 to any language in the State Enabling Act or in
20 the Ordinance giving us that power.

21 **MR. GOLDSTEIN:** I thought I did in my written
22 application 6-29-800 is what I'm pointing to.
23 Any person ---

24 **PROF. HUBBARD:** Is that the lang- ---

25 **MR. GOLDSTEIN:** --- aggrieved may appear before the



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1 Board of Zoning Appeals.

2 **PROF. HUBBARD:** Fine, you're aggrieved, we're
3 listening.

4 **MR. GOLDSTEIN:** Well, no, you just said you're not
5 listening. You just said we're gonna ---

6 **PROF. HUBBARD:** No, I'm saying we have said what
7 your -- your grievance is in the wrong place.
8 This grievance is in the wrong place. If you
9 don't like licensing, go to court, go to City
10 Council. We don't do it.

11 **MR. GOLDSTEIN:** Okay. Well, if your decision is you
12 don't want to listen to the presentation,
13 you're ---

14 **PROF. HUBBARD:** I want to listen to the
15 presentation. I just want to say that this
16 point, we understand your argument. We don't
17 agree with it. If you were before the South
18 Carolina Supreme Court, you would understand go
19 on to the next point, correct?

20 **MR. GOLDSTEIN:** That's right.

21 **PROF. HUBBARD:** Thank you.

22 **MR. GOLDSTEIN:** Okay. Well, it's -- but you just
23 told me you don't want to hear the next ---

24 **PROF. HUBBARD:** Is that your only point?

25 **MR. GOLDSTEIN:** No, of course not.



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1 **PROF. HUBBARD:** Well, then go to the next please.

2 **MR. GOLDSTEIN:** All right. The decision is clearly
3 discretionary by the -- and remember now, it's
4 Zoning that's controlling the decision of my
5 client's business. It's not Licensing, it's
6 Zoning. And I guess we'll revisit this at the
7 next case. But the City has not made any
8 effort to issue criminal citations over this
9 business until January 28th, 2016. That was
10 just, if you recall, a few months ago. So
11 clearly it's a discretionary act. The City's
12 ordinances ...

13 **PROF. HUBBARD:** Well, abuse of discretion is either
14 something lacking fact or mistake of law, is
15 that correct?

16 **MR. GOLDSTEIN:** I think that's a correct statement.

17 **PROF. HUBBARD:** So which do we have here?

18 **MR. GOLDSTEIN:** Both.

19 **PROF. HUBBARD:** Okay. Please tell us which ones.
20 Which is a mistake of fact, which is a mistake
21 of law?

22 **MR. GOLDSTEIN:** Well the mistake of fact is that
23 there's no evidence before you that my client
24 is operating a sexually oriented business. How
25 are you supposed to derive that? Does anybody



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1 read the Ordinance? The Ordinance says 30
2 percent of your inventory. I don't see
3 anything in this record that says it's 30
4 percent of their inventory. So ---

5 **PROF. HUBBARD:** Okay, I hear your point. When Mr.
6 Cook presents his side, and you will have a
7 rebuttal, we will see what evidence Mr. Cook
8 wants to point to ---

9 **MR. GOLDSTEIN:** Well ---

10 **PROF. HUBBARD:** --- is that fine with you?

11 **MR. GOLDSTEIN:** --- well, Professor, in your view,
12 and speaking on behalf of the City of Columbia
13 Board of Zoning Appeals, that would constitute
14 due process in your review, that I'm gonna hear
15 -- I'm now gonna hear what their case is?

16 **PROF. HUBBARD:** When his turn to speak is, he will
17 talk and then you will have rebuttal. We're
18 gonna have three parts. Part one is you, part
19 two is Mr. Cook and part three is your
20 rebuttal.

21 **MR. GOLDSTEIN:** Okay.

22 **PROF. HUBBARD:** I think it'd be just more efficient
23 to hear you talk about his evidence after he's
24 talked about it.

25 **MR. GOLDSTEIN:** Okay. Well, I guess I need to sit



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1 down and hear what his evidence then since I
2 don't know ---

3 **PROF. HUBBARD:** You can (inaudible) -- do you do
4 this in the court? I mean you go one point at
5 a time and then you do -- you have a list
6 points? Well, go to the next one, okay?

7 **MR. GOLDSTEIN:** I've been in a lot of courts and all
8 the courts I've been in -- but -- and let me --
9 let me -- you bring up a very good point.
10 Let's go back to it.

11 **PROF. HUBBARD:** No, let's go to the next point that
12 you have.

13 **MR. GOLDSTEIN:** Well ---

14 **PROF. HUBBARD:** You have filed a series of points in
15 your application for administrative appeal
16 typed out, numbered one through five, correct?

17 **MR. GOLDSTEIN:** That is correct.

18 **PROF. HUBBARD:** So that's what I'm -- so I know
19 apparently you have a number of points.

20 **MR. GOLDSTEIN:** That's correct.

21 **PROF. HUBBARD:** And one of them is that there is no
22 factual support for the allegation that this is
23 a sexually oriented business ---

24 **MR. GOLDSTEIN:** That's correct.

25 **PROF. HUBBARD:** I understand your point.



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1 MR. GOLDSTEIN: Okay.

2 PROF. HUBBARD: I think the thing to do is to
3 address it after we hear his evidence. I mean
4 ---

5 MR. GOLDSTEIN: At (ph) ---

6 PROF. HUBBARD: --- it's like you're making a motion
7 for ---

8 MR. GOLDSTEIN: I un- ---

9 PROF. HUBBARD: --- directed verdict and we haven't
10 even heard the other side.

11 MR. GOLDSTEIN: I understand that, but the point I
12 was trying to make in responding to you was
13 that due process means an opportunity to be
14 heard in a meaningful way and in a meaningful
15 manner.

16 PROF. HUBBARD: We're going to hear it in that
17 order.

18 MR. GOLDSTEIN: But (ph) ---

19 PROF. HUBBARD: If you have another point, move on -
20 --

21 MR. GOLDSTEIN: I do, but you won't let me ---

22 PROF. HUBBARD: You will be ---

23 MR. GOLDSTEIN: --- get it out.

24 PROF. HUBBARD: No, you will be heard.

25 MR. GOLDSTEIN: Okay. Well, let me get out my next



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1 point.

2 **PROF. HUBBARD:** Thank you.

3 **MR. GOLDSTEIN:** My next point is that under the
4 ordinances that bring me before this body
5 today, there is a directive to make telephone
6 contact with the staff in order to have a pre-
7 hearing review of the case to be prevented --
8 presented to this Board. I was not afforded
9 that opportunity. The staff refused me that
10 opportunity. That created ---

11 **PROF. HUBBARD:** How have you be prejudiced by that?

12 **MR. GOLDSTEIN:** I'm obviously being prejudiced right
13 now. You're just telling me they've got some
14 evidence that I hadn't seen that I'm about to
15 hear and that I get to stand up and rebut.
16 That's not due process. Nobody thinks that's
17 due process.

18 **PROF. HUBBARD:** Well, you can make that one of your
19 grounds for appeal from us, okay ---

20 **MR. GOLDSTEIN:** I agree.

21 **PROF. HUBBARD:** You have shown no prejudice except
22 you didn't have advance notice of something,
23 okay? Is that your argument?

24 **MR. GOLDSTEIN:** You're asking me to prove a
25 negative, which can't be done ---



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1 **PROF. HUBBARD:** That's why I'm telling you I want
2 you to come after he gives his. You say he has
3 no evidence. Let's hear it.

4 **MR. GOLDSTEIN:** Okay. Well, I don't think that that
5 comports with traditional notions of due
6 process ---

7 **PROF. HUBBARD:** Fine. You -- and you have argued
8 that -- and I want to make clear you -- I
9 understand your argument. There should have
10 been a pre-hearing conference that you argue --
11 assert other people got and that you did not.
12 I'm not quite clear your -- your prejudice is
13 lack of notice may -- tell me if I'm wrong --
14 lack of notice of what the evidence is the City
15 has, is that correct?

16 **MR. GOLDSTEIN:** That is correct.

17 **PROF. HUBBARD:** Fine. Can we go to the next point
18 please?

19 **MR. GOLDSTEIN:** Well, I mean, I'll be glad to read
20 them to you ...

21 **PROF. HUBBARD:** Well, I've got them in front of me.

22 **MR. GOLDSTEIN:** Well then, I don't need to read them
23 to you. I mean I think at this point, we're
24 just wasting everybody's time here ---

25 **PROF. HUBBARD:** Well, let's talk about number two.



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1 Do you have two in front of you?

2 **MR. GOLDSTEIN:** Sure.

3 **PROF. HUBBARD:** You talk about a record of
4 compliance and compatibility with the sound --
5 surrounding uses in the vicinity. Is that
6 correct?

7 **MR. GOLDSTEIN:** That is correct.

8 **PROF. HUBBARD:** Okay. Now, once again, wrong forum.
9 That's for the City Council to decide, not us.
10 They have decided and adopted an ordinance
11 declaring that the business of your client is
12 not compatible. They have written rules about
13 how it will go away. It is not for us to
14 second guess the City Council.

15 **MR. GOLDSTEIN:** Well, I agree with that. You don't
16 make legislative decisions. There's no
17 question about it. But the Board of Zoning
18 Appeals can certainly grant relief, and that's
19 -- now, we're getting into the next case.

20 **PROF. HUBBARD:** We cannot grant relief. We have no
21 power to grant.

22 **MR. GOLDSTEIN:** Well ...

23 **PROF. HUBBARD:** I could -- what do -- who -- what
24 are we gonna do? We're gonna rewrite the
25 Ordinance?



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1 **MR. GOLDSTEIN:** No, no, no, no, no. You can grant a
2 special exception.

3 **PROF. HUBBARD:** Aah. Where did -- do you want to go
4 ahead and go to your second appeal ---

5 **MR. GOLDSTEIN:** I think that -- I think it's a good
6 use of judicial resources to do that.

7 **PROF. HUBBARD:** You want to go to the second appeal?
8 Okay, fine ---

9 **MR. GOLDSTEIN:** If that suits all you all. I'm a
10 visitor here. I'm not in charge ---

11 **PROF. HUBBARD:** I just want to ask does Mr. Cook, do
12 you have any objection to that?

13 **MR. COOK:** I do actually. I would like to stay
14 within the bounds of the first appeal, 16-010,
15 which specifically we're talking about, you
16 know, what we've been talking about for the
17 last ten minutes. The idea of the special
18 exception and meeting with staff is a distinct
19 and separate case that I would like to keep
20 distinct and separate for voting or appeal
21 purposes. So if we could stay, I respectfully
22 request, within the bounds of the first appeal
23 and, you know ---

24 **PROF. HUBBARD:** Okay.

25 **MR. COOK:** --- have our presentation on that, I



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1 would appreciate it.

2 **PROF. HUBBARD:** So we're gonna focus on the first
3 appeal thus far ---

4 **MR. GOLDSTEIN:** Well, he -- he's in charge of it.
5 Not me.

6 **PROF. HUBBARD:** I wanted ea- -- both parties to have
7 a voice. I -- well, we're not -- you've got
8 three, four and five. Do you not want to talk
9 about three, four and five, are you waiving
10 them?

11 **MR. GOLDSTEIN:** No, I'm not waiving anything. I
12 thought ---

13 **PROF. HUBBARD:** Well, then let's go ---

14 **MR. GOLDSTEIN:** --- you were pretty clear that I was
15 wasting your time. No matter ---

16 **PROF. HUBBARD:** When you ...

17 **MR. GOLDSTEIN:** You've (ph) ---

18 **PROF. HUBBARD:** When you want to argue something
19 I've told you we can't decide, that's a waste
20 of time. But I'm trying to be as careful as we
21 can here. Let's go to number three.

22 **MR. GOLDSTEIN:** All right.

23 **PROF. HUBBARD:** How would you want to state your
24 argument today for number three?

25 **MR. GOLDSTEIN:** I think I already spoke on -- about



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1 that. It's a purely discretionary act. It's
2 been -- there's been no enforcement action
3 taken against my client until January of this
4 year. The case is on appeal. Judge Wooten
5 ruled and there's no appeal from his ruling
6 that ---

7 **PROF. HUBBARD:** So you don't want to get into the
8 lack of -- asserted lack of evidence of any
9 negative secondary effect or you ---

10 **MR. GOLDSTEIN:** There is no evidence of -- there is
11 no evidence of ---

12 **PROF. HUBBARD:** Okay (ph).

13 **MR. GOLDSTEIN:** --- negative secondary effect.

14 **PROF. HUBBARD:** Fine.

15 **MR. GOLDSTEIN:** The record is ---

16 **PROF. HUBBARD:** Does the City have to make a showing
17 -- now, you've been in the federal case pretty
18 much, right ---

19 **MR. GOLDSTEIN:** You bet they do.

20 **PROF. HUBBARD:** What does the US Supreme Court say -

21 --

22 **MR. GOLDSTEIN:** You bet they ---

23 **PROF. HUBBARD:** --- what does the US Supreme Court
24 say they can do to satisfy?

25 **MR. GOLDSTEIN:** I'll read you the quote. It's City



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1 of Los Angeles v. Alameda Books. It says when
2 a -- when a (sic) adult business owner casts
3 doubt on the city's ---

4 **PROF. HUBBARD:** What did you do to -- look, I'm not
5 gonna retry the federal case ---

6 **MR. GOLDSTEIN:** Well, I agree. You're right ---

7 **PROF. HUBBARD:** Okay. Okay. You realize they can -
8 --

9 **MR. GOLDSTEIN:** But that's on appeal.

10 **PROF. HUBBARD:** --- rely on studies from other
11 cities, correct?

12 **MR. GOLDSTEIN:** Absolutely not, not when the
13 plaintiff casts doubt on it and ---

14 **PROF. HUBBARD:** All that says is you have a fact
15 issue. You've raised a fact issue ---

16 **MR. GOLDSTEIN:** That's right (ph) ---

17 **PROF. HUBBARD:** --- and a court can address it.
18 You've had a court address it.

19 **MR. GOLDSTEIN:** I did raise a fact. The judge
20 decided I did not raise a fact and ruled
21 against me ---

22 **PROF. HUBBARD:** Well, that's -- again, that's the
23 judge ---

24 **MR. GOLDSTEIN:** That's being reviewed de novo,
25 fresh. The slate's wiped clean. We're back at



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1 the starting point.

2 **PROF. HUBBARD:** Now, what's -- again, number three,
3 you say arbitrary and I'm -- what was the
4 mistake of law or the lack of factual basis for
5 number three?

6 **MR. GOLDSTEIN:** Well, it's a mistake of law 'cause
7 we're entitled to a stay while we're on appeal
8 ---

9 **PROF. HUBBARD:** So it's a ---

10 **MR. GOLDSTEIN:** --- clear -- clearly ---

11 **PROF. HUBBARD:** --- that's another way of stating
12 number two then?

13 **MR. GOLDSTEIN:** Well, I think they're -- I think
14 they're all -- I don't think you can read any
15 of them in isolation ---

16 **PROF. HUBBARD:** Okay.

17 **MR. GOLDSTEIN:** --- I agree with that.

18 **PROF. HUBBARD:** What about number four?

19 **MR. GOLDSTEIN:** Oh. Well, that's back to their
20 refusal to communicate with me.

21 **PROF. HUBBARD:** The lack of a conference before
22 anything ---

23 **MR. GOLDSTEIN:** Right, yeah. Everybody's afforded
24 that right except me.

25 **PROF. HUBBARD:** So that's number four, the lack of



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1 conference ---

2 **MR. GOLDSTEIN:** Yeah. And let me tell you about
3 that. Can I tell you about that?

4 **PROF. HUBBARD:** If you can be brief please.

5 **MR. GOLDSTEIN:** Well, in voter suppression cases,
6 you can go on Google and you can see the old
7 black and white movies of black voters going
8 down to the clerk of court's office trying to
9 register to vote, and the all permutations the
10 clerk would go through to -- it's the same
11 thing. I -- why wasn't I ---

12 **PROF. HUBBARD:** Okay. You're arguing the merits of
13 it and, again, we're gonna -- at some point we
14 will hear the other side and in rebuttal, if
15 you think we need to, we'll come back to this
16 one.

17 **MR. GOLDSTEIN:** Okay, fair enough.

18 **PROF. HUBBARD:** Number five?

19 **MR. GOLDSTEIN:** It's a mistake of law. To adopt
20 your terms, it's a mistake of law and a mistake
21 of fact.

22 **PROF. HUBBARD:** Correct (ph). Well, which -- what's
23 the mistake of fact or mistake of law in number
24 five?

25 **MR. GOLDSTEIN:** Well, the mistake of law is the --



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1 is Section 11-610(b), the mistake ---

2 **PROF. HUBBARD:** We're back to the license, right?

3 That's back to the licensing part?

4 **MR. GOLDSTEIN:** Correct. That's correct ---

5 **PROF. HUBBARD:** All right (ph). So we seem to have
6 that again.

7 **MR. GOLDSTEIN:** Right.

8 **PROF. HUBBARD:** Is there some other mistake of law?

9 **MR. GOLDSTEIN:** The -- Judge Wooten's un-appealed
10 decision and prior restraint in the order that
11 seems to carry so much weight with you.

12 **PROF. HUBBARD:** At this point, I'm still wrestling
13 with it I guess, but to some extent the point
14 is I think you've -- so you tell me we have --
15 we have discussed that point already?

16 **MR. GOLDSTEIN:** Yes, sir.

17 **PROF. HUBBARD:** Okay.

18 **MR. GOLDSTEIN:** I think we have.

19 **PROF. HUBBARD:** Is there anything in addition
20 through one through five in the application
21 that you would like to say?

22 **MR. GOLDSTEIN:** Yes, that it goes back to your 2009
23 zoning comments that you don't remember, but in
24 that -- in those, you talk about, for example,
25 a Bantam v. City of Columbia, which is very



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1 similar to this case. And that was addressed
2 by the South Carolina Supreme Court.

3 **PROF. HUBBARD:** That was a special exception case,
4 right?

5 **MR. GOLDSTEIN:** That is correct.

6 **PROF. HUBBARD:** I think that's number two.

7 **MR. GOLDSTEIN:** You're right. You're right ---

8 **PROF. HUBBARD:** So we will ... Now, would you like
9 that we will -- do you have anything else on
10 number one ---

11 **MR. GOLDSTEIN:** No, sir. Thank you for allowing me
12 to conclude my remarks ---

13 **PROF. HUBBARD:** Thank you. Is there ---

14 **MR. GOLDSTEIN:** I don't know if anybody else has a
15 question?

16 **MR. CHAIRMAN:** No questions from me. Anybody else
17 on the Board have a question? I think we'll
18 hear from Mr. Cook now, and maybe that'll
19 clarify things in our minds a little better
20 about what we're talking about. Let's go.

21 **MR. COOK:** Thank you, Mr. Chairman. Again, we've
22 referred a good bit to Chapter 11, which is the
23 Business License Ordinance. That's not under
24 the purview of this board to listen to any
25 appeals on the Business License Ordinance.



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1 Where we are today is Chapter 17, the Zoning
2 Ordinance. Specifically dealing with sexually
3 oriented businesses and the interpretation of
4 the Zoning Administrator, the constitutionality
5 and any other pending or resolved cases are not
6 necessarily germane to this very specific
7 administrative appeal before you today. On
8 January 28th, 2016, the Zoning Administrator
9 delivered a written notice of violation letter
10 to the Taboo Adult Superstore located at 4716
11 Devine Street, which is located in the City of
12 Columbia, for operating a sexual device shop in
13 violation of the Zoning Ordinance. The notice
14 of violation was addressed to the owner and was
15 hand delivered by myself and accepted by an
16 employee Cheyenne Wiseman that was on duty that
17 day. A copy of that letter has been included
18 in your packet. Again, this appeal is and can
19 only be narrowly defined to answer the question
20 of if on January 28th, 2016, was Taboo Adult
21 Superstore operating as a sexual device shop in
22 violation of the Zoning Ordinance. There was
23 some mention about the 30 percent rule. The
24 Zoning Ordinance specifically in that section
25 of the 30 percent rule discusses adult



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1 bookstore or adult video stores. That's a
2 certain type of sexually oriented business.
3 What specifically I made the allegation in my
4 letter of violation to Taboo was they were
5 operating a sexual device store. In your
6 application ---

7 **MR. CHAIRMAN:** Do we have that section about the 30
8 percent rule? Is that in this part ---

9 **MR. COOK:** It is not in that 'cause it's
10 specifically not germane to this case. The
11 notice of violation was a sexual device shop
12 per 17-372, and the definition of a sexual
13 device shop, a sexual device and a sexually
14 oriented business is in your packet on the
15 second page. I won't read those specific
16 definitions unless you would like me to.

17 **MR. CHAIRMAN:** I think everybody on the Board can
18 read.

19 **MR. COOK:** So also, we have an exhibit that Andrew
20 would like to present to the Board and also to
21 the applicant. It was photographs that were
22 taken by our staff, myself, on January 28th,
23 2016, when we issued the notice of violation.
24 While he's passing those out, I will also just
25 briefly touch on that the property where Taboo



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1 is located is zoned C-3. It's a general
2 commercial district. Per 17-374(b) and (I),
3 you cannot operate a sexually oriented business
4 in that zoning district. In fact, a person
5 commits a misdemeanor if he or she operates, or
6 causes to be operated, a sexually oriented
7 business outside of M-1 or M-2 zoning district,
8 which again, the property at 4716 Devine Street
9 is not zoned M-1 or M-2. In fact, it is zoned
10 C-3, which is in violation of our Zoning
11 Ordinance. And as you can see by the
12 photographs, they clearly -- the day that we
13 were in Taboo Adult Superstore, January 28th,
14 2016, those photographs are date stamped.
15 Clearly the definition of a sexual device shop
16 or a sexual device can be seen in those
17 photographs. I don't think there's any doubt
18 that was primarily what was in the store. And
19 if you have any questions about those specific
20 photographs, we'll certainly be happy to answer
21 them but again, it certainly meets the
22 definition of a sexual device shop with those
23 inventory of sexual devices, and a sexually
24 oriented business. Again those definitions are
25 found in your packet and they're from the



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1 Zoning Ordinance Chapter 17-372. Again, I
2 personally visited the store, issued the notice
3 of violation, took those pictures and saw what
4 was in the store, and I can testify to that if
5 you have any questions. So with that, we
6 respectfully request that the termination made
7 in the letter of January 28th, 2016, that Taboo
8 Adult Superstore is operating as a sexual
9 device shop in violation of the Ordinance be
10 upheld based on the facts in the exhibit that
11 has been presented before you today.

12 **MR. CHAIRMAN:** Is that the end of your testimony?

13 **MR. COOK:** Yes. If you have any questions, I'll
14 certainly ---

15 **MR. CHAIRMAN:** Are there any questions from anybody
16 to Mr. Cook, on the Board?

17 **PROF. HUBBARD:** And would -- could you address the
18 point about the hearing one more -- the pre --
19 the failure to have a hearing ---

20 **MR. COOK:** Certainly. That is part of our next
21 case, but I'll briefly just say, you know,
22 these cases were -- have been tied together,
23 this appeal and the next appeal have been tied
24 together. Any ---

25 **PROF. HUBBARD:** I just ---



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1 **MR. COOK:** --- any information was relayed via
2 letter or e-mail, and any attempt -- well, no
3 attempt was made to, you know, come up to our
4 counter. Our counter is always open, staff's
5 always there. As far as I'm concerned, nobody
6 showed up at the front counter of Zoning and
7 asked to meet with us as far as the application
8 for variance or a special exception or
9 administrative appeal. And again, I'll get
10 into this in our next case, but it said you
11 should speak with a member of staff to discuss
12 the case or -- I'm paraphrasing. But generally
13 what that means is talk with staff, let us
14 understand what we're talking about so we can
15 better present your case. And you know, in
16 this particular incidence, you know, between
17 e-mail and letters, there's a ton of
18 communication that went on and, you know, I
19 think that that was adequate to answer any
20 questions that an applicant would normally
21 have. Again, it's not a mandatory that
22 somebody has to meet with our staff. Our
23 office is always open 8:30 to 5:00 Monday
24 through Friday, and we're available at that
25 time.



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1 **PROF. HUBBARD:** Would it be fair to say he never
2 asked for a hearing? Or did he ever ask for a
3 hearing?

4 **MR. COOK:** As for a hearing or a meeting?

5 **PROF. HUBBARD:** A pre-conference -- let's call it
6 that -- ask for a conference?

7 **MR. COOK:** It gets into the second case more so ---

8 **PROF. HUBBARD:** (Inaudible.)

9 **MR. COOK:** --- so if he -- he did ask in an e-mail
10 specifically about the special exception and
11 the variance that we'll discuss ---

12 **PROF. HUBBARD:** On the number two?

13 **MR. COOK:** Right.

14 **PROF. HUBBARD:** But not as to number one?

15 **MR. COOK:** They're kind of combined together 'cause
16 initially an administrative appeal, a variance
17 and a special exception were submitted as one
18 packet. Then we had to subdivide those to talk
19 about the administrative appeal for the
20 enforcement of the sexual device shop, and then
21 the special exception/variance appeal. So
22 there was communication in that regard via
23 e-mail and letters. But both -- again, both
24 are kind of tied together.

25 **PROF. HUBBARD:** Was there an explicit I want to have



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1 a conference request?

2 **MR. COOK:** I don't recall.

3 **PROF. HUBBARD:** Okay. But I think your view is it
4 really didn't matter, is that correct?

5 **MR. COOK:** Well, specifically what came to mind when
6 you asked that last question was for the
7 special exception request and the variance
8 request, which again I'll get into in our next
9 case. But that was kind of a moot point
10 because of the fact that I'll make the
11 assertion that you can't apply for a special
12 exception of variance in this case therefore we
13 ---

14 **PROF. HUBBARD:** I understand that. So I'm just
15 trying to say since there are two appeals ---

16 **MALE SPEAKER:** Uh-huh.

17 **PROF. HUBBARD:** --- one is the, as I understand it,
18 is an appeal of the enforcement decision, is
19 that correct?

20 **MR. COOK:** Correct. And generally speaking, with an
21 enforcement decision, which is the case of this
22 one before us of January 28th, 2016. It's a
23 little unusual in the fact that generally if
24 there's an enforcement issue, we send a notice
25 of violation followed by a summons to go to



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1 court. So generally these things are handled
2 in court. There's not a lot of dialogue back
3 and forth. So it's a little unusual in this
4 particular case to go to the Board of Zoning
5 Appeals for something that normally would go to
6 court. There is -- and I'll touch briefly on
7 this -- there was no enforcement action taken
8 by the Zoning Department. We issued a notice
9 of violation. The application for variance,
10 special exception and administrative appeal
11 were initially submitted. There is a stay of
12 proceedings from any action taking by this
13 office under Chapter 17 of the Zoning
14 Ordinance. So we basically put our enforcement
15 on hold to have this venue for due process
16 stay (ph) before you and, you know, just to
17 kind of give the applicant the opportunity to
18 speak and get everything out in the open. So
19 that is -- yes.

20 **PROF. HUBBARD:** And so the enforcement proceeding is
21 stayed pending the result of this appeal, is
22 that correct?

23 **MR. COOK:** Can you repeat (ph)? I'm sorry.

24 **PROF. HUBBARD:** The enforcement proceeding in the
25 court is stayed, is not proceeding, pending the



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1 administrative appeal determination?

2 **MR. COOK:** That is correct.

3 **PROF. HUBBARD:** Thank you.

4 **MR. COOK:** Just one other point on the
5 administrative application. There's no
6 suggestion to meet with staff that is
7 specifically on the special exception
8 application. So that point being specifically
9 for administrative appeal, the language about
10 you're encouraged to meet with staff is not on
11 the application. But again, you will find it
12 on the special exception application, which is
13 our next case.

14 **PROF. HUBBARD:** So the normal proceedings are --
15 where you would have the conference would be
16 with the variance or special exception on
17 appeal of a decision by the Administrator, is
18 that correct?

19 **MR. COOK:** That is accurate. And even with a
20 special exception or a variance, we don't
21 always talk to the applicant. For example, the
22 daycare we heard earlier, I've never met the
23 people, you know, if Andrew, you know, a
24 colleague spoke with them so it's not a
25 standard that every individual applicant gets



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1 to speak, you know, unless they would like to
2 speak. And again, most of our dialogue in this
3 case was in the form of e-mail or letters,
4 'cause we wanted to actually create a, you
5 know, a paper trail of what we're talking about
6 with the understanding that we probably would
7 end up before you today.

8 **PROF. HUBBARD:** If -- I'm assuming that they knew
9 you were in the store taking pictures?

10 **MR. COOK:** Yes.

11 **PROF. HUBBARD:** So they would know the evidence you
12 had?

13 **MR. COOK:** Yes.

14 **PROF. HUBBARD:** The evidence that was presented
15 today?

16 **MR. COOK:** Yes, correct.

17 **PROF. HUBBARD:** Thank you.

18 **MR. CHAIRMAN:** I just have one quick question and
19 you may not know this, but did it -- it -- was
20 a business license ever issued?

21 **MR. COOK:** Business license for a sexually oriented
22 business was never issued to my knowledge for
23 this business. So, with one correction for
24 that. Originally, they did have a business
25 license. I guess when they first opened. The



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1 Ordinance subsequently changed -- it was a
2 sunset provision -- and during the last few
3 years, they have not had a business license.

4 **MR. CHAIRMAN:** So since the Ordinance was changed by
5 City Council, is what you're saying, they would
6 -- did not issue a license?

7 **MR. COOK:** Correct.

8 **PROF. HUBBARD:** To put it another way, when the
9 amortization period ran, from that point on,
10 they did not have a license?

11 **MR. COOK:** Right, that's my understanding, yes.

12 **PROF. HUBBARD:** Thank you.

13 **MR. CHAIRMAN:** Any other questions? Would you like
14 to readdress?

15 **MR. GOLDSTEIN:** Oh, I'm sorry. It's hard -- it's
16 hard to hear. When we began, I was asked to
17 stand and take an oath to tell the truth. And
18 so I was paying attention to -- 'cause you were
19 administering the oath. Was Mr. Cook
20 administered that same oath? Is his testimony
21 under oath that he just gave to this Board?

22 **MR. CHAIRMAN:** I don't recall if he stood up and
23 raised his hand or not.

24 **MR. COOK:** No, I didn't. Generally -- I'd be glad
25 to do it and ---



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1 **MR. CHAIRMAN:** Would you mind doing that and affirm
2 that you've ---

3 **PROF. HUBBARD:** Generally, Mr. Cook, always stands
4 up and swears in because he is going to testify
5 on every case so it would be astonishing if he
6 did not do it today.

7 **MR. COOK:** No.

8 **PROF. HUBBARD:** Please, let's fix it up if there's a
9 problem.

10 **MR. COOK:** No, I did not.

11 **MR. CHAIRMAN:** Would you stand up and raise your
12 right hand? Do you affirm or attest that the
13 testimony that you gave today and will give
14 today is the truth and nothing but the truth?

15 **MR. COOK:** I do.

16 **MR. CHAIRMAN:** Thank for that correction.

17 **MR. GOLDSTEIN:** Well, we now know the prejudice
18 because they handed me photographs that I saw
19 for the first time during the presentation.
20 Had I known, had I been afforded an opportunity
21 to speak to somebody, I could have brought lots
22 of photos, for example, Spencer's at Columbiana
23 Mall with the exact same inventory. Target
24 with some of the same inventory. So there's
25 your prejudice. And as for Mr. Cook's now



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1 sworn testimony that I never made a request,
2 this should be in the appeal packet that you've
3 -- that you've been given. On February 11th,
4 I wrote to Mr. Brian Cook and Mr. Andrew
5 Livengood, and I quote, I also telephoned your
6 office 803-545-333 -- obviously got a typo,
7 left off a digit -- to schedule a pre-
8 application conference with staff prior to the
9 application deadline to discuss your specific
10 case and its requirements. Please note that
11 those words are in quotation marks. The reason
12 they're in quotation marks is 'cause they are
13 lifted verbatim from the City of Columbia's
14 application that I filled out and submitted.

15 **MR. CHAIRMAN:** Are we talking about the special
16 exception ---

17 **MR. GOLDSTEIN:** Both.

18 **MR. CHAIRMAN:** --- or are we still talking about the
19

20 **PROF. HUBBARD:** First ---

21 **MR. CHAIRMAN:** Well, let's do one at a time.

22 **PROF. HUBBARD:** --- challenge -- it doesn't matter
23 whether -- you seem to be saying some sort of
24 selective enforcement's going on, and if that's
25 the complaint you have then, again, you pursue



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1 it somewhere else. Is ---

2 **MR. GOLDSTEIN:** Well ---

3 **PROF. HUBBARD:** --- if you are pursuing both the
4 special exception and the appeal as to the
5 enforcement, it sort of stretches a lot to
6 always expect people to understand that I want
7 the pre-application that goes with the special
8 exception. Are you saying now that you can
9 give me something that has a pre-application
10 conference for an administrative appeal?

11 **MR. GOLDSTEIN:** It's on the form that you fill out
12 and send to the City. It's on the City's
13 website. It's ---

14 **PROF. HUBBARD:** The form for a variance is different
15 than the form for a special exception.

16 **MR. GOLDSTEIN:** That's right.

17 **PROF. HUBBARD:** And I think that's different from
18 the form for an administrative appeal.

19 **MR. GOLDSTEIN:** You might be correct about that.

20 **PROF. HUBBARD:** Okay. So they're not all the same
21 thing?

22 **MR. GOLDSTEIN:** Right. If I had a desk, I could
23 have pulled it out. I've got it somewhere in
24 here, but I'm going on my memory.

25 **PROF. HUBBARD:** Okay (ph).



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1 MR. GOLDSTEIN: But his testimony was -- his sworn
2 test- ---

3 PROF. HUBBARD: So are you saying that you've been
4 prejudiced because the pictures are not
5 accurate?

6 MR. GOLDSTEIN: They're not accurate. They're --
7 where's the -- where's your evidence of 30
8 percent in this record. The record's closed
9 now ---

10 PROF. HUBBARD: (Inaudible.)

11 MR. GOLDSTEIN: --- I'm on rebuttal. Where's the
12 evi- ---

13 PROF. HUBBARD: Okay, fine. Thank you. Would you -
14 - Mr. Cook said that the language that you're
15 quoting from does not apply to a sexual device
16 store. Okay? Can you help us out by letting
17 us see precisely where you got that language?

18 MR. GOLDSTEIN: This -- I'm reading the same
19 ordinance that he read to you ---

20 PROF. HUBBARD: The Ordinance is very long.

21 MR. GOLDSTEIN: Well, the Zoning Ordinance isn't
22 that long. The Licensing sure is but ...

23 PROF. HUBBARD: The Zoning Ordinance is pretty long.

24 MR. GOLDSTEIN: But it defines an adult store as 30
25 percent. I mean I'll read it to you but I ---



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1 **PROF. HUBBARD:** But (ph) ---

2 **MR. GOLDSTEIN:** --- I just want to say for the
3 record, not only did I write on February 11th,
4 but I followed up ---

5 **PROF. HUBBARD:** Do you mind if I ask if we have a
6 full copy of the Ordinance for us to see up --
7 on the Board? I think it's one of those
8 things, if you want to know how many teeth are
9 in the horse's mouth, you go look, right?

10 **MR. GOLDSTEIN (ph):** Right.

11 **PROF. HUBBARD:** So why don't we look at the
12 Ordinance?

13 **MR. GOLDSTEIN:** Well, while he's looking, let me
14 quote from my March 11 -- March 1st letter, let
15 me quote, please also reconsider your decision
16 that you will not schedule a pre-hearing
17 meeting with staff since according to your
18 application instructions, meeting with staff
19 prior to Board hearing is a prerequisite. I
20 got no response to that. I can't believe that
21 ---

22 **PROF. HUBBARD:** Well, but I think you're into the
23 special exception, as I understand it.

24 **MR. GOLDSTEIN:** Well ...

25 **PROF. HUBBARD:** Which section are you relying on for



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1 30 percent please?

2 **MR. GOLDSTEIN:** Oh well, I -- I wanted to show you
3 the photos of Spencer's and Target ---

4 **PROF. HUBBARD:** I don't think those are relevant ---

5 **MR. GOLDSTEIN:** Oh (ph), they are ---

6 **PROF. HUBBARD:** --- that's an argument that they're
7 not doing it fairly somehow. I, you know, if
8 you think those should be enforced, file a
9 citizen complaint and let the operation occur.

10 **MR. GOLDSTEIN:** It's Section 17-372, Definitions.
11 Adult bookstore or adult video store means a
12 commercial establishment which, as one of its
13 principal (inaudible) purposes offers for sale
14 or rental and it ---

15 **PROF. HUBBARD:** I don't -- okay. It's entirely
16 consistent with what Mr. Cook said. He said
17 that that's not the category of sexually
18 oriented business we're dealing with. Is that?

19 **MR. COOK:** That is correct.

20 **PROF. HUBBARD:** There are multiple categories of
21 sexually oriented businesses. That does not
22 apply to the particular type that's involved
23 for your client.

24 **MR. GOLDSTEIN:** Okay. Well, I guess we'll have to
25 agree to disagree. I didn't hear any evidence



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1 in this record that you ---
2 **PROF. HUBBARD:** Well, okay, we're agreeing to
3 disagree?
4 **MR. GOLDSTEIN:** Right.
5 **PROF. HUBBARD:** You've got a ground of appeal?
6 **MR. GOLDSTEIN:** Right ---
7 **PROF. HUBBARD:** Okay.
8 **MR. GOLDSTEIN:** Okay. Um ---
9 **MR. McMEEKIN:** Ask a question? May I ask a
10 question?
11 **PROF. HUBBARD:** Sure, please.
12 **MR. McMEEKIN:** Where is your evidence of what the
13 makeup is of the inventory in the shop ---
14 **MR. GOLDSTEIN:** Well, isn't that a good question?
15 **MR. McMEEKIN:** --- all I'm hearing ---
16 **MR. GOLDSTEIN:** That's an excellent question.
17 **MR. McMEEKIN:** --- all I'm hearing is ---
18 **MR. GOLDSTEIN:** Yeah. Gosh, wouldn't that have been
19 a wonderful thing to be able to present to you
20 right now ---
21 **MR. McMEEKIN:** Why can't you?
22 **MR. GOLDSTEIN:** --- had I been afforded an
23 opportunity to prepare for the hearing. That
24 would -- that's ---
25 **MR. McMEEKIN:** You mean to tell me that you knew



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1 that you were coming in front of this board and
2 that you chose not -- I don't understand. So
3 you mean to tell me that you don't know the
4 makeup of your client's inventory ---

5 **MR. GOLDSTEIN:** Of course I do.

6 **MR. McMEEKIN:** --- is that what I heard you say?

7 **MR. GOLDSTEIN:** Of course I do.

8 **MR. McMEEKIN:** Well then, why can't you tell us?

9 **MR. GOLDSTEIN:** I can -- you can look at the photos.

10 **MR. McMEEKIN:** But where is that burden ---

11 **MR. GOLDSTEIN:** Where's the City -- the City ---

12 **MR. McMEEKIN:** --- the burden -- the burden that
13 you're putting on the City to prove that it's
14 30 -- more or less than 30 percent, why don't
15 you make that case for us?

16 **MR. GOLDSTEIN:** The burden is on them not me. \

17 **MR. McMEEKIN:** So what you're saying ---

18 **PROF. HUBBARD:** It doesn't matter. You're not that
19 kind of business ---

20 **MR. McMEEKIN:** --- that's what I don't under- ---

21 **MR. GOLDSTEIN:** Okay.

22 **PROF. HUBBARD:** I mean it -- the -- I think the
23 point's well made though. You thought 30
24 percent was important?

25 **MR. GOLDSTEIN:** Right.



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1 **PROF. HUBBARD:** And you didn't proceed on any ---

2 **MR. McMEEKIN:** Whether the burden's on the City or
3 not, if you find that to be so relevant, why
4 don't you make that point?

5 **MR. GOLDSTEIN:** Well, if you leave the record open,
6 I'll certainly submit some additional evidence
7 to refute what they said.

8 **PROF. HUBBARD:** We don't do that.

9 **MS. WILLIAMS:** Excuse me, I have a question.

10 **PROF. HUBBARD:** Thank you (inaudible).

11 **MS. WILLIAMS:** Okay. Attorney Goldstein?

12 **MR. GOLDSTEIN:** Goldstein.

13 **MS. WILLIAMS:** You stated in your application for
14 administrative appeal that the City caused
15 Taboo significant loss of inventory, loss of
16 sales and substantial costs to restock empty
17 shelves. My question to you is how much of a
18 loss did the City cause you?

19 **MR. GOLDSTEIN:** Well, I don't have the exact figure,
20 but it was thousands and thousands of dollars.
21 But -- and I'll -- let me answer your question.
22 What happened was Mr. Cook came in. My client
23 said fine, we'll go to -- we'll just be general
24 retail. Pulled everything off and just went to
25 general retail. Sent his employee down to pull



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1 a general retail license and the City said
2 sorry, you ain't getting a general retail
3 license either. Go away. And so, that's when
4 we went back to the stay provision, and that's
5 what turned the temperature up. All of our
6 efforts to turn the temperature down were met
7 with a stiff arm from the City. I mean I can't
8 even get them to pick up the phone and return
9 a phone call. Uh ---

10 **MS. WILLIAMS:** So what I want to know from you is
11 how much -- what percentage of that stock would
12 have been -- would it have been more than 30
13 percent at that time?

14 **MR. GOLDSTEIN:** No, of course not. It's -- and
15 let's just -- can we just have an honest
16 conversation? Can we just cut through all the
17 smoke and let me answer your question? What
18 they're talking about are the devices. They're
19 talking about devices. Women buy devices.
20 Couples buy devices. It's a small percentage
21 of their inventory. If you go in the store, it
22 takes up -- I don't know -- probably five
23 percent of the shelf space. Maybe three
24 percent of the shelf space. That's what
25 they're talking about -- devices. Let's just



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1 have an honest conversation. That's what's got
2 the City upset. But yet Target, CVS, Spencer's
3 -- they all sell the same devices without any
4 objection from the City. I've got a -- here's
5 the -- here's the shelf at Target right here.
6 There's a photograph of the shelf at Target
7 selling devices.

8 **MS. WILLIAMS:** May we see that ---

9 **MR. GOLDSTEIN:** Sure. I mean it's my only copy but
10 -- and it's -- I can ---

11 **MS. WILLIAMS:** I'll give it back to you. I don't
12 want it.

13 **MR. GOLDSTEIN:** I can e-mail you a color copy.
14 That's a ---

15 **MS. WILLIAMS:** Huh-uh.

16 **MR. GOLDSTEIN:** That's sort of a ---

17 **MS. WILLIAMS:** I just need to see it right now.
18 That's all.

19 **MR. GOLDSTEIN:** Well, he says you're gonna ---

20 **MR. LIVENGOD:** (Inaudible) make you a copy.

21 **MR. GOLDSTEIN:** Okay. Well, that's fair enough.
22 That's fair. He says they're gonna keep it but
23 make me a copy. That's fair enough.

24 **PROF. HUBBARD:** The problem with your argument once
25 again is this is not up to us. The device says



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1 basically a commercial establishment that
2 regularly features sexual devices. That
3 describes what Mr. Cook took a picture ---

4 **MR. GOLDSTEIN:** What did you just read? What did
5 you just read? Regularly features? Where's
6 the adverb regularly? Who's -- defines
7 regularly?

8 **PROF. HUBBARD:** We will define that as we apply the
9 rule ---

10 **MR. GOLDSTEIN:** Okay.

11 **PROF. HUBBARD:** --- I just want to make sure we can
12 agree on the language.

13 **MR. GOLDSTEIN:** Oh, sure. But there is -- there's
14 an adverb in there. Doesn't make for a good
15 ordinance if you throw in a bunch of adverbs.

16 **PROF. HUBBARD:** Then it goes on to say this
17 definition shall not be construed to include
18 any pharmacy, drug store, medical clinic, any
19 establishment primarily dedicated to providing
20 medical or healthcare products or services, or
21 any establishment that does not limit access to
22 its premises, or a portion of its premises, to
23 adult only. And notice, those are all tied
24 together by ors.

25 **MR. GOLDSTEIN:** Right.



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1 **PROF. HUBBARD:** And so, whatever you take a picture,
2 these other kinds of stores, has been addressed
3 by the City Council in the Ordinance.

4 **MR. GOLDSTEIN:** But not by your Zoning Administrator
5 because we offered to make it open. We offered
6 to put all the -- take down all the anatomical
7 devices, open the ---

8 **PROF. HUBBARD:** As I understood, you said the
9 Licensing people wouldn't give you a license?

10 **MR. GOLDSTEIN:** Well -- see, you want to draw a
11 distinction between ---

12 **PROF. HUBBARD:** I told you we do not supervise
13 Licensing.

14 **MR. GOLDSTEIN:** I understand.

15 **PROF. HUBBARD:** So I have to draw this distinction.

16 **MR. GOLDSTEIN:** Yeah (ph).

17 **PROF. HUBBARD:** I know you don't like it ---

18 **MR. GOLDSTEIN:** (Inaudible.)

19 **PROF. HUBBARD:** --- you'd like to just kind of chat
20 about it ---

21 **MR. GOLDSTEIN:** No, no, no ---

22 **PROF. HUBBARD:** --- and if we were a policy board,
23 it might be interesting to do it, but we're not
24 a ---

25 **MR. GOLDSTEIN:** No, there is no distinction. There



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1 is no distinction.

2 **PROF. HUBBARD:** There's no -- well, we say there is.

3 You've gotten your ---

4 **MR. GOLDSTEIN:** Well, that's like saying ---

5 **PROF. HUBBARD:** --- if we vote -- if we vote to deny
6 your appeal ---

7 **MR. GOLDSTEIN:** Oh, well, that's a foregone
8 conclusion ---

9 **PROF. HUBBARD:** --- you can say that we were in
10 error on that ground, okay?

11 **MR. GOLDSTEIN:** That's right.

12 **PROF. HUBBARD:** All right. Is there any more ---

13 **MR. GOLDSTEIN:** That's like saying electricity is
14 only voltage but not amperes ---

15 **PROF. HUBBARD:** Let (ph) ---

16 **MR. GOLDSTEIN:** --- I mean if you've got
17 electricity, you've got both.

18 **PROF. HUBBARD:** I love, you know, analogies are fun.
19 Did you have another point to -- in rebuttal to
20 Mr. Cook ---

21 **MR. GOLDSTEIN:** No, no. Thank you very much.

22 **MR. CHAIRMAN:** Very good. Any -- any questions?
23 Any further questions from the Board? Is
24 anybody in the audience -- audience wish to
25 speak? Okay. Not hearing anybody, I'm looking



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1 for a motion. Somebody like to make a motion
2 on this case?

3 **PROF. HUBBARD:** I move to deny the appeal of the
4 decision by the Zoning Administrator. I think
5 that the facts and the legal issues have been
6 explored, and that the decision that the Zoning
7 Administrator made was correct based on the
8 facts. We have ample evidence that sexual
9 devices were indeed shown. They appeared to be
10 regularly shown here (ph). The legal issues
11 have been addressed. I think the Zoning
12 Administrator correctly decided them.

13 **MR. McKNIGHT:** Second.

14 **MR. CHAIRMAN:** We have a motion and a second. All
15 in favor say aye.

16 **IN UNISON:** Aye.

17 **MR. CHAIRMAN:** All opposed? The motion carries.
18 Mr. Goldstein, are you prepared to do your
19 second ---

20 **MR. GOLDSTEIN:** I'm sorry, it's (inaudible).

21 **MR. CHAIRMAN:** I'm sorry? Yeah, maybe speak into
22 the microphone ---

23 **MR. GOLDSTEIN:** Yes.

24 **MR. CHAIRMAN:** --- a little bit better.

25 **MR. GOLDSTEIN:** We've basically already covered it.



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1 The ordinances -- the Ordinance speaks for
2 itself. The Zoning Administrator has denied --

3 -

4 **MR. YOUNG (ph):** Excuse me, Mr. Goldstein.

5 **MR. GOLDSTEIN:** Yes?

6 **MR. YOUNG (ph):** Does staff need to present the next
7 case?

8 **MR. COOK:** Right. Would it be okay if I just
9 announce the case ---

10 **MR. CHAIRMAN:** Thank you, Preston. My mistake ---

11 **MR. GOLDSTEIN:** Okay ---

12 **MR. CHAIRMAN:** --- Mr. Goldstein. If you'll hang on
13 for a second, we'll let the staff make their
14 presentation ---

15 **MR. GOLDSTEIN:** I just do what I'm told ---

16 **MR. CHAIRMAN:** It's my first day as the chairman.
17 I'm a little rusty ---

18 **MR. COOK:** Thank you, Mr. Chairman, (inaudible).
19 Next case is '16-011 administrative appeal.
20 Subject property is 4716 Devine Street, Tax Map
21 13814-09-02. It is the application for
22 administrative appeal. The applicant does
23 allege in the application for administrative
24 appeal that the Zoning Administrator did error
25 by refusing to accept Taboo's application for



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1 special exception, the granting of which the
2 Board of Zoning Appeals is authorized under
3 Section 6-29-800(A)(3) of State law, and also
4 by Zoning Administrator's refusal to schedule a
5 pre-hearing conference which is prerequisite to
6 such applications per his letter dated February
7 26, 2016, quote, please be advised that neither
8 a variance nor a special exception is
9 applicable in this case. Applications for same
10 cannot be processed. City Code Section 17-
11 374(a). See also Zoning Administrator's e-mail
12 dated February 26, 2016, quote, your
13 administrative appeal request before the Board
14 of Zoning Appeals will be scheduled for the
15 April 12th, 2016 meeting at 10:00 a.m. at 1737
16 Main Street, Council Chambers. A pre-hearing
17 conference is not required. Again, the
18 applicant is Mr. Goldstein for Cricket Store
19 17, LLC, also known as Taboo Adult Superstore.

20 **MR. CHAIRMAN:** Okay. Anyone here to speak on that?

21 **MR. GOLDSTEIN:** (Inaudible.)

22 **MALE SPEAKER:** Yes.

23 **MR. GOLDSTEIN:** Does that (inaudible)?

24 **MR. CHAIRMAN:** Yeah (ph) ---

25 **MR. GOLDSTEIN:** Okay. I'm sorry.



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1 **MR. CHAIRMAN:** Yes, sir.

2 **MR. GOLDSTEIN:** Tommy Goldstein. I'm the lawyer for
3 the applicant. This I think we can make very
4 brief. We've already discussed the request for
5 pre-hearing. According to the application, it
6 appears to be a mandatory prerequisite. We
7 were not afforded that opportunity. The Zoning
8 Administrator is refusing to put the case in
9 front of you. He's refusing to allow me to
10 appear.

11 **PROF. HUBBARD:** Well, maybe can we just cut ---

12 **MR. GOLDSTEIN:** Sure.

13 **PROF. HUBBARD:** --- your phrase, what, cut to the
14 chase ---

15 **MR. GOLDSTEIN:** Sure.

16 **PROF. HUBBARD:** --- whatever it was you were talking
17 about earlier. The Ordinance clearly says that
18 no special exception regarding any of the
19 requirements of this section -- that being the
20 sexually oriented business provisions -- may be
21 granted by the Zoning Board of Adjustment.

22 **MR. GOLDSTEIN:** May. Doesn't say shall. It says
23 may. Now, let me read you your ordinance,
24 Section 1-2, Definitions and Rules of
25 Construction. This is your ordinance. Shall



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1 (inaudible) -- the word shall is mandatory.
2 The word may is permissive. But that's not
3 really the heart of my argument. The heart of
4 my argument is this is a quasi-judicial body
5 created by the General Assembly. With all
6 deference to your expert Zoning Administrator,
7 the City does not have the authority to deny my
8 client the right to appear before a State-
9 created Board of Zoning Appeals. You exist by
10 the General Assembly, not by the City of
11 Columbia. The Enabling Act that creates you
12 says any person aggrieved may appear before the
13 Board of Zoning, a person. Well, here I am and
14 I'm aggrieved. But your Zoning Administrator
15 won't let me appear. So it's very simple. We
16 have the right to make our -- and by the way,
17 this is where we go back to Professor Hubbard's
18 excellent, excellent article on zoning. I
19 don't know why you want to disavow it. It's a
20 nice piece of work. Professor Hubbard, in his
21 article, says that when you meet the five
22 statutory criteria for special exception then
23 public policy is served by granting the special
24 exception. Now, Professor Hubbard didn't make
25 that up. He lifted it out of a ---



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1 **PROF. HUBBARD:** I have to tell you that this has
2 been amended. The language you're -- that's
3 discussed there, so it's a very different
4 ordinance that we would do -- use today for
5 special exceptions. Um ---

6 **MR. GOLDSTEIN:** Well, I'm talking about State law.
7 I'm not talking about your ordinance.

8 **PROF. HUBBARD:** What the State law says is special
9 exceptions is that special exceptions may be
10 granted -- I don't have in front of me, but
11 something subject to whatever conditions the --
12 -

13 **MR. GOLDSTEIN:** Sure.

14 **PROF. HUBBARD:** --- City Council -- so the City
15 Council sets conditions. So your argument ---

16 **MR. GOLDSTEIN:** Well ---

17 **PROF. HUBBARD:** --- boils down to whether may
18 prohibits as opposed to shall ---

19 **MR. GOLDSTEIN:** That's right.

20 **PROF. HUBBARD:** --- that we're entitled to grant
21 special exception?

22 **MR. GOLDSTEIN:** But that's not my real argument. My
23 real argument is am I allowed to appear and be
24 heard, yes or no? He says no. And I assume
25 you all are gonna say no too. So really that's



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1 all I have to say. I'll be happy to answer any
2 questions.

3 **PROF. HUBBARD:** Well, would you like to respond to
4 my, you know, I think it's an interesting point
5 you've raised, the may versus shall, probably
6 would have been better to say shall. So now
7 we're in the wonderful game of statutory
8 interpretation. Do you want to make a record
9 on that or just ...

10 **MR. GOLDSTEIN:** Well, the rules of statutory
11 construction are so clear that ---

12 **PROF. HUBBARD:** Oh.

13 **MR. GOLDSTEIN:** --- that when an ordinance is clear,
14 you can't apply a forced construction to it.
15 You've gotta give the words their ordinary and
16 plain meaning. And when the -- when your
17 ordinance says may not, well it doesn't say
18 shall not. So may is permissive by reference
19 to City of Columbia Ordinance Definitions ---

20 **PROF. HUBBARD:** Okay, fine ---

21 **MR. GOLDSTEIN:** --- and Rules of Construction.

22 **PROF. HUBBARD:** I -- that's a great argument, first,
23 but not following it complicates everything
24 because now it's may -- if they had said they
25 may grant it, then we would be -- but when it



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1 says may not, that makes it not so clear. If
2 we get to not so clear, we're gonna read the
3 thing as a whole, right? That's another --
4 that's fun about statutory interpretation.

5 **MR. GOLDSTEIN:** Well, you're concluding it's
6 ambiguous. I disagree. I don't think it's
7 ambiguous at all ---

8 **PROF. HUBBARD:** This is a good one. You can take it
9 to court if you want, okay?

10 **MR. GOLDSTEIN:** Right.

11 **PROF. HUBBARD:** I just want to make -- I'm clear
12 what our view would be, okay? And I'm sure
13 that it, you know, if it gets -- as a matter of
14 ---

15 **MR. GOLDSTEIN:** Well ---

16 **PROF. HUBBARD:** --- or a court, other arguments ---

17 **MR. GOLDSTEIN:** Well ---

18 **PROF. HUBBARD:** --- you made for both sides ---

19 **MR. GOLDSTEIN:** Let -- let's ---

20 **PROF. HUBBARD:** --- but it's hard to read this
21 ordinance as a whole and think that somehow you
22 could come to this board and all of this effort
23 that has gone into on the part of the City
24 would be for nothing and that we could decide
25 based on the criteria, okay ---



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1 MR. GOLDSTEIN: Okay. Well ---

2 PROF. HUBBARD: --- not only that, the criteria
3 today are quite clear. They include things
4 like ---

5 MR. GOLDSTEIN: Well, do you want to talk about the
6 criteria? 'Cause I do.

7 PROF. HUBBARD: May I finish?

8 MR. GOLDSTEIN: Sure. Well, I ---

9 PROF. HUBBARD: They include ---

10 MR. GOLDSTEIN: If I'm being permitted to finish, I
11 will be -- certainly allow you to finish.

12 PROF. HUBBARD: But it explicitly includes public
13 interest. And generally, when we're pretty
14 sure what the City Council thinks is a public
15 interest, we think that's a good guide for what
16 we can do. But it's a good argument in terms
17 of it perhaps arguably should have been better
18 drafted.

19 MR. GOLDSTEIN: Well, you -- now, may I ---

20 PROF. HUBBARD: Please.

21 MR. GOLDSTEIN: --- talk without being interrupted?

22 PROF. HUBBARD: I want you to be able to make your
23 argument ---

24 MR. GOLDSTEIN: All right (ph).

25 PROF. HUBBARD: --- on the issue.



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1 **MR. GOLDSTEIN:** Ms. Williams and I had an honest
2 conversation a few minutes ago about devices.
3 So I'm gonna have an honest conversation with
4 you. Let's just be honest with each other.
5 The City is discriminating against this
6 business because it views it as having negative
7 secondary effects, which is nothing more than
8 a canard. It was the same canard used to
9 enslave an entire race, prevent women from
10 practicing law, keeping women -- you know (ph),
11 just a few years ago, the Citadel argued to
12 this very court right across the street --
13 wasn't Judge Wooten, another judge -- said
14 women cannot be admitted to the Citadel 'cause
15 it will destroy 150 years of impeccable
16 tradition. Well, that's a canard too. Now, we
17 all know I don't have a chance before this
18 board. When you say your view, the view is of
19 the prevailing animosity and discrimination
20 against anything that smacks of an adult
21 message. Now, that's the truth. And in the
22 seventies in Connecticut, it was contraception.
23 And we look back on that case now and we think,
24 gol, what were those people thinking? And 20
25 years from now, people'll look back on this



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1 case and think it was all silly 'cause it
2 really is silly. Taboo is nothing more than a
3 general retail establishment. It's not a
4 sexually oriented business. It markets itself
5 in that direction, but the inventory contained
6 within it is no different than any inventory
7 found at any of a dozen retail businesses. You
8 know I don't have a chance before this board.
9 I'm just dotting my Is and crossing my Ts so I
10 can go get a real hearing before a real judge
11 and get a fair shake. Maybe I win, maybe I
12 lose, but I get a fair shake. I'm not gonna
13 get a fair shake here today. We all know that.
14 So now, that brings us back to your criteria.
15 In my application, my appeal, you will see that
16 we meet all of the criteria for special
17 exception. There's no way that this propo- --
18 and of course, we're getting into the merits of
19 the case and, you know, your Zoning
20 administrators determine I don't get there.
21 I'm not entitled to a hearing. That's really
22 what this case is about. But it won't have a
23 substantial adverse impact on vehicular traffic
24 or pedestrian safety. You know that. I know
25 that. So we meet criteria one.



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1 **PROF. HUBBARD:** We're not going to rule on something
2 because -- I -- maybe the other Board members
3 might disagree with me at the end of the day,
4 but I'm gonna do a -- go -- you said let's be
5 honest. I've been honest all along. I've
6 tried ---

7 **MR. GOLDSTEIN:** Mmm ---

8 **PROF. HUBBARD:** --- to tell you what I was thinking
9 and why I was thinking it, and to help you
10 protect your record. I honestly don't think we
11 have the power to do what you're saying we want
12 to do. I honestly accept what the US Supreme
13 Court said when it talked about secondary
14 effects. Again, I'm -- that's not for me to
15 second guess. That's the law of the land by
16 the US Supreme Court so maybe you're right.
17 Maybe 20 years from now it will be different
18 world ---

19 **MR. GOLDSTEIN:** Well ---

20 **PROF. HUBBARD:** --- but in today's world, given our
21 power, I don't see how we can do what you want
22 us to do.

23 **MR. GOLDSTEIN:** Yeah. And Professor, you know, when
24 I bought my house on San Souci Street in
25 Charleston, I checked -- I did my own title



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1 search and, you know, I didn't have to go far
2 back to find a deed restriction saying this
3 property shall not be sold to any ---

4 **PROF. HUBBARD:** I'm not questioning whether there's
5 injustice in the world and your client maybe
6 has been given an injustice, but we don't ---

7 **MR. GOLDSTEIN:** You don't want to hear it. I
8 understand.

9 **PROF. HUBBARD:** Well, that's not our -- gosh, we ---

10 **MR. McMEEKIN:** If we don't want to hear it, what
11 have we been doing for the last hour?

12 **MR. GOLDSTEIN:** I'm asking for permission to be
13 heard on a special exception, and we're
14 debating on whether or not I'm gonna be allowed
15 to be heard.

16 **PROF. HUBBARD:** It looks like the City Council has
17 told us not to. And if -- you've ---

18 **MR. GOLDSTEIN:** Well ---

19 **PROF. HUBBARD:** --- you've got that preserved. We
20 don't need to hear ---

21 **MR. GOLDSTEIN:** Well, I thank you for that. I do
22 thank you for that. Fair. I will stop right
23 there.

24 **PROF. HUBBARD:** Thank you.

25 **MR. CHAIRMAN:** Would anybody like to speak? Would



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1 you like to ---

2 **MR. COOK:** Yeah.

3 **MR. CHAIRMAN:** --- speak, Mr. Cook?

4 **MR. COOK:** Right. I want to take a few minutes just
5 to kind of present my, you know, point of view,
6 if you will and we talked a little bit about,
7 you know, South Carolina Code Section 6-26-
8 800(A)(3). It does authorize a Board of
9 Appeals to permit uses by special exception
10 subject to terms and conditions for the uses
11 set forth for such uses in the Zoning Ordinance
12 if the municipality so chooses as permitted by
13 State Code. The City of Columbia Zoning
14 Ordinance does not permit a sexually oriented
15 business by special exception, but instead
16 outlines the Zoning districts where permitted
17 and other applicable regulations. A sexually
18 oriented business is simply not a permitted use
19 at 4716 Devine Street in the City of Columbia
20 because it does not meet the applicable Zoning
21 regulations found in Chapter 17 of the Zoning
22 Ordinance. Application for special exception
23 for a sexually oriented business cannot be
24 accepted as there is no section in the Zoning
25 Ordinance for which the special exception may



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1 be outlined and, as such, BOZA has no standing
2 to hear and decide applications for special
3 exceptions in this case. We touched a little
4 bit on the facts of the applicant trying to get
5 in touch with this office for a pre-conference
6 hearing, specifically on a special exception,
7 the application, and I have a copy of it in
8 your packet at the top, for the purposes of
9 trying to obtain information to present before
10 the Board. The application says, and I'll
11 quote from the top of this special exception
12 application, you should -- key word being
13 should -- schedule a pre-application conference
14 with staff -- it lists the phone number --
15 prior to the application deadline to discuss
16 your specific case and its requirements.
17 That's on the special exception application.
18 It's not on the administrative appeal
19 application. The purpose of you should
20 schedule a pre-application conference is so we
21 can find out what exactly they're looking to do
22 on a specific case. In this case, it was
23 outlined specifically by the application, back
24 and forth e-mails and letters. The letter,
25 also in your packet, dated February 26, 2016



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1 was kind of a key letter that was addressed in
2 the application for this special exception and
3 administrative appeal in this case. Again,
4 February 26, 2016, letter to the -- Jeff White
5 of Taboo Adult Superstore and also Mr.
6 Goldstein. It was sent via e-mail. It
7 basically outlines that I am in receipt of the
8 application requesting administrative appeal
9 and application for a special exception, and
10 also that point of variance. The variance or
11 the special exception in that case, again, is
12 not applicable. We can't hear a special
13 exception. The -- when I say the Board of
14 Zoning Appeals doesn't have the authority to
15 hear a special exception case, we go to Section
16 17-112(2)(a), the Board of Zoning Appeals shall
17 hear and decide only the applications for
18 special exception as the Board of Zoning
19 Appeals is specifically authorized to pass upon
20 by the terms of this article. Again, a special
21 exception is not a choice you get to pick.
22 You're either permitted in M-1 or M-2 as a
23 sexually oriented business and you meet the
24 criteria found with (ph) the Ordinance, or you
25 don't. A special exception under Chapter 17,



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1 the City of Columbia Zoning Ordinance, is not
2 applicable for a sexually oriented business.
3 Specifically 17-374(a) talks about no variance
4 from any provisions of this section --
5 referring to the sexually oriented business --
6 may be granted by the Board of Zoning Appeals.
7 It goes on to say no special exception
8 regarding any of the requirements of the
9 section may be granted by the Board of Zoning
10 Adjustment. And that would be this board.
11 Specifically, to kind of wrap up, there was
12 application for two administrative appeals, a
13 variance and a special exception. They all
14 kind of came in together, and then they were
15 separated, then they were resubmitted. There
16 was a lot of (inaudible) e-mails back and
17 forth, letters back and forth. The
18 correspondence was there. My e-mail on
19 February 26, 2016 to Mr. Goldstein, I'm just
20 gonna read it 'cause it's short. It says Dr.
21 Mr. Goldstein, good afternoon. Please find
22 attached with this e-mail a letter regarding
23 4716 Devine Street, Taboo. Your administrative
24 appeal request before the Board of Zoning
25 Appeals will be scheduled for the April 12th,



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1 2016 meeting at 10:00 a.m. at 1737 Main Street,
2 Council Chambers. A pre-hearing conference is
3 not required. Again, at that point, we're not
4 looking at a special exception, we're looking
5 at administrative appeal. I had all the
6 information that I needed to proceed with the
7 administrative appeal in this particular case.
8 So based on the facts that I've submitted for
9 you today -- again, the Board of Zoning Appeals
10 has no authority to accept or hear an
11 application for special exception for the
12 operation of a sexually oriented business at
13 4716 Devine Street, as the Zoning Ordinance
14 does not grant authority nor the use to be
15 permitted as a special exception. The Zoning
16 administrators respectfully request that the
17 determination not to accept application for a
18 special exception be upheld. That concludes my
19 testimony. Thank you.

20 **MR. CHAIRMAN:** Are there any questions from the
21 Board?

22 **MR. YOUNG:** I've got a question for staff. If it's
23 clearly stated that we're not authorized to do
24 it, why did it get on the agenda to come before
25 us today?



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1 **MR. COOK:** It came to you today as an administrative
2 appeal as a determination not to bring it as a
3 special exception.

4 **MR. CHAIRMAN:** Okay. Anybody else? Mr. Goldstein,
5 would you like to have a rebuttal?

6 **MR. GOLDSTEIN:** Oh, I'll keep it short. I think you
7 all have heard enough of me. I just noticed --
8 I just was taking notes as Mr. Cook was
9 speaking. He said -- he used the plural --
10 first case nominative plural we. We can't hear
11 a special exception. That's not his decision.
12 That's your decision. And it's a decision
13 given to you by State law, not the City of
14 Columbia ---

15 **MR. CHAIRMAN:** I can -- if it's -- if there's not a
16 -- in the Zoning Regulation a special exception
17 that can be granted, then how can we hear that?

18 **MR. GOLDSTEIN:** Well, what you're saying is ---

19 **MR. CHAIRMAN:** You make one up?

20 **MR. GOLDSTEIN:** Well, no, what you're saying is,
21 Goldstein, you can't win, so why do you get to
22 be heard? And ---

23 **MR. CHAIRMAN:** No, it's not that you can't win.
24 It's just you -- there's no -- there's no
25 provision in the Zoning Ordinance that allows



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1 for special exceptions to sexually oriented
2 business in any zoning.

3 **MR. GOLDSTEIN:** It says may not be permitted, that's
4 what the Ordinance says. May not be permitted,
5 quote, end quote. May. You all define may.
6 You define it. The City defines it -- may. I
7 didn't write the Ordinance, I just follow it.
8 May says permissive. May not be granted. Now,
9 I understand what Professor Hubbard said ---

10 **MR. CHAIRMAN:** I know. I'm saying show me in the
11 Ordinance right now where there's a -- where
12 there's anywhere that says in this Zoning that
13 this property is zoned that a sexually oriented
14 business is permitted by special exception.

15 **MR. GOLDSTEIN:** Well, I'm ---

16 **MR. CHAIRMAN:** I don't see it.

17 **MR. GOLDSTEIN:** I'm not sure I'm following you. I'm
18 relying on 6-29-800, the State statute that
19 creates you. You're not created by the City of
20 Columbia. You're created by the fellas under
21 the gold dome down the street. That's who
22 creates the Board. And an interesting thing
23 that Mr. Cook said, he says -- when he's
24 quoting the statute, he says the Board of
25 Adjustments not authorized to hear it. That's



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1 what he just told you, and that's what it says,
2 Board of Adjustment. The reason it says Board
3 of Adjustment is 'cause Mr. Bergthold drafted
4 the Ordinance for the City of Columbia and --
5 because he's from Tenn- -- I think Tennessee,
6 it must be a board of adjustment. Here it's a
7 board of zoning appeals. So -- I mean they
8 don't even have the right -- name of the right
9 -- they don't even know your all's name in the
10 Ordinance.

11 **MR. CHAIRMAN:** So you're contending that you have
12 the right -- your client has the right to make
13 up a special exception in a particular zoning
14 that's not in the Ordinance, on any zoning they
15 want to, and come before this Board and be
16 heard, is that what you're saying? So like if
17 I wanted to build a factory in C-3 ---

18 **MR. GOLDSTEIN:** Uh-huh.

19 **MR. CHAIRMAN:** --- it's not allowed. I can come
20 before this Board and say I want a special
21 exception, even though it's not allowed on the
22 Ordinance as a special exception?

23 **MR. GOLDSTEIN:** You're absolutely correct. Article
24 I, Section 22, South Carolina Constitution
25 guarantees it. So -- and again, I didn't write



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1 the Constitution. I just follow it. That's
2 all I do. It says that no person will ever be
3 denied a property or liberty interest without
4 first having an opportunity to appear before a
5 judicial forum to hear -- to have the
6 application ruled on. That's in the
7 Constitution. So you've got that, Article I,
8 Section 22. You've got 6-29-800. You all
9 don't want to hear it? I understand. Like I
10 said, I didn't have any -- I didn't really
11 expect any favorable outcome today but, you
12 know, I'm just going through the -- as
13 Professor Hubbard already observed -- I'm just
14 going through the procedural steps in order to
15 get to where I need to be. So that -- that's
16 all I have by way of rebuttal.

17 **MR. CHAIRMAN:** Okay. Thank you very much.
18 Entertain a motion please?

19 **PROF. HUBBARD:** I move to deny the administrative
20 appeal. I think the most correct
21 interpretation of the language at issue about
22 the special exception is pretty darn clear that
23 we are not supposed to consider -- even
24 consider this because we cannot grant them, and
25 so I think that's the -- it's a fairly simple



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1 thing. But I think that's the correct
2 interpretation.

3 **MR. YOUNG:** I'll second it.

4 **MR. CHAIRMAN:** Looks like we have a motion and a
5 second. All in favor say aye.

6 **IN UNISON:** Aye.

7 **MR. CHAIRMAN:** All opposed? Okay.

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State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2016-CP-40-3478

Cricket Store 17,
Plaintiff,
vs.
City of Columbia Board of
Zoning Appeals,
Defendant.

Transcript of Record

October 28, 2016
Columbia, South Carolina

B E F O R E:

The Honorable Robert E. Hood, Judge

A P P E A R A N C E S:

Thomas R. Goldstein, Esquire
Attorney for the Plaintiff

Peter A. Balthazor, Esquire
Scott D. Bergthold, Esquire
Attorneys for the Defendant

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

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<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>Ev.</u>
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1 THE COURT: The next case on the docket is
2 2016-CP-40-3478, *Cricket vs. City of Columbia*. Mr.
3 Goldstein?

4 MR. GOLDSTEIN: Yes, Your Honor.

5 THE COURT: Okay, Mr. Balthazor, is this you again?

6 MR. BALTHAZOR: Yes, sir. It sure is, and I'm here
7 today with cocounsel Scott Bergthold, who has been admitted
8 *pro hac vice* in this, in this case.

9 THE COURT: Okay. Can you spell your last name for
10 me, sir?

11 MR. BERGTHOLD: Yes, Your Honor. B as in boy,
12 e-r-g-t-h-o-l-d.

13 THE COURT: Okay. Thanks. All right, so this is the
14 Cricket Store's appeal from a zoning board hearing. Is
15 that right?

16 MR. BALTHAZOR: That is correct, Your Honor.

17 THE COURT: Okay, and this is your appeal, Mr.
18 Goldstein?

19 MR. GOLDSTEIN: It is, Your Honor.

20 THE COURT: All right. I'm listening.

21 MR. GOLDSTEIN: Thank you, Your Honor. As a matter of
22 housekeeping, we do not agree that Mr. Bergthold has been
23 admitted *pro hac vice* in this case.

24 THE COURT: Okay.

25 MR. GOLDSTEIN: As set forth in my memorandum, Mr.

1 Bergthold made an application for admission *pro hac vice*.
2 Judge Benjamin granted a form order admitting him on
3 September the 1st, the same day I filed my written
4 objection to his admission *pro hac vice*. Once I received
5 the order admitting him *pro hac vice*, I immediately filed a
6 motion for reconsideration and asked to be heard on that.
7 However, in between that time, for reasons that have not
8 been disclosed to the parties in this case, Judge Benjamin
9 recused herself in this case. Now, I'm guessing she did
10 that because she's married to the mayor of Columbia. I'm
11 guessing.

12 THE COURT: I wouldn't guess that. She doesn't recuse
13 herself from any of the City of Columbia criminal cases in
14 any way, shape, or form.

15 MR. GOLDSTEIN: Okay.

16 THE COURT: So.

17 MR. GOLDSTEIN: Well, then she recused herself. No
18 party asked her to recuse yourself.

19 THE COURT: Okay.

20 MR. GOLDSTEIN: And, and we didn't get an order. We
21 just got notified that she had recused herself. So, that
22 leaves my motion -- so, I've written to Judge Benjamin and
23 I pointed out to her that we are sort of in limbo now
24 because she signed an order without considering my
25 objection, and now I've got a motion for reconsideration

1 which by rule only Judge Benjamin can hear. And I'm happy
2 to agree that Your Honor can hear it.

3 I'm happy to do -- now, to be fair to Mr. Bergthold,
4 before we -- I don't think we can reach the merits of my
5 appeal today. So, I think we're going to be able to get
6 this worked out one way or another prior to reaching the
7 merits of the hearing. So, if you would like me to go to
8 the next step, it's -- next step is why this case is not
9 ready to be heard on the merits.

10 THE COURT: Okay.

11 MR. GOLDSTEIN: And the reason the case is not, as set
12 forth in my memorandum, is we have not been provided a
13 written transcript of the hearing below. And I don't know
14 why I have mental difficulty in mispronouncing Mr. -- I
15 want to say Balthazor. I know it's a mispronunciation, but
16 I stumble over it.

17 THE COURT: He answers to both.

18 MR. BALTHAZOR: I answer to anything.

19 MR. GOLDSTEIN: Balthazor, I think, is the correct
20 pronunciation, he has submitted to the court -- and of
21 course he's -- you've got his excellently researched and
22 well crafted memorandum as well. His position is is that
23 the disk alone is sufficient for the record. I disagree.
24 I think you've got to have the written transcript which is
25 required by statute.

1 THE COURT: Is there a transcript? I don't know.
2 I've never been to zoning board hearing.

3 MR. BALTHAZOR: No, Your Honor. There's been a
4 certified copy of the entire proceeding before the board
5 which has been filed with the court and a DVD of the entire
6 board proceedings that were held before the board. The DVD
7 has video and audio of everything that occurred.

8 THE COURT: So, how are we supposed to get a
9 transcript?

10 MR. GOLDSTEIN: I, I asked Mr. Balthazor to file the
11 transcript. He said he's under no obligation to do that.
12 We've agreed to disagree. So, I have sent, I've sent the
13 DVD to a certified court reporter and requested that
14 Southeastern Transcripts prepare a transcript. I don't
15 think it's my obligation to do that.

16 And, and I have to tell you, Judge, and I hope it
17 doesn't come across the wrong way. I apologize in advance
18 if it is, but I'm on the Board of Zoning Appeals in
19 Charleston and there's been appeals from us, and there's
20 always a written transcript that goes up to the circuit
21 court. Whether you think that carries any weight or not --
22 you know, people think Charleston always does things kind
23 of screwed up anyway, so maybe we do.

24 THE COURT: I'll take the Fifth on that.

25 MR. GOLDSTEIN: Well, I appreciate that, but in

1 preparing my case, I want to be able to cite to specific
2 statements made by Professor Hubbard on the Board of Zoning
3 Appeals.

4 THE COURT: Okay. So, he wants to hold off this thing
5 until he gets a transcript.

6 MR. GOLDSTEIN: Correct.

7 THE COURT: How long you think that's going to take?

8 MR. GOLDSTEIN: Well, I've sent it to Southeastern
9 Transcripts. They're usually pretty quick, Judge; I would
10 say thirty days would be my guess.

11 THE COURT: Do you care if I maintain jurisdiction
12 over it and we wait ---

13 MR. GOLDSTEIN: Not at all.

14 THE COURT: I'm not talking to you.

15 MR. GOLDSTEIN: Oh. I'm sorry, Judge.

16 THE COURT: And we wait for him to get his transcript?

17 MR. BALHAZOR: I mean...

18 THE COURT: And I'll deal with the *pro hac*. I mean, I
19 can just kind of deal with it from what it is.

20 MR. BALHAZOR: Right.

21 THE COURT: But y'all have to wait for this conundrum
22 of getting back on the docket. I can -- as soon as he gets
23 his transcript, we can schedule it ---

24 MR. BALHAZOR: Well.

25 THE COURT: --- regardless of where I am and what I'm

1 doing ---

2 MR. BALTHAZOR: Right.

3 THE COURT: --- and get it done.

4 MR. BALTHAZOR: The court can certainly do that. Mr.
5 Bergthold has traveled from out of state today. I don't
6 think there's any requirement that a transcript be
7 prepared. So, I think the matter is ready to, to go
8 forward today.

9 THE COURT: Okay.

10 MR. BALTHAZOR: The fact that there's no transcript
11 doesn't mean there can't be a hearing today, and the
12 transcript can always be submitted to the, to the court
13 later on. I mean, the transcript is just going to be a
14 transcribing of ---

15 THE COURT: Right.

16 MR. BALTHAZOR: --- the DVD which is already before
17 the court. I don't know if Your Honor was -- got a copy of
18 a memo. I think I filed it Wednesday, Wednesday evening
19 after getting Mr. Goldstein's brief, but it outlines some
20 of the South Carolina law. Do you have a copy?

21 THE COURT: I don't. Why don't you give me one.

22 MR. BALTHAZOR: I can hand up a copy.

23 THE COURT: We were in Horry County yesterday.

24 MR. BALTHAZOR: Yeah. I understand you were at trial
25 this week. I guess that's what somebody told me.

1 But in my brief, the brief that I just handed you
2 addresses two of the issues and I think, I think it's got
3 the other issue that's going to be addressed by Mr.
4 Goldstein also. It's about prelitigation mediation, but on
5 page 3 of that memo it talks about the transcript of any --
6 transcript of an appeal from the Board of Zoning Appeals,
7 and there's a case on point in South Carolina from 2001,
8 which is cited in the brief. It's *Grant vs. The City of*
9 *Folly Beach*, and in that same case, the same -- and in that
10 case, the same issue was raised.

11 The Court of Appeals actually remanded the case for
12 reconstruction of the record because a transcript wasn't
13 provided. The Supreme Court looked at that issue and
14 clearly said looking at the statute, which is 6-29-830,
15 clearly said that that statute imposes no requirement that
16 a verbatim recording be made, and it's up to the board's
17 discretion whether to make a transcript or not. And in
18 that case, I think there was -- in the *Grant* case, there
19 was other evidence presented to the, to the court. I mean,
20 there was a whole certified record of the proceedings
21 presented to the court there.

22 So, again my point is -- and there's no reason to
23 stall the hearing today based on, based on no transcript
24 being available. I mean, the hearing can proceed today.
25 Mr. Goldstein is certainly free to transcribe that DVD at

1 expensive and at -- at his leisure, but it's nothing to,
2 nothing to stop the hearing about today.

3 THE COURT: Another way we could do it, Mr. Goldstein,
4 is let's go ahead and argue today, and then you get your
5 transcript. I'll withhold ruling and once you get your
6 transcript, then everybody can submit memos or briefs or
7 proposed orders or whatever you want to do in case
8 something comes up in the transcript that you didn't see in
9 the DVD. I mean, that's another way we could do it. You
10 got an objection to that?

11 MR. GOLDSTEIN: None.

12 THE COURT: Okay.

13 MR. GOLDSTEIN: No, no objection here.

14 THE COURT: Okay. That way you can get your
15 transcript. You can have it to protect your client's
16 interests and make sure what's in there is the accurate
17 rendition of what's in there or what was said, and I will
18 agree to maintain jurisdiction over the matter and not rule
19 until you have an adequate opportunity to get the
20 transcript and review the transcript and everybody submit
21 proposed orders or further memos, or if we need to get
22 together and do another hearing, we can do that. That's
23 fine with me. I want you to have what you believe you need
24 to have to be prepared. So, I'm trying to accommodate that
25 and also deal with the statute at the same time. Does that

1 seem fair?

2 MR. GOLDSTEIN: It does.

3 THE COURT: Okay. All right. Great. Now let's talk
4 about this *pro hac vice* issue.

5 MR. GOLDSTEIN: Yes, sir.

6 THE COURT: So, does anybody have an objection to me
7 hearing that issue?

8 MR. BALTHAZOR: Your Honor, Mr. Bergthold, I do not.

9 THE COURT: Okay.

10 Mr. Goldstein, do you?

11 MR. GOLDSTEIN: No.

12 THE COURT: Okay. For whatever reason, Judge Benjamin
13 has recused herself. For the record, we don't need to
14 speculate as to why that is, but this matter, this issue
15 needs to be resolved and it needs to be heard, and we need
16 a ruling on it so things can move forward in an orderly
17 fashion. So, let's go ahead and deal with that *pro hac*
18 *vice* issue.

19 Mr. Goldstein, you want to be heard?

20 MR. GOLDSTEIN: Yes, Your Honor.

21 THE COURT: Okay.

22 MR. GOLDSTEIN: I, I want to interpose an objection to
23 Mr. Bergthold's being admitted *pro hac vice* in this case.
24 The basis for my objection is South Carolina has, as you
25 know, a barratry statute. Mr. Bergthold is -- I'm going --

1 he's a brilliant lawyer. There's no question about that,
2 and there's no question that he is a marketing genius, and
3 what Mr. Bergthold has done is he has prepared a
4 prepackaged ordinance that's the subject of this lawsuit.
5 It's where -- it's the jumping off place. It's the, it's
6 the *sine qua non* of this dispute.

7 And what Mr. Bergthold does is he sells this ordinance
8 nationwide. He sells it all over the United States, and
9 there's lots and lots of cases discussing the Bergthold
10 ordinance. And I won't bore you with them, but we're in
11 the Fourth Circuit Court of Appeals right now over the
12 ordinance, and it's been discussed in detail by a lot of
13 federal circuits.

14 What the -- so, so, let me back up. My client opened
15 an adult business on 4917 Devine Street on December the 17,
16 2011. I may be getting the date -- December the 9th. It
17 was December 9, 2011. Seventeen days later, the city
18 brought in Mr. Bergthold, who presented to the city council
19 in a fifteen minute city council hearing this prepackaged
20 ordinance, along with 3000 pages of legislative history.
21 And in a matter of less than eighteen minutes, without
22 discussion or debate, city council had passed and adopted
23 the Bergthold ordinance, which is the genesis of this
24 entire dispute.

25 Now, I contend that Mr. Bergthold is a witness because

1 there's the author of this ordinance, and I contend that
2 the ordinance is based on nothing more than a prejudice
3 toward anybody who disseminates a protected, lawful, adult
4 message protected by the First Amendment. Now, I'm not
5 going to debate that case with Your Honor here because
6 we're in the Fourth Circuit. I lost before Judge Wooten
7 down the street. He said Goldstein, you're wrong, and sent
8 me on my way.

9 And interesting side note, Judge. In losing that
10 case, in losing that case, Judge Wooten said the issue of
11 the special exception, the subject matter of our case, was
12 not before him and he did not rule on that, which is kind
13 of why we're here. In other words, he had an opportunity
14 to take jurisdiction of that state case, and he declined to
15 do so. So, you're the lucky judge who drew us.

16 Fast-forward. The Bergthold ordinance has now been
17 adopted. The Bergthold ordinance does a peculiar thing.
18 First of all, you can tell it's a one-size-fit-all,
19 prepackaged template ordinance because it calls the Board
20 of Zoning Appeals the Board of Adjustments. Of course it's
21 not the Board of Adjustments. It's the Board of Zoning
22 Appeals, and that's just one of those little artifacts in
23 there that shows you that it's a template ordinance.

24 But what the ordinance does, and this is spectacularly
25 unique and scary. It says that if you own an adult

1 business, you are precluded from appearing before the Board
2 of Zoning Appeals. It's a bill of attainment. You're a
3 second-class citizen; you can't appear before the Board of
4 Zoning Appeals. Now, that's the merits of this case. So,
5 I contend that Mr. Bergthold is not acting in the best
6 interest of the city. He's not acting as a lawyer
7 representing a client. Rather, he's selling a product
8 which he then defends, and that's the marketing genius of
9 it.

10 And I was going to make one more point, and it just
11 went out of, it just went out of my head. Oh, the other
12 thing is Rule 404 which allows lawyers to be admitted *pro*
13 *hac vice* says, you know, you can be admitted *pro hac vice*,
14 but you can't be doing business in the State of South
15 Carolina on a regular basis. Well, you can look at his own
16 application for admission *pro hac vice* and see how much
17 business he's doing in the State of South Carolina without
18 being a member of the bar.

19 Now, let me say, let me say this about being a member
20 of the bar. Being a lawyer is not about making money and
21 selling a product. It's not. I know we all charge fees
22 and we all make a living. I get that and that's -- there's
23 nothing wrong with that. There's nothing wrong with making
24 an income, but lawyers do a lot more than making an income.
25 They represent clients, appointed -- I don't know how many

1 cases Mr. Balthazor has handled on behalf of indigent
2 clients, but I'll bet it's over a hundred. I haven't kept
3 count of the ones I've handled, but I'll bet I'm around 400
4 or 500 now. Lawyers serve on boards. Lawyers switch sides
5 all the time. One time you're against the lawyer; the next
6 time you're with the lawyer. So, there's a -- there's an
7 equilibrium that governs the -- unspoken, unspoken
8 equilibrium that governs the conduct of lawyers. It's,
9 it's the lubricant, the social lubricant that allows
10 lawyers to be lawyers. It's the incentive to settle a
11 case.

12 For example, this litigation that's spawned tremendous
13 litigation, there's never been any discussion about
14 settlement from anyone. Why? Because the city is being
15 represented by an out-of-state lawyer who's not
16 representing the city. He's presenting his product, the
17 ordinance. Only a lawyer representing a product could
18 draft an ordinance that would exclude an entire class of
19 citizen from participation before a quasi judicial body.

20 So, I object to his appearance in this case. He's
21 practicing law all over South Carolina without contributing
22 anything that the rest of us contribute. And it I want --
23 if I'm only one who's going to stand up for the South
24 Carolina Bar, then I'm prepared to do that, and that's what
25 I'm doing. So, for those reasons I object to his admission

1 *pro hac vice*.

2 THE COURT: All right.

3 MR. BERGTHOLD: Your Honor, may it please the court?

4 THE COURT: Yes, sir.

5 MR. BERGTHOLD: You've heard a lot this morning. The
6 vast majority of it's not in the record. Lots, lots of --
7 we heard a lot this morning. The vast majority of what
8 he's saying is not in the record; it's not supported by any
9 facts. It's barred by the *res judicata* effect of the
10 federal court judgment that rejected a lot of these
11 pejorative, *ad hominem* -- not loud enough? I'll start
12 again.

13 COURT REPORTER: No. You don't need to. Just
14 continue.

15 MR. BERGTHOLD: Okay. These arguments are not based
16 in anything in the record. They're barred -- they're
17 really arguments against the ordinance, the motives behind
18 its adoption, so on and so forth, and they are barred by
19 the *res judicata* effect of the federal court judgment.

20 But to get to the issue of *pro hac vice* admission, the
21 -- Judge Benjamin properly granted the order *pro hac vice*
22 under 404. I've attached and if Your Honor -- I'm not sure
23 if this was handed up to you earlier, but this is a copy of
24 the defendant's response that was filed last week, and
25 attached to it is the 16-page order and packet from Judge

1 Benjamin. And the court has an internal checklist to make
2 sure that all the requirements of Rule 404 have been
3 complied with, and in that document all those are checked
4 off, and those were verified as having been met before
5 Judge Benjamin granted the order admission *pro hac vice*.

6 There's not any -- all this argument is not anything
7 that's relevant under the rule. He's basically ignored the
8 rule, and his initial objections never mentioned Rule 404.
9 So, Rule 404 was met because I'm an attorney in good
10 standing. I'm not under any disciplinary. I paid the
11 fees. I'm associated with Mr. Balthazor, who's a regular
12 member of the South Carolina Bar who is actively
13 participating in this case, as he was in the federal case.
14 Never cites any portion of Rule 404 that was not complied
15 with.

16 They make a couple of arguments that try to get there.
17 The first one is that I'm engaged in the regular practice
18 of law. That is false. Rule 404(f) defines what regular
19 is, and that means no more than six appearances in South
20 Carolina state courts in a calendar year. This application
21 for *pro hac vice* that was granted is only my third
22 application for *pro hac vice* ever in the history of my
23 practice in South Carolina. So, I have two matters in
24 Horry County; I have one matter here. Out of an abundance
25 of caution, I included some federal court matters which are

1 not relevant to Rule 404 because they don't look at federal
2 court admissions where I've been admitted for Horry County
3 in that other case and in the Columbia case here, of
4 course.

5 Rule 404(a), this is important, says that for purposes
6 of the *pro hac vice* rule, a -- it applies to the state
7 courts of South Carolina, the South Carolina Administrative
8 Law Court, and other agencies of the State of South
9 Carolina as defined in South Carolina Code 1-23-310. And
10 it's very clear that that is at state-level agencies. So,
11 this is the first proceeding for the City of Columbia.
12 It's directly related. It's a follow-on action after the
13 federal court judgment upholding the city's ordinances and
14 rejecting all these *ad hominem* arguments, and so it's not a
15 regular practice, not even close. I'm not even at half the
16 number of admissions that the South Carolina Supreme Court
17 allows in state court before there's a regularity issue.

18 Number two, Mr. Goldstein has repeatedly in these
19 proceedings and elsewhere ignored Rule of Professional
20 Conduct 5.5. That is the multijurisdictional practice rule
21 in South Carolina which says -- for example, in this brief
22 he argues that I appeared before the Board of Zoning
23 Appeals. I did not, but it doesn't matter. That's not a
24 tribunal because this is not a state-level court or agency.
25 But in any event, I was present and I was with Mr. Brian

1 Cook, the city's zoning administrator and the client, which
2 is expressly permitted under Rule 5.5.

3 The inner -- the multijurisdictional practice rule has
4 a couple of different provisions that apply. Mr. Goldstein
5 will never mention these, but he'll make these really
6 unprofessional attacks based on things that are addressed
7 by the rule. Rule 5.5(c)(1) says that you can provide
8 temporary services in the jurisdiction as long as you're
9 not under discipline and you're admitted in another
10 jurisdiction in association with a South Carolina lawyer.
11 You can also do that on a temporary basis. What you can
12 also do -- and it's in the disjunctive, or you can do it if
13 it's in anticipation of a potential proceeding, or -- and
14 the lawyer reasonably expects that he would be admitted *pro*
15 *hac vice* in that potential or forthcoming proceeding.

16 We knew that when this went to the Board of Zoning
17 Appeals, and for months after the final federal court
18 judgment that Taboo was not complying with the ordinance,
19 we knew that they were going to challenge anything by way
20 of enforcement. So, we went -- so, I was present at the,
21 at the meeting although I did not stand up and address the
22 Board of Zoning Appeals.

23 Number three, his remaining arguments are without any
24 merit. He argues that this is just a local law issue, but
25 that's not a reason against granting *pro hac vice* motion.

1 More importantly, it's a sexually oriented business
2 ordinance issue which I was involved with the City of
3 Columbia and they -- my client had asked me to appear, to
4 be present, and argue this case as a follow on.

5 The second argument that we made in our brief is that
6 *res judicata* bars all these claims against the motives and
7 so forth of the ordinance, and we cited the *Hilton Head*
8 *Center vs. Public Services Commission* from the South
9 Carolina Supreme Court 1987.

10 The next argument he makes is that I'm not an
11 attorney. I'm a vendor. That's just an *ad hominem*
12 argument. That would make every attorney who produces
13 documents, whether it's contracts or whatever, as, as a
14 vendor. It's -- it, it doesn't even -- it -- he's --
15 there's no dispute that I'm an attorney practicing and
16 helping with temporary legal services on behalf of my
17 client. He, He filed some other things we've addressed in
18 our brief.

19 As far as the contributions to the bar, in the three
20 admissions that I've had *pro hac-vice* ever in the state
21 courts of South Carolina -- and they all happened this year
22 -- each time I had to pay the full \$250 fee. So, I have
23 already contributed \$750 to the South Carolina Bar from
24 this year.

25 And then finally he's making a conflict of interest

1 argument of sorts in his brief, but that's a challenge to
2 the city's ordinance, which is barred by *res judicata*. And
3 the federal court, by the way, said that the motives behind
4 the city council's adoption is just irrelevant to the
5 constitutionality of the law. That's black letter law.

6 Finally, he made a statement I think for the first
7 time in this proceeding here that there's been no efforts
8 at settlement. I think he's forgetting we spent an entire
9 day of mediation at Mr. Balthazor's office when the case
10 was in federal case. And what it came down to is Taboo is
11 doing what it's doing now, which is after years of having
12 an amortization period that ended at the end of 2013, and
13 then suing in federal court and then losing at the
14 preliminary injunction stage, the summary judgement stage,
15 and on two post-judgment orders, they're refusing to comply
16 with the ordinance. And that's why they are eventually
17 given a letter saying they need to come into compliance,
18 which is how the case, the Board of Zoning Appeals case,
19 arose.

20 I think I comprehensively addressed everything, but
21 essentially the rule is clearly satisfied and the *ad*
22 *hominem* arguments that are being made don't have any
23 relevance to the rule, and there's no grounds to vacate the
24 order. Are there any other questions Your Honor would like
25 to ---

1 THE COURT: No. I just want to ask Mr. Balthazor a
2 few questions.

3 MR. BERGTHOLD: Sure.

4 THE COURT: You're in this case?

5 MR. BALTHAZOR: Yes.

6 THE COURT: You've been in this case?

7 MR. BALTHAZOR: I've been in this case from day one in
8 the federal court case.

9 THE COURT: Okay.

10 MR. BALTHAZOR: I've been involved with the, with the
11 zoning issues, any, any enforcement issues also as -- I'm,
12 I'm here today as far as -- unless the city wants to get
13 rid of me at some point ---

14 THE COURT: Unless the city fires you today.

15 MR. BALTHAZOR: That's right. That's right.

16 THE COURT: You're in the case.

17 MR. BALTHAZOR: I'm here until the bitter end.

18 THE COURT: All right, Mr. Goldstein, do you want to
19 respond to any of that?

20 MR. GOLDSTEIN: Very briefly, Your Honor.

21 THE COURT: Yes, sir.

22 MR. GOLDSTEIN: I'm, I'm, I'm glad Mr. Bergthold did
23 point that -- did concede the point that he was before the
24 Board of Zoning Appeals. He was there; the videotape shows
25 it. You can see him passing notes to Mr. Cook during the

1 presentation. It's on the videotape that's in the record.

2 THE COURT: Okay.

3 MR. GOLDSTEIN: So, he, and, and he ---

4 THE COURT: He said he was there. He said he didn't
5 address it.

6 MR. BERGTHOLD: That's right.

7 MR. GOLDSTEIN: He did ---

8 MR. BERGTHOLD: It's irrelevant because it's not a
9 proceeding for which *pro hac vice* is required.

10 THE COURT: Right.

11 MR. BERGTHOLD: It's not a state tribunal.

12 MR. GOLDSTEIN: I, I, I -- as a South Carolina lawyer,
13 I'm pretty sure the Board of Zoning Appeals is a
14 state-created quasi judicial body, but that's neither here
15 nor there. The second ---

16 THE COURT: Do you have some authority for that
17 statement?

18 MR. GOLDSTEIN: Sure, I do. Yes, sir.

19 THE COURT: What's that?

20 MR. GOLDSTEIN: 6-29-800.

21 THE COURT: Okay.

22 MR. GOLDSTEIN: 6-29-800.

23 THE COURT: All right, and what does that say?

24 MR. GOLDSTEIN: It says that the Board of Zoning
25 Appeals is created by the General Assembly, is open to any

1 person aggrieved, and is a quasi judicial body is what it
2 says.

3 THE COURT: All right.

4 MR. GOLDSTEIN: The only other point -- Mr. Bergthold
5 is, of course, correct. I, I did lose on the merits at
6 summary judgment in the United States District Court.
7 He's, he's correct on that. However, the case is being
8 reviewed, and as Your Honor knows, a review from a summary
9 judgment is a *de novo* review.

10 THE COURT: Right.

11 MR. GOLDSTEIN: So, that's all I had on reply.

12 THE COURT: Okay.

13 MR. BERGTHOLD: Your Honor, if I could?

14 THE COURT: Sure.

15 MR. BERGTHOLD: In response to one argument that he
16 just made for the first time? And Board of Zoning Appeals
17 is not a state-created board. This is -- if I may
18 approach?

19 THE COURT: You may.

20 MR. BERGTHOLD: The statute 6-29-780 that discusses
21 the creation of the Board of Zoning Appeals and sub (a)
22 says: As part of the mechan -- administrative mechanism ---

23 THE COURT: Hold on, just let me read it.

24 MR. BERGTHOLD: Oh. I'm sorry.

25 THE COURT: You're going to read it too fast.

1 MR. BERGTHOLD: Sorry.

2 (A PAUSE.)

3 THE COURT: Okay.

4 MR. BERGTHOLD: Okay. So, my point from this is it's
5 not a -- it's not created by statute. This is the enabling
6 statute that allows a zoning ordinance to provide for the
7 Zoning Board of Appeals, but all of that is irrelevant to
8 the *pro hac vice* issue because Rule 404 from the Supreme
9 Court, §(a), says the *pro hac vice* rule applies to South
10 Carolina state courts, the South Carolina Administrative
11 Law Court, and in state agencies as defined in 123-310,
12 which does not include a, a city-level board in South
13 Carolina.

14 THE COURT: Okay.

15 MR. BERGTHOLD: Thank you.

16 THE COURT: All right, anything else on that issue?

17 MR. GOLDSTEIN: Nothing from me, Your Honor.

18 THE COURT: Okay. I'm going to admit Mr. -- I still
19 don't know how to say your name.

20 MR. BERGTHOLD: Berg, like iceberg, and then Thold,
21 Bergthold.

22 THE COURT: Bergthold *pro hac vice*. I believe he's
23 met the requirements of the rule and that he is not a
24 vendor in the state, or practicing business in the state,
25 or practicing law in the state so much as to make him

1 somebody that should have to come under the rules of the
2 South Carolina Bar and, therefore, I'm going to admit him
3 *pro hac vice* in this case. I believe that he's met all the
4 requirements under the rules. He has paid the money. He
5 has paid the money. He has -- he is in good standing in
6 his own state. He's been approved by the Supreme Court,
7 and he is associated with Mr. Balthazor, who is a lawyer in
8 this state in good standing. And the part of the law that
9 talks about the practice of law or substantial business and
10 should have to come under being -- not being able to be
11 admitted *pro hac vice* I do not believe applies to Mr.
12 Bergthold's situation as he has offered to the court today.

13 Okay. All right. So, let's talk about the merits of
14 this thing. Do you want to go first, Mr. Goldstein?

15 MR. GOLDSTEIN: Well, I'm going to do whatever it
16 pleases the court.

17 THE COURT: Okay.

18 MR. GOLDSTEIN: So, you tell me who you want to go
19 first.

20 THE COURT: All right. Go ahead, let's go ahead.
21 Tell me, tell me what your issues are.

22 MR. GOLDSTEIN: The second procedural issue is that
23 under 6-29-825, party appealing from a Board of Zoning
24 Appeals has the right to demand prehearing mediation, which
25 we have done.

1 THE COURT: Okay.

2 MR. GOLDSTEIN: And the city refuses to, refuses to
3 grant the mediation. So, I don't know if you want me to go
4 past that, or do you want to give them a chance to respond
5 to that.

6 THE COURT: Do them one at a time. My mind works
7 better that way.

8 MR. GOLDSTEIN: And, Judge, before I forget, could,
9 could I hand to your court reporter? I made reference to
10 the special meeting on December 22, 2011, at -- which sort
11 of touched off this whole controversy. Could I hand that
12 to your court reporter and make those minutes part of the
13 record?

14 MR. BALTHAZOR: And I'm sorry, Tommy?

15 MR. GOLDSTEIN: The minutes, December 22, 2011,
16 meeting which adopted the Bergthold ordinance.

17 MR. BALTHAZOR: Your Honor, we would object to that.

18 THE COURT: Why?

19 MR. BALTHAZOR: The, the B.Z.A. appeal is in, in the
20 -- the same thing as an appeal to the Court of Appeals.
21 Once the record is provided to the, to the court, that
22 record is closed. There's nothing else. The record can't
23 be supplemented at that point. I don't know what the
24 relevance of the 2011 ordinance enactment would, would be
25 at this point.

1 MR. GOLDSTEIN: Judge.

2 THE COURT: I don't know how I can create a new record
3 on appeal.

4 MR. GOLDSTEIN: No, this isn't going to the appeal.
5 This is going to the -- your ruling on the *pro hac vice*
6 issue. I, I told the court that Mr. Bergthold first
7 appeared on December 22nd. They had about a thirty-minute
8 or eighteen-minute meeting and they adopted the ordinance,
9 and this is just, this is just the minutes from that
10 meeting which shows that he appeared.

11 THE COURT: Does anybody dispute that?

12 MR. GOLDSTEIN: I don't think anybody disputes it.

13 THE COURT: Do you dispute being there?

14 MR. BERGTHOLD: No, I don't dispute being there.

15 THE COURT: Okay, he doesn't ---

16 MR. BERGTHOLD: But ---

17 THE COURT: --- dispute being there.

18 MR. BERGTHOLD: Yeah. So, it's not necessary to be in
19 the record. All this is discussed in the federal court
20 judgment, but it's still outside the record of the Board of
21 Zoning Appeals case.

22 MR. GOLDSTEIN: All right. Well, then could I give it
23 to the court reporter to mark it for identification only
24 then if it's not going to be admitted?

25 THE COURT: Sure.

1 (MINUTES MARKED AS PLAINTIFF'S EXHIBIT NUMBER 1 FOR
2 IDENTIFICATION.)

3 THE COURT: Okay, you want to talk about the
4 prehearing mediation? That's what we were on. Sorry.

5 MR. BALTHAZOR: Yes, Your Honor. May it please, may
6 it please the court? I know you've been bombarded with a
7 number of memos this morning, the one that I handed up
8 earlier entitled Memorandum of Law Regarding Prelitigation
9 Mediation.

10 THE COURT: I've got it.

11 MR. BALTHAZOR: Okay. Starting on page 1 addresses
12 that. The applicable statutes are 629-820 and 629-825.

13 THE COURT: Okay.

14 MR. BALTHAZOR: Which both address prelitigation
15 mediation, and let me just give you a quick timeline here.

16 The petition for appeal, which was really called a
17 summons and complaint or amended complaint, were filed on
18 June 6th and June 8th of this year. The city timely filed
19 a response to that, but then fast forward all the way to
20 September 13th of this year. That's when the petitioner,
21 Taboo, filed its demand for prelitigation mediation, and
22 the petitioner alleges that under 8 -- 629-825 that it is
23 entitled to prelitigation mediation. Well, we contend that
24 the court needs to look at both 820 and 825 in deciding
25 whether prelitigation mediation is allowed.

1 First of all, 820 addresses a couple categories of
2 persons that may be allowed to appeal from a decision of
3 the Board of Zoning Appeals. First in §(a) talks about any
4 person with a substantial interest can appeal from the
5 Board of Zoning Appeals. It doesn't say anything about
6 prelitigation mediation in that subsection. The next
7 subsection, §(b) of 820, talks about a property owner who
8 may appeal. A property owner may appeal pursuant to that
9 method in §(a) the same way an interested person can
10 appeal. There's also a property owner can appeal by filing
11 a notice of appeal accompanied by a request for
12 prelitigation mediation in accordance with Section 825.

13 But what's important in that 820 is that:

14 Any notice of appeal and request for
15 prelitigation mediation must be filed within
16 thirty days after the decision of the board is
17 postmarked.

18 Then we flip over to 825, which again addresses
19 prelitigation mediation, and it again talks about a
20 property owner:

21 If a property owner filed a notice of appeal with
22 a request for prelitigation mediation, then the
23 request for mediation may be granted.

24 Again, it doesn't address anything about an interested
25 person being able to ask for prelitigation mediation, but

1 it does say that a person who is not the owner of the
2 property may petition to intervene as a party, and then
3 they can participate in any mediation if it's properly been
4 asked for by, by the property owner.

5 Well, here the petitioner has not set forth any
6 evidence that it is the property owner of the property at
7 issue in this case. Even if the petitioner was the
8 property owner, the city would still object to that request
9 for prelitigation mediation because reading 820 and 825
10 together, any request for prelitigation mediation must be
11 done within thirty days of the decision of the, of the
12 Board of Zoning Appeals. That's going back and looking at
13 820 together with, with 825. 820 says: Any notice of
14 appeal and request for prelitigation, and request for
15 prelitigation must be filed within thirty days. And then
16 825 again says: If a property owner files a notice of
17 appeal with a request for prelitigation mediation. They
18 have to be done together within that thirty days. Then
19 that request can be granted. It, it's got to be done at,
20 at the same time, and it can only be a property owner that,
21 that requests that.

22 Taboo has not met either of those requirements: not a
23 property owner and haven't, haven't filed the request
24 within the, within the proper amount of time. That request
25 should have been filed along with the complaint or the

1 amended complaint within thirty days of, of the decision.
2 And just, just, just for the record, the written orders
3 from the board were mailed on -- I think it was May, May,
4 May 11, 2016. And like I said, the complaint was filed on
5 June 6th, amended complaint on June 8th, and the request
6 for prelitigation mediation did not come until September
7 13, 2016. So, for those reasons we don't think that Taboo
8 is entitled to prelitigation mediation based on the clear
9 terms of 820 and 825.

10 THE COURT: What about it, Mr. Goldstein?

11 MR. GOLDSTEIN: It's interesting. One of the most
12 interesting aspects of this case is pursuant to the city's
13 ordinances. When applicant files -- you have to remember
14 we never appeared before the Board of Zoning Appeals. We
15 weren't sure what we were doing before the Board of Zoning
16 Appeals. Under the city's ordinances, when you file for an
17 appeal before the Board of Zoning Appeals, the city is
18 required to give you a prehearing conference to figure out
19 what the issues are. Mr. Cook here refused to do that.
20 We've never -- to this date, we've never been afforded an
21 explanation as to why we weren't permitted through the
22 doors. Now, he did send me an email one time saying yeah,
23 you can walk through the doors and talk to the person at
24 the counter if you want. That's not what their ordinance
25 says.

1 And all of this will be in the transcript. This was
2 discussed at length in the transcript that you don't have
3 in front of you because it doesn't exist, and of course I
4 can't identify to it. I guess we could play the DVD and I
5 could pull ---

6 THE COURT: Well, I mean, that's why I'm going to let
7 you get the transcript.

8 MR. GOLDSTEIN: Right.

9 THE COURT: And you can submit something.

10 MR. GOLDSTEIN: Right.

11 THE COURT: And cite to it specifically, yes.

12 MR. GOLDSTEIN: So, this is the first time we've heard
13 that we're not a property owner. I don't how in the world
14 we could not be a property owner. The Board of Zoning
15 Appeals didn't raise that objection. They certainly
16 thought we were a property owner. We got a twenty-year
17 lease on the place. We had a right to purchase the
18 property but, you know, we didn't address any of that
19 before the Board of Zoning Appeals because they wouldn't
20 communicate with us. So, we're hearing that now for the
21 very first time. I don't think the city can raise for the
22 first time that we didn't have the right to appear before
23 the Board of Zoning Appeals. That issue was not discussed.
24 What was discussed was our refusal -- or their refusal to
25 give us the prehearing conference that they give everybody

1 else.

2 THE COURT: Is that different than the prehearing?

3 MR. GOLDSTEIN: Yeah, absolutely.

4 THE COURT: Okay. Okay.

5 MR. GOLDSTEIN: Yeah. Absolutely.

6 THE COURT: All right. Okay.

7 MR. GOLDSTEIN: The prehearing mediation, there's no
8 time period for us. We're not bound by the thirty days
9 because we're obviously a property owner. We've got a
10 twenty-year lease and we've got a right to purchase the
11 property. We would have purchased this property a long
12 time ago but for our legal problems with the city. So,
13 it's a little late to be raising at this stage of the game
14 that we don't have standing to ask that our property --
15 that we appear before the Board of Zoning Appeals.

16 And like I said, I'm on the Board of Zoning Appeals.
17 We have tenants appear before us all the time and that's,
18 that's certainly never been an issue raised before us, and
19 this is -- I never -- that issue was not raised to me until
20 Mr. Balthazor filed his memorandum with the court.

21 MR. BALTHAZOR: I'm not arguing that you have to be a
22 property owner to appear before the Board of Zoning
23 Appeals.

24 THE COURT: Your argument is not that you have to be a
25 property owner to appear. Your argument is that if you

1 want a prehearing mediation, you have to be a property
2 owner and you have to file it when you file your notice of
3 intent to appeal within thirty days ---

4 MR. BALTHAZOR: Within thirty days.

5 THE COURT: --- of receiving the notice of the
6 decision of the zoning board.

7 MR. BALTHAZOR: That, that's correct. I mean, Mr.
8 Goldstein appeared before the Board of Zoning Appeals.
9 Whether he was a property owner or not did not matter
10 before the Board of Zoning Appeals. It matters now when
11 he's requesting prelitigation mediation, but that didn't
12 matter before the, before the Board of Zoning Appeals. So,
13 it didn't, didn't come up then. It comes up now based on
14 the, based on the wording of the statute.

15 THE COURT: Okay. All right, anything else on that
16 issue, Mr. Goldstein?

17 MR. GOLDSTEIN: I just say if it didn't matter then,
18 it doesn't matter now. It doesn't -- our, our, our
19 capacity as a party doesn't switch as we go down the line
20 on an appeal.

21 THE COURT: Okay. All right, next issue.

22 MR. GOLDSTEIN: Well, the next issue would be the
23 merits, and the heart of this case is the offensive section
24 of the ordinance that says if you own an adult business --
25 it, it's a bill of attainder is what it is. It's a classic

1 bill of attainder. If you're an adult business owner, you
2 cannot come before us and, that was the issue that we
3 litigated to the Board of Zoning Appeals. When you get the
4 transcript, you'll see that was the issue.

5 THE COURT: Okay.

6 MR. GOLDSTEIN: I asked to go before the Board of
7 Zoning Appeals. Mr. Cook, acting in his capacity as zoning
8 administrator, said no, you can't go before the Board of
9 Zoning Appeals. So, we appealed that decision. You, you
10 -- and it's kind of weird. You, you follow what I'm
11 saying? We -- he said you can't go before the Board of
12 Zoning Appeals. We said we can go before the Board of
13 Zoning Appeals. We're a citizen; we have the same rights
14 as everybody else. So, it was the appeal from his decision
15 that we cannot appear before the Board of Zoning Appeals
16 that brought us to the Board of Zoning Appeals.

17 Does, does that make sense? I know it's convoluted.
18 It would have been easier for them to say we don't think
19 you can appear. We're going to let you argue your case,
20 but they wouldn't let us argue our case. When you get the
21 transcript, you will see that we never -- they would not
22 consider the merits of our case because they said -- and
23 this is almost a direct quote. I'm doing this from memory
24 now, so don't hold it against me if I get, get it wrong,
25 but almost from memory I can say Professor Hubbard said on

1 the record you -- we can't do it because the city won't let
2 us. And I said, well, if that's your ruling, I'll stop
3 right there. And I sat down because that's -- those were
4 the magic words I was looking for. So, their decision is
5 you can't come in here because of who you are. I mean,
6 that's a really ugly legal sentiment. It really is. It's
7 offensive.

8 It would have -- you know, the statute says the Board
9 of Zoning Appeals, and I respectfully disagree with learned
10 counsel that it's not a -- I think it is a state-created
11 quasi judicial body. But whatever it is, the city -- it's
12 created by the General Assembly. There's no doubt about
13 that. I think even opposing counsel will agree with me
14 about that. They say they won't agree about that. So, we
15 can't even agree on what creates a Board of Zoning Appeals.
16 So, maybe I can reach common ground with opposing counsel
17 and say this. The comprehensive -- the Local Enabling
18 Comprehensive Planning Act of 1994 breathes life into the
19 Board of Zoning Appeals. Maybe I can say it that way and
20 we'll reach common ground.

21 My client has the right to appear; they cannot shut
22 the doors to the courthouse in his face because he
23 disseminates an unpopular message. I cannot think of a
24 principle of law that is more offensive and more
25 un-American than that. So, all we were asking is for the

1 right to be heard, and they denied us that right.

2 And let me just say, Judge. In making this argument,
3 if you look, when you do look at the record and you see our
4 application, we meet all the statutory criteria for a
5 special exception. We do, and Professor Hubbard -- and
6 again when you get the transcript you'll see this.
7 Professor Hubbard published an article. He sits on the
8 Board of Zoning Appeals. He published an article saying
9 that, well, he's not sure he agrees with the principle, but
10 it appears that state law says that if you meet all the
11 statutory requirements for a special exception, the board
12 has no choice but to grant it. And when I showed him that
13 article and complimented him on that article -- and again,
14 when you get the transcript you will see this -- he
15 disavowed it. He said, oh, well, I just -- I didn't, I
16 didn't really mean that. I mean, it's just been -- it --
17 I've just been on quicksand. It's like battling a glacier
18 from the beginning of this case to the end of this case.

19 So, my client has a right to be heard before the Board
20 of Zoning Appeals. He has a right to be treated like any
21 other citizen of the State of South Carolina, and this
22 court should send a clear message to the board that they
23 can't turn people away because they don't like their
24 message.

25 THE COURT: So, what you're telling me is this. Okay,

1 I do this a lot to make sure I understand what you're
2 saying.

3 MR. GOLDSTEIN: Yes, sir.

4 THE COURT: Now, you've said a lot more words than I'm
5 going to say, but I'm trying to narrow it down, but what
6 you're saying is there was a zoning issue with the Taboo
7 store. You, on behalf of Taboo or your client, attempted
8 to appear before the zoning board to discuss whether or not
9 -- the merits of a zoning matter.

10 MR. GOLDSTEIN: Correct.

11 THE COURT: You were told you can't come in here.

12 MR. GOLDSTEIN: Correct.

13 THE COURT: Because your client runs an adult
14 business.

15 MR. GOLDSTEIN: Correct.

16 THE COURT: And you appealed that to the Board of
17 Zoning Appeals.

18 MR. GOLDSTEIN: Correct.

19 THE COURT: You appeared there.

20 MR. GOLDSTEIN: Correct.

21 THE COURT: And argued probably close to the same
22 thing, not verbatim, but same kind of thing you're arguing
23 here, and they said too bad, so sad, and that's why you're
24 here.

25 MR. GOLDSTEIN: Correct.

1 THE COURT: Okay. Got it.

2 MR. GOLDSTEIN: And then my -- and then I'll end ---

3 THE COURT: No. You keep going. I just wanted to
4 make sure I was following where you are so far.

5 MR. GOLDSTEIN: Absolutely correct.

6 THE COURT: Because you're say zoning board and Board
7 of Zoning Appeals, and they kind of sound the same.

8 MR. GOLDSTEIN: Right.

9 THE COURT: That's why I wanted to make sure I
10 understood.

11 MR. GOLDSTEIN: Right.

12 THE COURT: Okay.

13 MR. GOLDSTEIN: Now, I'll end with this. Let's talk
14 about the rules of statutory construction. The Local
15 Comprehensive, the, the 1994 Local Comprehensive Planning
16 Enabling Act, Section 6-29-800 says that any person
17 aggrieved can appear before a Board of Zoning Appeals. Mr.
18 Bergthold's ordinance says, and I quote and this is on page
19 9 of my memorandum. You don't need the transcript for
20 this: No variance from any of the provisions of this
21 section may be granted by the Zoning Board of Adjustment.

22 Now, let's talk about rules of statutory construction.
23 City of Columbia has its rules of statutory construction.
24 Section 1-2 of the city's ordinance define how words are to
25 be used in the ordinance as follows: Shall, may. The word

1 shall is mandatory; the word may is permissive.

2 So, Mr. Bergthold, who is the author of this
3 ordinance, composed the following sentence: No variance
4 from any of the provisions of this section may be granted.
5 And when you get the transcript, you will see that they
6 interpreted that as shall. And I tried to have a colloquy
7 with Professor Hubbard about this, and again I'm quoting
8 from memory and again when we get the transcript we'll see,
9 but I think he said something to the effect of, well, it
10 could have been more artfully drawn.

11 Two things about that. One, logic of that. If I came
12 into this court and I argued to Your Honor that this means
13 because it says may be granted that -- note that a variance
14 from the provisions of this section may be granted. In
15 other words, if I just drop the negative out. If I stood
16 here and told you, Judge, that means it shall be granted,
17 it must be granted, you'd look at me like I was an idiot
18 and you'd send me out because that would be a stupid thing
19 to argue because that's not what words mean. So, that's a
20 perfect, logical analysis of what's wrong with this.

21 The second point is to segue back to our right to be
22 treated like any other message. Now, remember when the
23 United State District Court sent me packing? Remember
24 Judge Wooten sent me packing, saying that he wasn't
25 addressing this state issue? He said you got to go down to

1 state court and address that issue. So, that's what we're
2 doing.

3 THE COURT: So, my question is this.

4 MR. GOLDSTEIN: Yes.

5 THE COURT: Tell me specifically what you want from
6 me. So, if I say you win, what -- is what you want a
7 hearing before this zoning board where you're allowed to be
8 present and present the merits of the case?

9 MR. GOLDSTEIN: Exactly. It's one-page up there.

10 THE COURT: All right.

11 MR. GOLDSTEIN: It's a one-page order.

12 THE COURT: So, what you want is for me to say your
13 client had a right to be present before the zoning board
14 and argue the merits of their case?

15 MR. GOLDSTEIN: That -- I, I can't say it any better
16 than that, so I'm going to sit down with that.

17 THE COURT: Okay.

18 MR. GOLDSTEIN: Because that's, that's it. That's my
19 argument.

20 THE COURT: Got it. Okay.

21 MR. BERGTHOLD: Your Honor, may it please the court?

22 THE COURT: Yes.

23 MR. BERGTHOLD: The brief on appeal that addressed the
24 merits, you may have a copy of this, but I'll approach and
25 give it to you just as well. That was filed last week.

1 I'll start on January 7, 2016, was -- which was the
2 last final court order from the federal court. Taboo
3 continued operations in violation of the zoning ordinance
4 after they had remained open for over two years past what
5 they were allowed to operate a sexually oriented business
6 at 4716 Devine Street. So, the zoning administrator on
7 January 28, 2016, took pictures of all the inventory,
8 gathered evidence, and then wrote a letter saying you're
9 not in compliance. You need to come into compliance or you
10 will be cited for violations of the zoning ordinance.

11 There's two Board of Zoning Appeals. There's no --
12 the zoning board and the Board of Zoning Appeals are the
13 same thing.

14 THE COURT: Okay.

15 MR. BERGTHOLD: There's only one zoning board, so I
16 think there was some confusion there. He went to staff and
17 he, he made two applications.

18 THE COURT: You're talking about Mr. Goldstein?

19 MR. BERGTHOLD: Yeah, Mr. Goldstein on behalf of
20 Taboo.

21 THE COURT: On behalf of his client.

22 MR. BERGTHOLD: Yeah. He made two appeals. One is
23 the 16-10-AA case, and that application for appeal was an
24 appeal of the zoning administrator's determination that on
25 January 28, 2016, they were operating as a sexual device

1 shop, one of the kinds of sexually oriented business under
2 the ordinance. So when Mr. Cook issued that letter, he
3 appealed that determination. He called that a
4 determination, and he was allowed to appear before the
5 Board of Zoning Appeals and argue the full merits of that
6 application for administrative appeal of the zoning
7 administrator's determination that on January 8, 2016,
8 Taboo was continuing to operate a sexual device shop in
9 violation of the zoning ordinance.

10 And the evidence presented at the hearing on the
11 merits was that Taboo was operating in the C3 zone. That
12 sexually oriented businesses are not allowed in C3 zoning
13 districts. Under Section 17-374(b) of the zoning
14 ordinance, they are only allowed in M1 and M2. So, the
15 board received the pictures from January 28th. These are
16 in the record at pages 12 through 19, and the order
17 concluded that the decision, quote, the decision of the
18 zoning administrator on January 28, 2016, is correct based
19 on the facts, end quote.

20 So, that was one appeal. Fully argued, heard on the
21 merits. I can stand here with confidence and say that
22 nobody ever said because of who you are, you can't be here.
23 Go away. None of that ever happened in my knowledge and I
24 think in the zoning administrator's knowledge. So, so,
25 that was the first appeal.

1 The second appeal is appeal number 16-11-AA, and this
2 is also an administrative appeal of the zoning
3 administrator's decision refusing to accept Taboo's
4 application for a special exception. That's the second
5 appeal. He refused -- he, he received an application for a
6 special exception. He sent it back with a check and said
7 I'm not processing this. Because of the zoning ordinance,
8 a sexually oriented business cannot be granted a special
9 exception.

10 Now before we get into that, that statement in the
11 zoning ordinance, which is Section 11- -- or 17-374(a), and
12 I'll hand up a copy of, of the ordinance, and this is 3 --
13 17-374(a) is the no variance or special exception.
14 17-374(b) says these are the zoning districts where
15 sexually oriented businesses have to be.

16 And I will make just as a side note because I think it
17 matters not a whit, but this whole thing about the Board of
18 Zoning and about the Board of Adjustments, that's what it
19 used to be called in Columbia, and there's trace references
20 to the Board of Adjustments in the code, but now it's
21 called the Board of Zoning Appeals. And if you search case
22 law in South Carolina, you'll see zoning variances out of
23 Horry County with adult businesses appealing from the Board
24 of -- Board of Adjustments and Zoning Appeals is what it
25 was called down there. So, that's not anything indicative

1 of a lack of knowledge of South Carolina law.

2 But the second thing is that the 16-11-AA appeal is an
3 appeal of the zoning administrator's determination to
4 refuse to accept Taboo's application for special appeal,
5 and the board ruled that that was correct as a matter of
6 law. They said that 17-374(a) prohibits the granting of a
7 variance or a special exception to a sexually oriented
8 business. If that language wasn't in the statute, they
9 still wouldn't be eligible for a special exception or a
10 variance because all throughout the code of ordinances, and
11 especially the zoning ordinances, there's the Table of Uses
12 and the Table of Uses says -- it lists all the zoning
13 districts across the top, and then down the side it lists
14 all the different uses.

15 Bakeries, for example, bakeries are allowed in
16 multiple commercial districts, but in the box for the C1
17 district, there is no letter. If it's permitted, there's
18 an X there. If it's allowed in the zoning district by
19 special exception, there will be an E that stands for
20 exception. When you get to bakeries and you look at the
21 bakery and you come down to C1, you look at that box and
22 there's nothing there; someone couldn't open a bakery even
23 by special exception in the C1 district. They -- it's just
24 not allowed. If Mr. Cook got an application for a special
25 exception to open a bakery in a C1, he would send it back

1 saying the zoning ordinance doesn't allow. Here's the
2 zones where it's permitted by right, and here are the zones
3 where the box says E for other zoning districts where you
4 can apply maybe in the C4, for example, for a special
5 exception. So, that's how the zoning code works.

6 So, this language in some respects is surplusage but
7 there's nothing infirm about it because under the statute,
8 which is 6-29-800(a)(3), and I'll hand that up for Your
9 Honor, this (a) says: The Board of Appeals has the
10 following powers. And §(a)(3) says:

11 To permit uses by special exception subject to
12 the terms and conditions for the uses set forth
13 for such uses in the zoning ordinance.

14 This section of the state's law is never mentioned in
15 any of the briefs on, on appeal. It's, it's totally
16 ignored by the petitioner. And so when something comes to
17 the Board of Zoning Appeals, their authority to hear
18 applications for special exceptions is constrained by the
19 zoning ordinance, either if there's no box, or in the box
20 or that zoning district -- which in this case would have
21 been a C3 -- if, if there's no box with an E there, they
22 can't hear the special exception.

23 17-374(a), which is in the sexually oriented business
24 portion of the zoning ordinance, just makes that very
25 clear. It just states what is already the effect of the

1 Table of Uses where in the C2, C3 there's no E for special
2 exception. That's no X. Basically you have an X in these
3 other zones, and the federal court found that there's
4 forty-six other locations in Columbia where they could
5 lawfully operate but not at 4716 Devine Street. So, there
6 was no -- so, the only question here is as a matter of law
7 -- and, and, and, of course on appeal from the Board of
8 Zoning Appeals's decision the, the standard of review as
9 set forth in 6-29-840(a) is that the findings of the Board
10 of Zoning Appeals are treated the same as findings by a
11 jury. The court cannot take additional evidence, and the
12 only review is whether the Board of Zoning Appeals decision
13 is correct as a matter of law.

14 The case law interpreting that statute says that
15 findings are only disturbed if no evidence supports the
16 board's decision. There is substantial deference given to
17 the Board of Zoning Appeals, and the court will not
18 substitute its judgment for the Board of Zoning Appeals
19 decision even if it disagrees with it.

20 So on the first case, all the evidence proved that on
21 January 28, 2016, when Mr. Cook, the zoning administrator,
22 went and took pictures and gathered evidence that, in fact,
23 as a matter of fact and law they were operating a sexual
24 device shop illegally in a location where it's not
25 required. So, they affirmed in 16-10-A the first appeal

1 case before you.

2 The second case presented a purer question of law, and
3 that was what Professor Hubbard -- I'm not going to --
4 there are so many things about what he said that do not
5 comport with what the video says. I'm not even going to
6 get into that because Your Honor can watch the video or
7 read the transcript when it's prepared. But, but as a
8 result, Professor Hubbard said, well, 17-374(a) says no
9 special exception may be granted. So, the whole
10 distinction between may being discretionary and shall being
11 mandatory doesn't matter when you have a no in front of it,
12 and that's what Professor Hubbard said. He says the board
13 -- the city council who adopts the zoning ordinance which
14 under state statute constrains the types of appeals we can
15 hear because it's the condition set forth for such uses in
16 the zoning ordinance -- said no special exception shall be
17 granted for a sexually oriented business. No variance
18 shall be granted for a sexually oriented business and, and
19 he said as a matter of law, they're authorized to do that.
20 And the zoning administrator's decision to send back your
21 application for a special exemption which is implicitly
22 prohibited by the table itself, which has nothing in that
23 box for granting the right to seek a special exception, and
24 then is explicitly prohibited by 17-374 which says no
25 special exception or variance for sexually oriented

1 business, was correct as a matter of law. And so that was
2 the second appeal of the determination they made. So, for
3 all of those reasons, unless the court has further
4 questions, the record is complete.

5 We don't have any problem waiting for the transcript,
6 but the, the wording of the statute and the transcript says
7 the board will send up the certified record of proceedings
8 and the transcript, comma, if any, comma, so on to the
9 circuit court. So, there's not a requirement that -- I
10 mean, on the face of the statute, it doesn't require a
11 transcript, and that was case law that Mr. Balthazor was
12 saying ---

13 THE COURT: But y'all don't object to me letting ---

14 MR. BERGTHOLD: No, we don't, we don't object ---

15 THE COURT: --- them get the transcript?

16 MR. BERGTHOLD: --- to the transcript. We'll review
17 it.

18 THE COURT: Okay.

19 MR. BERGTHOLD: And make sure it's accurate but, Your
20 Honor, the first case should be affirmed because the Board
21 of Zoning Appeals had facts to support its determination
22 affirming the Board of Zone -- the zoning administrator's
23 January 28, 2016, determination. The second appeal should
24 be affirmed because, as a matter of law, the Board of
25 Zoning Appeals got it right.

1 THE COURT: All right.

2 MR. BERGTHOLD: Thank you.

3 THE COURT: Would you like to respond, Mr. Goldstein?

4 MR. GOLDSTEIN: I would, Your Honor, briefly.

5 THE COURT: Okay.

6 MR. GOLDSTEIN: Keep it under -- I'll keep it under
7 two or three minutes. Mr. Bergthold made, made a lot of
8 statements but he, he didn't, he didn't give you a lot of
9 the details. So, let me give you the details.

10 He says that Mr. Cook went out and made a
11 determination as to what the facts are there, and there's
12 no, there's no question about the facts and, and therefore
13 there was nothing for the Board of Zoning Appeals to hear,
14 and it's not in the Table of Uses. The board of appeals is
15 not an algorithm. It's a series of -- it's a, it's a board
16 of citizens with different experiences who listen to the
17 evidence and can grant variances and special exceptions and
18 were not bound by whether it is in a box or not. If it was
19 just check the box, you wouldn't need the Board of Zoning
20 Appeals.

21 And as for Mr. Cook's facts that it's a sexual devices
22 shop, counsel just told you Mr. Cook went out and
23 determined it was a sexual device shop. Two things about
24 that. One, he didn't tell you the definition of a sexual
25 device shop, so let me tell you what it is under his

1 ordinance. One device, one magazine: out of business.

2 Now, the ordinance has got a built-in escape clause
3 for Target, CVS, Spencers, and all them. They're exempt
4 and I won't bore you with the details because I don't want
5 to relitigate that case, but what Mr. Cook goes out and
6 determines is extremely disputed question of fact, but we
7 weren't permitted to question that fact because -- and we
8 finally reach some common ground. Mr. Bergthold and I do
9 agree. He's absolutely correct about the procedure. We
10 weren't allowed to present our case.

11 And if all of these facts are so definitive, why
12 didn't they just say, well, we're not sure you -- we have
13 the right to grant this but we'll hear you. I mean,
14 wouldn't that have been an easier way to address it rather
15 than saying you can say whatever you want where our, our --
16 I mean, if we -- Judge, if we walked in here today and you
17 told us, Goldstein, you can say whatever you want, but I'm
18 denying your -- I'm, I'm going out, take a break with my
19 law clerk. We're going to have a cup of coffee and, and
20 talk about the Tennessee-Carolina game, and let me know
21 when you're done, come back, and I'll rule on your case, I
22 mean, wouldn't that just be abhorrent to the system of
23 justice? It would, and that's what happened to us. They
24 said say whatever you want, but the city won't let us grant
25 the special exception. So, we're not -- just say whatever

1 you want. We're not considering it.

2 He also says, in quoting Mr. Cook, Mr. Cook says we're
3 not taking your application, and again some ground. We, we
4 have some common ground here. Mr. Bergthold said Bruce
5 Cook wrote us back and said look. We cannot accept your
6 application because we cannot give a special exception.
7 That's exactly the point; that's exactly the point. That
8 was a decision reached by the Board of Zoning Appeals.

9 I think that's all the comments I had, Judge. I was
10 just checking my notes.

11 THE COURT: Okay.

12 MR. GOLDSTEIN: Thank you for an opportunity to
13 respond.

14 THE COURT: All right, here's what we're going to do.
15 Okay. So, Mr. Goldstein, when you get your transcript.

16 MR. GOLDSTEIN: Yes, sir.

17 THE COURT: Okay, from the point that you get your --
18 when you get your transcript, let us know. So, email
19 everybody.

20 MR. GOLDSTEIN: Yes, sir.

21 THE COURT: And say I've gotten the transcript. I
22 don't know how long they're going to take because I don't
23 know those people. And then from that point forward, y'all
24 have thirty days to submit proposed orders on the issues
25 raised today outside of the *pro hac vice* issue. I've

1 already decided on that, so it's the other issues, the
2 merits of the appeal.

3 Y'all have thirty days from when Mr. Goldstein gets
4 the transcripts to submit proposed orders. That will give
5 me time to read all this and to watch the video and then to
6 have the transcript so y'all can make specific references
7 to it if you would like to.

8 MR. BERGTHOLD: Your Honor.

9 THE COURT: Is that enough time?

10 MR. BERGTHOLD: It is, and actually I'm concerned that
11 it might be too much time only because it's open-ended.

12 THE COURT: Okay.

13 MR. BERGTHOLD: I would think that preparing that
14 transcript would not take more than two weeks, but if we
15 said thirty days to -- and put some time limit on it
16 because this -- for the city, this case has been going on
17 for four years.

18 THE COURT: Okay. What have they told you about the
19 time?

20 MR. GOLDSTEIN: I, I didn't ask them.

21 THE COURT: Okay.

22 MR. GOLDSTEIN: I, I didn't ask them.

23 THE COURT: Okay, why don't you do this. Why don't
24 you ask -- when you ---

25 MR. GOLDSTEIN: I mean, they're happy to send it to

1 their people. If they want to pay for it, they can get it,
2 they can get it expedited overnight.

3 THE COURT: No. When you get back to wherever you're
4 going, I want you to ask the court reporting people how
5 long it's going to take to get it done.

6 MR. GOLDSTEIN: And I'll report.

7 THE COURT: And then send that. Courtesy copy
8 everybody on an email and so we can get some kind of
9 timeframe. If they say it's going to be six months, then
10 we can revisit the thing. If they say, you know, it's
11 going to take us two or three weeks, then ---

12 MR. GOLDSTEIN: Sure.

13 THE COURT: --- I will let the thirty days from that
14 time point stand in place, but I want everybody to have
15 time to put your thoughts together and look at the
16 transcript. If you want to make references to the
17 transcript and cite things you can, and I won't take long
18 to rule. Mr. Balthazor can tell you I don't usually just
19 sit around on stuff for six months or a year and wait on a
20 ruling on it. So, as soon as I get it, we'll already be
21 processing through and going through everything, watching
22 the DV, looking at law, and then my decision won't take
23 long after that.

24 MR. GOLDSTEIN: Okay.

25 THE COURT: I don't like to delay things.

1 MR. BALTHAZOR: Quick point of clarification. Getting
2 the proposed order, do you want us to address the mediation
3 issue, or is -- sort of by hearing the merits today, Your
4 Honor may have implicitly, implicitly ---

5 THE COURT: No, I don't need the mediation issue
6 addressed. I can address that on my own.

7 MR. BALTHAZOR: Okay.

8 THE COURT: Okay.

9 MR. BALTHAZOR: Thank you.

10 MR. GOLDSTEIN: Thank you.

11 MR. BERGTHOLD: Thanks, Your Honor.

12 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 28TH DAY OF OCTOBER, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MARCH 23RD, 2017

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2016-CP-40-03478
	)	
CRICKET STORE 17,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
CITY OF COLUMBIA BOARD OF	)	
ZONING APPEALS,	)	
	)	
DEFENDANT,	)	

January 26, 2017
Columbia, South Carolina

BEFORE:

THE HONORABLE ROBERT E. HOOD, JUDGE.

APPEARANCES:

THOMAS R. GOLDSTEIN, ESQ.
Attorney for the Plaintiff

PETER BALTHAZOR, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: All right. We're on the record in
2 2016-3478, Cricket Store 17 and others versus the City of
3 Columbia Board of Zoning Appeals.

4 Mr. Goldstein is here on behalf of the plaintiff.
5 Mr. Balthazor is here on behalf of the defendant and Mr...

6 MR. BERGTHOLD: Bergthold.

7 THE COURT: All right. I may say it wrong seven more
8 times.

9 MR. BERGTHOLD: No problem.

10 THE COURT: If I do, I apologize. All right. So we
11 had a hearing a few months ago on the issues of the zoning
12 appeal. There was an issue of a transcript. There was an
13 issue of pro hac vice. All of that came around full
14 circle.

15 So what issue do you want to start with,
16 Mr. Goldstein?

17 MR. GOLDSTEIN: Your Honor, I'm happy to address the
18 issues in the -- any order that suits the court.

19 THE COURT: You go, pick your order. It doesn't
20 matter to me.

21 MR. GOLDSTEIN: Well, let's just go to the merits of
22 the case if you don't mind, Judge --

23 THE COURT: Okay.

24 MR. GOLDSTEIN: -- because it's ready now for
25 disposition. You now have the transcript, and I have to

1 tell you I'm going to make a public confession.

2 I really didn't realize how bad the appearance before
3 the Board of Zoning Appeals was until I went back through
4 the transcript, and it really brought back a horrible
5 childhood memory of mine of my first grade love in 10th or
6 11th grade was Elizabeth Boles. Her family belonged to
7 the Cherokee Country Club, and I remember always the
8 horrible realization that I wasn't allowed to go into
9 Cherokee Country Club.

10 I wasn't -- you know, it was restricted membership.
11 I was excluded. That is a childhood memory that has
12 stayed with me now as I begin my final descent into
13 departing this mortal coil. That appearance before the
14 Board of Zoning Appeals, that -- that is just inexcusable.

15 I wasn't permitted to be heard. I wasn't permitted
16 to articulate a single thought without interruption, and
17 the issue before the Board of Zoning Appeals takes us back
18 to my Cherokee Country Club metaphor.

19 The question was am I allowed to be -- am I allowed
20 to come through the door? Am I allowed to be in the room?
21 Am I allowed to be heard? The answer came back clearly
22 from the board: No, you're not, and the reason it came
23 back no from the board is because of their misreading of
24 what I contend is a very clear and unambiguous city
25 ordinance which says that no special exception may be

1 granted to an adult bookstore.

2 Now, first of all, the fact that an adult bookstore
3 is put into a special category of non-permitted citizens
4 to participate is in itself offensive, but second of all,
5 applying the plain Rules of Statutory Construction which
6 are well known -- and the City of Columbia defines the
7 word may. All of this is in my brief. At this point, I'm
8 really just repeating what's in the brief.

9 THE COURT: I read your brief.

10 MR. GOLDSTEIN: Okay. Well, then I'm just being
11 repetitive. The statute is clear. It says may be
12 granted.

13 You know, here is the thing, Judge: In this case,
14 the case that brings us before you here today, the City of
15 Columbia has demonstrated that it can amend an ordinance
16 with a laxity when it is inclined to do so. It did so in
17 this case.

18 When I pointed out a deficiency in this very
19 ordinance, they amended it like that. So now we're a
20 year-and-a-half down the road. They haven't amended the
21 ordinance. They could have amended it. If they wanted to
22 say shall, they could have amended it to say shall, but
23 they didn't.

24 So it's just a plain issue of statutory construction.
25 I had a right to appear before the board. I had a right

1 to be heard on the merits, and they denied me that right.
2 That's reversible error.

3 Now, let's have an honest conversation. I know going
4 back before the board is an act of futility. I know what
5 the decision is going to be at the outset. That's, again,
6 back to my Cherokee Country Club metaphor.

7 I know that my client is a second class citizen that
8 would never permitted a full and fair hearing before the
9 Board of Zoning.

10 This ordinance -- and as I point out in my brief --
11 and I make no -- I think even Mr. Bergthold will concede
12 this point. That is template ordinance that Mr. Bergthold
13 distributes all over the country. That's why the
14 ordinance refers to the Board of Zoning Appeals as the
15 Board of Adjustment because it's a template ordinance, and
16 they didn't fine tune it, and that's fine.

17 This Court should require the Board of Zoning Appeals
18 to allow us to be heard on the merits even though we all
19 know what the outcome is.

20 If they will stipulate that the outcome is in
21 futility, Judge, I'll let you decide the special exception
22 upon its merits, but absent a stipulation of futility from
23 the City, I'm entitled to be heard. My client is entitled
24 to be heard. So that's all I have to say.

25 THE COURT: All right.

1 MR. GOLDSTEIN: Everything else would just be
2 repetition.

3 THE COURT: So the 60-second version of what you want
4 is you --

5 MR. GOLDSTEIN: For -- I'm sorry.

6 THE COURT: Go ahead.

7 MR. GOLDSTEIN: No, I interrupted you.

8 THE COURT: No, go ahead.

9 MR. GOLDSTEIN: Sixty seconds, the ordinance is
10 clear. The Rules of Statutory Construction is control.
11 I'm entitled to be heard on the merits.

12 THE COURT: So what you want me to say is an order
13 that says Mr. Goldstein's client is entitled to a hearing
14 on the merits before the City of Columbia Board of Zoning
15 Appeals?

16 MR. GOLDSTEIN: Correct.

17 THE COURT: All right. Is that it in a nutshell? I
18 try to make things simple.

19 MR. GOLDSTEIN: No, Judge. That's not in a nutshell.
20 That's the entire case.

21 THE COURT: Okay.

22 MR. GOLDSTEIN: If I got a one-sentence order that
23 said that, I would be grateful.

24 THE COURT: Okay.

25 MR. GOLDSTEIN: All right. Now, do you want me to

1 sit down so we can go issue by issue?

2 THE COURT: Yes. Let's go through that.

3 MR. GOLDSTEIN: Okay.

4 THE COURT: Hold on one second, Mr. Bergthold.

5 (Pause).

6 All right.

7 MR. BERGTHOLD: Thank you, Your Honor.

8 THE COURT: All right. Welcome back.

9 MR. BERGTHOLD: Thank you. May it please the Court.

10 From the tenor of what you have heard, this is really an
11 attack on the substance of the zoning ordinance which
12 prohibits a special exception from sexually oriented
13 businesses.

14 In fact, Mr. Goldstein's supplemental memorandum says
15 that that violates the 5th and 14th Amendments to the U.S.
16 Constitution. So in many ways, it's just an attempt to
17 re-litigate constitutional claims that were adjudicated by
18 Judge Wooten in the Federal District Court.

19 However, we have some more recent authority that we
20 wanted to provide for the court. Because yesterday, the
21 United States Court of Appeals for the Fourth Circuit
22 affirmed Judge Wooten's decision. It's an 11-page order.

23 It's a pro curium order issued just about a
24 month-and-a-half after we did oral argument -- in
25 Richmond, but I could hand that up at this time.

1 THE COURT: Sure.

2 MR. BERGTHOLD: And I won't -- I won't go through
3 what is a rather terse opinion, but it -- but basically
4 the bulk of these 11 pages summarizes Judge Wooten's
5 decision.

6 The very last paragraph on page 11, the last page of
7 the order, says Taboo timely appealed raising
8 substantially the same arguments advanced in the District
9 Court having carefully considered the controlling law and
10 the parties' briefs and the oral argument, we affirm on
11 the reasoning of the opinion of the District Court.

12 So they essentially affirmed Judge Wooten on every
13 single issue, and believe me, there were many issues
14 raised on appeal.

15 The footnote references claims of prior restraint,
16 discovery motions, leave to amend complaint, motion to
17 vacate the judgment based on the ordinance amendment which
18 is the one that Mr. Goldstein just referenced about three
19 minutes ago, and basically, they said we find with Wooten
20 on this.

21 So that is part of our appeal brief in this case is
22 that many of the arguments that are being lodged against
23 the Bosa (phonetic) decisions that are supposed to be
24 under review are really just nothing more than thinly
25 veiled attempts to re-litigate.

1 THE COURT: Explain to me in layman's terms why --
2 and just I know you guys do this every single day, okay.
3 You all have lived with this case for a lot longer than I
4 have.

5 I want you to explain to me in layman's terms like
6 you're explaining to it to a high school government class
7 why Cricket, whatever it's called, or Taboo or whatever
8 you want to call it, doesn't get a hearing before the
9 Zoning -- the Board of Zoning Appeals.

10 MR. BERGTHOLD: Okay. First, because 17-3-74(A), the
11 zoning ordinance says no special exception may be granted
12 for this type of use, and then the enabling statute that
13 allows the City through its zoning ordinance to set up a
14 Board of Zoning Appeals which is 6-29-800 sub(A)(2) -- or
15 (A)(3) states that the board has the power, "To permit
16 special uses by exception subject to the terms and
17 conditions for the uses set forth for such uses in the
18 zoning ordinance."

19 Sections 3--- third--- of the zoning ordinance, the
20 zoning ordinance in Columbia states that no variance or
21 special exception shall be granted for a sexually oriented
22 business. Thus, the Board of Zoning Appeals in this forum
23 said that the zoning administrator was correct to not
24 process an application for a special exception that the
25 zoning ordinance says cannot be granted.

1 THE COURT: Okay.

2 MR. BERGTHOLD: Now, so everything is subject to the
3 limitations in the zoning ordinance established by the
4 municipality, and one of the limitations is this type of
5 use that adult businesses have to be so far away from
6 churches and schools and residences, we're not going to
7 allow an exception to that.

8 THE COURT: Okay.

9 MR. BERGTHOLD: Now, and you know, obviously, he has
10 challenged the zoning ordinance, and it's been found to be
11 constitutional and so on and so forth. So that's
12 really -- that's it.

13 THE COURT: Okay. All right.

14 Are there any other issues you want to take up this
15 morning, Mr. Goldstein?

16 MR. GOLDSTEIN: The -- well, there is one
17 housekeeping matter on -- regard -- it's in regard to
18 the -- and in response to Mr. Bergthold, if I may say
19 this --

20 THE COURT: You may.

21 MR. GOLDSTEIN: -- the ordinance doesn't --

22 THE COURT: I wasn't saying you can't respond.

23 MR. GOLDSTEIN: Oh, okay.

24 THE COURT: I was saying if you want to respond,
25 you're welcome to respond.

1 MR. GOLDSTEIN: Very brief. 6-29-800 is the correct
2 statute, and the issue of the application for special
3 exception was never raised, never litigated by Judge
4 Wooten.

5 In fact, Judge Wooten sent back, held that there was
6 no prior restraint in this case which is an unappealed
7 finding, and it's on page 43 of Judge Wooten's order if
8 you want a copy of the order on the ground that the City
9 provided an emergency provisional license for businesses
10 while they were on appeal. So the special exception was
11 never before the United States District Court.

12 Last time we were here, Judge, there was a
13 considerable colloquy devoted to the fact as to whether or
14 not I did or did not have a responsibility to provide a
15 written transcript of what happened before the Board of
16 Zoning Appeals.

17 THE COURT: And whether or not the City did.

18 MR. GOLDSTEIN: Right, correct.

19 THE COURT: Right.

20 MR. GOLDSTEIN: And they said no. It's on you,
21 Goldstein. We don't have to do it.

22 So I did that, and on the day that the transcript was
23 completed by Southeastern Transcript, they emailed me
24 theirs. So I've now incurred a bill of \$359.10 which my
25 court reporter discounted by 30 percent based on the

1 circumstances.

2 I've telephoned -- or emailed opposing counsel asking
3 what their position is on this. Do I have to file a
4 motion with the Court to ask to be reimbursed for this. I
5 mean, if they told me they were having it transcribed, I
6 wouldn't have gone to the trouble.

7 I haven't gotten any response, so I just thought as a
8 matter of courtesy while we're here if they would let me
9 know what their position is on that.

10 As to the remaining issue, the remaining issue before
11 the Court is the unresolved issue over the pro hac vice
12 admission. Again, Your Honor, that matter has been fully
13 briefed.

14 I have requested a -- an advisory opinion from the
15 South Carolina Bar. Yet, they have a response. We know
16 what the position is. The position is -- their position
17 is you don't have to be admitted pro hac vice for an
18 administrative hearing.

19 My position is yeah, it was an adversarial
20 proceeding. You have got to be admitted. At the hearing,
21 at the transcript hearing -- and I've quoted this in our
22 brief, the statement was that they had admitted for pro
23 hac vice admission, but now we know from -- from the
24 information furnished from the Supreme Court that's not
25 the case.

1 So maybe there was an admission for pro hac vice, but
2 it wasn't to the South Carolina Supreme Court which I
3 think has the sole authority. So I think that issue has
4 been fully briefed. I'll be happy to answer any questions
5 Your Honor has on that.

6 THE COURT: Mr. Bergthold.

7 MR. BERGTHOLD: If you --

8 THE COURT: Do you want to respond to the transcript,
9 Mr. Balthazor?

10 MR. BALTHAZOR: Certainly. May it please the Court.

11 THE COURT: Did I say your name right today?

12 MR. BALTHAZOR: Balthazor. I think. I don't know, I
13 wasn't really listening.

14 THE COURT: You stopped listening to me a long time
15 ago, didn't you?

16 MR. BALTHAZOR: That's right.

17 THE COURT: Yeah.

18 MR. BALTHAZOR: Especially the way people -- the way
19 my name is pronounced.

20 Yeah, I will address the transcript issue real
21 quickly, and I sent Your Honor a letter back on
22 January 7th --

23 THE COURT: Okay.

24 MR. BALTHAZOR: -- of this month sort of outlining
25 what had occurred with the -- with the transcript.

1 As you indicated, back in the hearing in October of
2 last year the issue did come up of who may have been
3 required or whether the City was required to provide a
4 transcript.

5 There is very clear law which I have cited in that
6 letter on January 7th that the City is not required to
7 produce a transcript, doesn't mean we can't go out and get
8 our own transcript.

9 The transcript issue first arose with Mr. Goldstein
10 back in September of last year where he requested that the
11 City get one. I said we weren't planning on doing it.
12 There was a DVD of the hearing, and he said back in
13 September, well, I'm going to get one.

14 You know, we fast forward to October. There was a
15 discussion what about the transcript would arrive. There
16 was further discussion in December about when the
17 transcript would arrive, and the transcript was all tied
18 to providing you with proposed orders.

19 THE COURT: All right.

20 MR. BALTHAZOR: I think once a transcript was
21 provided, then proposed orders would be forthcoming in 30
22 days.

23 THE COURT: Right.

24 MR. BALTHAZOR: So once I got an indication that --
25 that the transcript was on the back burner, Mr. Goldstein

1 invited me to contact his court reporter. I did so, was
2 informed the transcript was on the back burner.

3 I went ahead and ordered a transcript. As soon as I
4 received the transcript, I sent it to the Court and to Mr.
5 Goldstein. I received a bill from his court reporter for
6 a copy of that transcript which I intend to pay. I have
7 had to pay for my transcript.

8 There is nothing, nothing that says we can't go out
9 and get our own -- get our own transcript which we've done
10 and provided -- provided to everyone at this point.

11 THE COURT: All right. So I think the answer to your
12 question, Mr. Goldstein, is no.

13 MR. BALTHAZOR: Yes.

14 THE COURT: They don't intend on paying.

15 MR. BALTHAZOR: Do not intend on paying those costs.
16 We have paid our costs, and they can bear their costs on
17 getting their own transcript.

18 THE COURT: All right. Mr. Bergthold, do you want to
19 respond to the pro hac vice information?

20 MR. BERGTHOLD: Yes. If I could first address what
21 he brought up for the first time which was sort of a
22 rebuttal of the merits which was simply a licensing
23 provision that isn't within the purview of the Board of
24 Zoning Appeals and frankly does not apply in this
25 circumstance any way. So you talked about provisional

1 license in getting that.

2 As for the fairness of the proceeding, I think the
3 transcript will reveal there were several locations in the
4 transcript where Mr. Goldstein basically said let's be
5 fair. I'm not going to get a fair shake here.

6 Page 63 of the transcript, he basically tells
7 Professor Hubbard I'm not going to get a fair shake here,
8 and then at one point says can we have an honest
9 conversation.

10 Throughout the proceeding, the Board of Zoning
11 Appeals said, well, okay, make your next point. Do you
12 have any other points? So he did have an opportunity to
13 be heard. Enough on that.

14 With regard to the pro hac vice issue, it's fairly
15 straightforward. Rule of Professional Conduct 5.5 says
16 that a lawyer admitted in another state can temporarily
17 provide legal services in the State of South Carolina
18 provided that they are undertaking an association with the
19 lawyer who is admitted in South Carolina or that there
20 are -- that it relates to a potential proceeding where the
21 lawyer expects to be admitted, and that's how I was
22 appearing and had authorization to appear with Mr.
23 Balthazor in November of 2013.

24 What we did as a matter of course just of -- just
25 because there was never a hearing before that

1 administrative person at the city level before, we filed
2 an application for admission pro hac vice just to the City
3 Hearing Officer.

4 We followed kind of all the information that would be
5 required of somebody, and we got there. Mr. Balthazor
6 said, "I wanted to make sure that you had received that
7 and accepted it."

8 She said, "Yes, that's right. I have accepted it."
9 So on and so forth.

10 So basically, we had proceeded with the proceeding.
11 Then when we came to court here, we filed under the rule.
12 Rule 5.5 allows temporary practice when it's not in front
13 of a state court or a state administrative agency.

14 When you get into a state court like here in Common
15 Pleas or Circuit Court, then Rule 404 kicks in. In
16 subsection (A) of that rule specifically outlines the
17 scope of when you have to apply to the South Carolina
18 Supreme Court, and you're not really applying to the South
19 Carolina Supreme Court. You're sending them a check for
20 \$250.

21 They notify the trial court that that's been
22 received, and then the trial court makes the ruling on the
23 pro hac vice admission. So the last sentence of 404(A)
24 says, "For the purposes of this rule, a tribunal includes
25 any court of this state, the South Carolina Administrative

1 Law Court, and any South Carolina agency authorized to
2 hear and determine contested cases as defined under the
3 code in 1-23-310."

4 Then you turn to 1-23-310, an agency means each state
5 court or a State Board, Commission Department or Officer.
6 So there is nothing in Rule 404 that triggers any filing
7 with the South Carolina Supreme Court with regard to a
8 municipal level hearing officer proceeding.

9 We filed something that kind of had the same kind of
10 information just because we didn't know what the hearing
11 officer would require, but we got there. Mr. Balthazor
12 asked her if she had accepted that and was okay to
13 proceed. She said yes, and that's -- that's the only
14 issue.

15 Therefore, one thing that Mr. Goldstein did raise at
16 the October 28th hearing is under Rule 404, 409 admission
17 in this case, there is the necessity of a written order.
18 So I brought a proposed order.

19 THE COURT: Okay. Pass that you up.

20 All right. Do you want to respond to that,
21 Mr. Goldstein?

22 MR. GOLDSTEIN: Yes, Your Honor. I'd like to respond
23 to his rebuttal to my rebuttal on the merits. I'm not
24 re-litigating the -- Judge Wooten ruled. He is affirmed
25 by the Fourth Circuit. I'm going to petition for a

1 rehearing.

2 I'll probably have a slim chance of prevailing on
3 that. Then I'll ask the US Supreme Court to take a look
4 at the case, probably unlikely that they will, but I have
5 the right to do that.

6 I'm not challenging the constitutionality of the
7 ordinance. I'm here before you on the state rules of
8 statutory construction. The ordinance says what the
9 ordinance says. It says no special exception may be
10 granted. Fine. I'm happy with that. I'm not challenging
11 anything about that.

12 It doesn't say shall not be granted. It said may not
13 be granted. It may or may not. That's fine. He wrote
14 that -- the author of the ordinance is sitting right here
15 in this courtroom, so we can certainly him about the
16 intent of the ordinance.

17 Now, as for pro hac vice, I'm just confused on what
18 their position is. I don't -- on one hand, I hear that
19 you do have to be admitted pro hac vice. I'm also hearing
20 no you don't because it was an administrative hearing. I
21 don't know what they're saying.

22 THE COURT: I understood what they're saying. Argue
23 what you need to.

24 MR. GOLDSTEIN: Okay. Here is the hearing. It was
25 -- it was --

1 THE COURT: Right.

2 MR. GOLDSTEIN: -- direct, cross, exhibits, ruling on
3 evidence.

4 THE COURT: That was the one before the Board of
5 Zoning Appeals.

6 MR. GOLDSTEIN: The -- the -- no. The -- this -- I'm
7 back to the Application for Hardship Extension --

8 THE COURT: Okay.

9 MR. GOLDSTEIN: -- on -- where Mr. --

10 THE COURT: All right. Who was that in front of?

11 MR. GOLDSTEIN: It was in front of somebody named
12 Pike, P-I-K-E. Let me see what her -- I don't know what
13 her first name is.

14 MR. BERGTHOLD: It's Malane. It's a city hearing
15 officer.

16 THE COURT: Okay. And is that some kind of City of
17 Columbia person?

18 MR. GOLDSTEIN: I do -- I wouldn't know. I wasn't
19 there.

20 MR. BERGTHOLD: She -- she is a licensed attorney.
21 The provisional licensing ordinance for the City of
22 Columbia provides for a sexually oriented business to
23 apply for a hardship extension after the two-year
24 amortization period runs. That's an administrative
25 hearing that gets heard by a hearing officer.

1 That hearing officer was -- for lack of a better
2 term, I guess retained or hired by the City to preside
3 over this hearing. She is a licensed attorney, Malane is
4 her first name. Pike is her last name.

5 THE COURT: Okay. That's who it is.

6 MR. GOLDSTEIN: Right. And, of course, there was
7 no -- when they got there, my client was uncounseled. He
8 didn't have a lawyer.

9 THE COURT: Okay.

10 MR. GOLDSTEIN: And he hadn't been provided notice
11 that Mr. Bergthold was appearing pro hac vice. I think
12 even looking at the argument in the light most favorable
13 to Mr. Bergthold, they would have had an obligation to
14 notify their -- they knew it was an adversarial proceeding
15 -- they had to know that. It clearly is an adversarial
16 proceeding.

17 Your witnesses are sworn in direct examination and
18 cross-examination. So had the -- had my client shown up
19 without a lawyer, been afforded an opportunity to respond
20 to the application pro hac vice, he may have elected to
21 retain counsel and be represented. So, you know, I don't
22 understand this foot in one half of the can.

23 THE COURT: Okay. Anything else? You don't need to
24 respond to that.

25 MR. BERGTHOLD: No.

1 THE COURT: Unless you want to.

2 MR. BERGTHOLD: No, Your Honor.

3 THE COURT: Okay. All right. I'm going to make a
4 decision by the end of next week, and then I'll -- whoever
5 I side for can do a proposed order. But I'm not letting
6 this thing linger. Your motion for pro hac vice is
7 admitted. I'm signing that today.

8 MR. BERGTHOLD: Thank you.

9 THE COURT: That issue is over and done with, and
10 I'll make an issue on the case really quick.

11 MR. BALTHAZOR: Sure. And I certainly don't want to
12 belabor things. I just want to make sure all of the
13 issues were out there today. There was another issue --

14 THE COURT: Okay.

15 MR. BALTHAZOR: -- that was raised by -- by Cricket
16 Store which was not -- which was not brought up today.

17 I mean, I question whether that issue is abandoned at
18 this point or if we're -- I just don't want to -- I want
19 to make sure when Your Honor issues a ruling that you're
20 ruling on all of --

21 THE COURT: Which issue are you referring to?

22 MR. BALTHAZOR: Well, the issue that was posed in the
23 administrative appeal to the Board of Zoning Appeals was
24 whether the zoning administrator was arbitrarily requiring
25 Taboo to comply with the zoning ordinance.

1 There was a letter that was sent on January 28th,
2 2016 that said -- to paraphrase, the District Court has
3 now ruled against you, and we intend to enforce our
4 ordinances if you are a sexually oriented business.

5 It was not -- it was not a ticket. It was not a
6 citation. It just said we plan on enforcing our
7 ordinances.

8 Taboo filed an administrative appeal from that saying
9 we should not be required to comply with these ordinances,
10 basically.

11 Well, the Fourth Circuit as we -- as you now know has
12 ruled and said this ordinance is valid. You need to
13 comply with it.

14 So basically, Taboo is trying to get out of complying
15 with that ordinance, and what the Board of Zoning Appeals
16 ruled at the hearing was that letter that Mr. Cooke, the
17 zoning administrator issued on January 28th, which defined
18 the business as a sexual device shop; that that decision
19 was supported -- was supported by evidence in the record.

20 The standard of review for this court is whether
21 there was any evidence to support that decision of the
22 zoning administrator.

23 THE COURT: That's my standard, right?

24 MR. BALTHAZOR: Yes, that's your standard, Your
25 Honor.

1 THE COURT: Right.

2 MR. BERGTHOLD: And we do have a proposed order which
3 addresses both of the issues that are raised by
4 Mr. Goldstein.

5 But that's -- that's -- that was the first issue.
6 There were two administrative appeals to the Board of
7 Zoning Appeals. One was that letter written by Brian
8 Cooke, and the second was whether a special -- whether the
9 Board of Zoning Appeals could entertain an application for
10 special exception.

11 THE COURT: All right. Do you want to respond to
12 that, Mr. Goldstein?

13 MR. GOLDSTEIN: Yes, sir, Your Honor. That's
14 addressed in my brief, my supplemental brief on page two
15 as I state --

16 THE COURT: You're not waiving that argument?

17 MR. GOLDSTEIN: Oh, no. I thought it was resolved,
18 and I'm grateful for Mr. Balthazor for the way -- I'm
19 going to trip over your name every time. Balthazor. I'm
20 grateful for him for bringing it up.

21 Honestly, when I got the transcript and read it, I
22 was surprised to see that I thought we had reached a
23 common ground on that, and I addressed it on page two of
24 my supplemental brief. I cite to page 35 of the
25 transcript of the hearing where Mr. Cooke says the

1 enforcement proceeding in the court is stayed, is not
2 proceeding pending the administrative appeal
3 determination. That was a question for Professor Hubbard.
4 Mr. Cooke says, "That is correct."

5 So I assume -- and later on he testifies that all the
6 criminal citations are, quote, on hold, so I thought we
7 had reached common ground there. So if we haven't then
8 yes, that issue is very much alive --

9 THE COURT: Okay.

10 MR. GOLDSTEIN: -- and it would be the -- it would be
11 reviewed by Your Honor on the standard that Mr. Balthazor
12 just identified.

13 THE COURT: Great. Okay.

14 MR. BERGTHOLD: Your Honor, can we hand up the
15 proposed order?

16 THE COURT: You may. All right. I'll make my -- I'm
17 not letting this thing linger around. It's been around
18 long enough. I'll make a decision by the end of the next
19 week. Thank you both very much.

20 MR. GOLDSTEIN: Thank you, Your Honor.

21 (Whereupon, the proceedings were concluded.)
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 26th day of
January, 2017.

May 29, 2016

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

- **Sec. 1-2. - Definitions and rules of construction.**

(a)

In the construction of this Code and of all ordinances of the city, the following definitions and rules of construction shall be observed, unless inconsistent with the manifest intent of the city council or the text clearly requires otherwise:

And, or. The word "and" may be read as "or," and the word "or" as "and," where the sense requires it.

Bond. When a bond is required, an undertaking in writing shall be sufficient.

City. The term "the city" means the City of Columbia, in the County of Richland and State of South Carolina, except as otherwise provided.

Code. Whenever the words "Code" or "this Code" are used they shall mean and refer to the Code of Ordinances, City of Columbia, South Carolina, as designated in section 1-1.

Computation of time. The time within which an act is to be done shall be computed by excluding the first day and including the last day, and if the last day is Sunday or a legal holiday, that day shall be excluded.

Council and city council. The terms "the council" and "the city council" mean the City Council of Columbia, South Carolina, and shall be inclusive of the mayor.

County. The term "county" means the County of Richland and/or the County of Lexington in the State of South Carolina.

Delegation of authority. Whenever a provision appears in this Code requiring or authorizing the head of a department or other officer of the city to do some act or perform some duty, it shall be construed to authorize such department head or other officer to designate, delegate and authorize subordinates to do the required act or perform the required duty unless the terms of the provision specifically designate otherwise.

Gender. Words importing the masculine gender include the feminine and neuter.

In the city. The term "in the city" means and includes any territory within the corporate limits of the City of Columbia, South Carolina, and the police jurisdiction thereof, and any other territory over which regulatory power has been conferred on the city by general or special act, except as otherwise specified.

Interpretation. In the interpretation and application of any provision of this Code, it shall be held to be the minimum requirement adopted for the promotion of the public health, safety, comfort, convenience and general welfare. Where any provision of this Code imposes greater restrictions upon the subject matter than any general provisions imposed by this Code, the provisions imposing the greater restriction or regulation shall be applicable.

Joint authority. All words giving joint authority to three or more persons or officers shall be construed as giving such authority to a majority of such persons or officers.

Minor. The term "minor" means any person under the age of 18 years, unless otherwise governed by state law.

Month. The term "month" means a calendar month.

Municipal clerk and clerk. The terms "municipal clerk" and "clerk" mean the Municipal Clerk of the City of Columbia as described in S.C. Code 1976, § 5-7-220.

Number. Words used in the singular number include the plural, and words used in the plural number include the singular.

Oath. The term "oath" includes an affirmation in all cases in which, by law, an affirmation may be substituted for an oath, and in such cases the words "swear" and "sworn" shall be equivalent to the words "affirm" and "affirmed."

Officers, employees, departments. The title of any officer, employee, department, board or commission used in this Code shall be construed as if the words "of the City of Columbia, South Carolina" followed it.

Owner. The term "owner," applied to a building or land, includes any part owner, joint owner, tenant in common, joint tenant, or tenant by the entirety of the whole or a part of such building or land.

Person. The term "person" includes a corporation, firm, partnership, association, organization and any other group acting as a unit, as well as an individual.

Personal property. The term "personal property" includes every species of property except real property.

Preceding, following. The terms "preceding" and "following" mean next before and next after, respectively.

Property. The term "property" includes real and personal property.

Public property. The term "public property" includes all land owned or leased by the city within or without the city.

Real property and real estate. The terms "real property" and "real estate" include lands, tenements and hereditaments.

Roadway. The term "roadway" means that portion of a street improved, designated or ordinarily used for vehicular travel.

Shall, may. The word "shall" is mandatory; the word "may" is permissive.

Sidewalk. The term "sidewalk" means any portion of a street between the curblin, or the lateral line of a roadway where there is no curb, and the adjacent property line, intended for the use of pedestrians.

Signature and subscription. The terms "signature" and "subscription" include a mark when the person cannot write.

State. The terms "the state" and "this state" mean the State of South Carolina.

Statute references. Whenever reference is made to state law or to the state statutes, it shall be construed to refer to the latest edition of the Code of Laws of South Carolina, as amended.

Street. The term "street" includes avenues, boulevards, highways, roads, alleys, lanes, viaducts, bridges and the approaches thereto and all other public thoroughfares in the city, and means the entire width thereof between opposed abutting property lines. It shall be construed to include a sidewalk or footpath, unless the contrary is expressed or unless such construction would be inconsistent with the manifest intent of the city council.

Tenant and occupant. The term "tenant" or "occupant," applied to a building or land, includes any person who occupies the whole or a part of such building or land, whether alone or with others.

Tense. Words used in the past or present tense include the future as well as the past and present.

Writing and written. The terms "writing" and "written" include printing and any other mode of representing words and letters.

Year. The term "year" means a calendar year.

(b)

In the construction of this Code and of all ordinances of the city, all officers, agents, employees and other persons, together with all things and places therein referred to, unless a contrary intention appears, shall be construed to mean the officers, agents, employees, and other persons, things and places situate in the city or employed by or appertaining to the city.

• **Sec. 17-374. - Location.**

(a)

No variance from any of the provisions of this section may be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section may be granted by the zoning board of adjustment.

(b)

A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of a designated M-1 or M-2 district. A sexually oriented business shall be located within an M-1 or M-2 district; however no sexually oriented business shall be permitted to operate within an M-1 or M-2 district appended with a -DD, -ID, -DP, -NC or -PD Overlay district.

(c)

A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within 900 feet of:

(1)

A church;

(2)

A boundary of any residential district;

(3)

Any outdoor recreational facility at which minors are likely to congregate;

(4)

A lot devoted to residential use;

(5)

A day care facility;

(6)

A cemetery.

(d)

A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(e)

A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,250 feet of a public or private elementary or secondary school.

(f)

A person commits a misdemeanor if he causes or permits the operation, establishment or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(g)

For purposes of subsections (c) and (e), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure where a sexually oriented business is conducted, to the nearest boundary of a residential district, or to the nearest property line of the premises of a church, day care facility, cemetery, outdoor recreational facility at which minors are likely to congregate, a lot devoted to residential use, or a public or private elementary or secondary school.

(h)

For purposes of subsection (d) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(i)

Any sexually oriented business lawfully operating as of the date of the ordinance from which this section is derived that is in violation of subsections (b), (c), (d), (e) or (f) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue until and through January 1, 2014, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(j)

A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a land use within the distances set forth in subsection (c), (d), or (e) above. This provision applies only to the renewal of a valid license, and does not apply when a completed application for a license is filed after a license has expired or has been revoked.

(Ord. No. 2012-093, 11-13-12)

Sec. 311.016. "MAY," "SHALL," "MUST," ETC. The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:

- (1) "May" creates discretionary authority or grants permission or a power.
- (2) "Shall" imposes a duty.
- (3) "Must" creates or recognizes a condition precedent.
- (4) "Is entitled to" creates or recognizes a right.
- (5) "May not" imposes a prohibition and is synonymous with "shall not."
- (6) "Is not entitled to" negates a right.
- (7) "Is not required to" negates a duty or condition precedent.

Added by Acts 1997, 75th Leg., ch. 220, Sec. 1, eff. May 23, 1997.

ZONING COMMENTS

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In December 2008, I began a five-year term as a member of the Columbia Board of Zoning Appeals. Because I teach a course on "Land Use Planning," serving on this board seemed a very good way to combine public service with academic development.

Prior to beginning my term on the Board, I had attended numerous Board meetings (as well as meetings of the City Council, the Planning Commission, and the Design and Development Review Commission) over a period of over twenty years. I had also served as a member of the City of Columbia Planning Commission, including a term as chair. As a result of this experience and of my awareness of the practice in other local governments, I was familiar with the often informal and flexible approach of citizen boards to the application of rules. Because most people (including many lawyers) do not know much about how the zoning process works, I am going to post "Comments" at various times here on my faculty website. In addition, these Comments will provide me with a way to express my personal views in a more precise and organized fashion than is possible at Board meetings.

Several caveats or disclaimers about these Comments are necessary. First, the initial comments are necessarily preliminary and tentative in some respects. Boards change "personality" as membership changes, and I have only been a member of the Board for a few months as I begin these Comments.¹ It is likely that many observations and conclusions will be qualified or changed as time goes on. Second, these Comments are my personal views and do

¹ I have also tried to get a sense of what the Board did before I joined by skimming through minutes for meetings in the most recent years prior to my appointment to the Board.

not reflect the views or position of the Law School, the University, the City of Columbia, or the Board. Third, much of my background in “real world” zoning disputes has been in the role of advocate of neighboring owners or of neighborhood associations. This background could be viewed as the basis for a bias. Not surprisingly, I do not view myself as biased. For example, I have frequently worked with developers to help them with “good” projects. I have also helped draft legislation that strengthened property owners’ procedural rights in zoning disputes.

I would welcome comments or questions concerning these comments. My contact information is available on this website.

I. JUNE 2009

These first comments address four points: (1) a summary of regulatory provisions relating to the Board; (2) an overview of the Board’s powers; (3) a discussion of the Board’s composition and procedures; and (4) an analysis of one of the Board’s powers—the grant or denial of a special exception. Additional comments will be added later.

A. The Regulatory Framework

South Carolina has followed the practice of most states by enacting an “enabling act” that enables or authorizes local governments to adopt zoning schemes.² The enabling act provides the basic framework that all local governments must follow. Cities and counties, acting pursuant to the enabling act, adopt specific local zoning schemes applicable to their jurisdiction. Local

² See South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. CODE §§ 6-29-310 *et seq.*

governments are not required to have zoning, and many local governments in South Carolina have not adopted zoning schemes. Columbia's scheme for planning, land development, and zoning is set forth in Chapter 17 of the Code of Ordinances of the City of Columbia. Article III of this chapter addresses zoning.

Because the South Carolina enabling act and Article III of Chapter 17 of the Columbia Code establish the framework for zoning, selections from both are set forth as an appendix to these comments. In addition, because the Board's "Rules and Regulations" contain its rules of procedure,³ a copy of these by-laws is also attached.

B. The Three Powers of the Board

The Board makes three types of decisions. First, it hears and decides *appeals* from decisions made by a city zoning official.⁴ Second, it decides whether to grant a *special exception*.⁵ Generally, permitted uses of land are granted as a matter of right based on a table indicating permitted uses in a certain zoning category. For example, restaurants are permitted as a matter of right in a C-3 (General Commercial) district in Columbia because the City Council has determined that regular restaurants are always appropriate for C-3 districts. In contrast, a fast food restaurant may, or may not be, appropriate in a C-3 district. The Board determines on a case-by-case basis whether a proposed fast food restaurant is appropriate at a particular site and, if it is appropriate, grants a special exception, which permits the fast food restaurant to conduct

³ See S.C. CODE § 6-29-790.

⁴ See S.C. CODE § 6-299-800A(1); COLUMBIA CODE § 17-112(1).

⁵ S.C. CODE § 6-29-800A(2); COLUMBIA CODE § 17-112(2).

business at that site. Third, the Board considers requests for a *variance*.⁶ An example of such a case is a request by a homeowner in an RS-3 (small lot single family residential district) for a variance to allow him to build an addition to his home that will be six feet from a rear property line even though the ordinance requires a ten-foot setback from the rear line.

C. Composition and Procedures of the Board

1. The rules

The Board has seven members, who are appointed by the City Council for staggered five-year terms.⁷ It is a “quasi-judicial” body with a number of court-like aspects. For example, it has the power to administer oaths and to compel attendance of witnesses by subpoena, and it has a statutory duty to adopt rules of procedure.⁸ Columbia’s Board has adopted “Rules and Regulations,” which set forth, *inter alia*, its rules of procedure, which include a provision that “the opportunity to cross-examine opposing witnesses may be freely extended.”⁹ The Board is also like a trial court in that an appeal from it is based on a “record,” and this results in the need for procedures to create and maintain written orders and decisions, with separately stated findings of fact and conclusions of law.¹⁰ The Board is only quasi-judicial in nature because it is

⁶ S.C. CODE § 6-299-800A(3); COLUMBIA CODE § 17-112(3).

⁷ S.C. CODE § 6-299-780; COLUMBIA CODE § 17-111(a).

⁸ S.C. CODE § 6-299-790; COLUMBIA CODE § 17-111(b). The Board may also request the Circuit Court to impose a penalty for contempt by a person appearing before the Board. S.C. CODE § 6-29-810.

⁹ Rules and Regulations of the Zoning Board of Adjustment, Columbia South Carolina § 10.1 (rev. 2/11/97).

¹⁰ See S.C. CODE § 6-29-800(F); COLUMBIA CITY CODE § 17-113(b).

unlike a court in many respects. For example, the South Carolina Rules of Evidence do not apply to its proceedings.

2. The practice

Though the practice of the Board generally follows the legal framework, there are a number of interesting deviations. For example, the terms of the current members are “staggered” only in the sense that five expire in 2013 and two expire in 2014.

There is no requirement that members of the Board be lawyers. In Columbia, as in most cities and counties in South Carolina, most of the Board members are not lawyers. In addition, there are no lawyers on the Columbia zoning staff, and city attorneys do not routinely attend Board meetings. As a result, if the Board wants legal advice, it must ask for a city attorney to come give it advice, which is almost always given in executive session.¹¹ Because the Board and staff are nonlawyers, it is not surprising that some of the powers of the Board are *not* used. More specifically, I am not aware of a single instance where the Board has used its powers to issue subpoenas or to allow cross-examination.

Most of the time, the Board uses an informal, nontechnical approach to procedural matters and pays little, if any, attention to the procedural requirements contained in its Rules and Regulations. This approach is used, and generally works well in practice, because most Board members, as well as many applicants and other members of the public, have little, if any,

¹¹ Though the Board is subject to the open meetings requirement of the South Carolina Freedom of Information Act, meetings may be closed for the receipt of legal advice. See S.C. CODE §§ 30-4-60, -70.

experience with technical procedural rules or formal public speaking. However, this approach can cause problems. For example, a recent decision of the Board was reversed by a court for failure to follow its rules.¹² Another example of the Board's lack of use of its "Rules and Regulations" is its pattern of allocating time at hearings without using its Rules and Regulations. Instead, it tends to allow persons to present evidence without time limitations. On the occasions when it does impose limits, it does so without reference to the Rules and Regulations.

This non-rule-based approach to time limits was used in a case before the Board at its May 2009 meeting. At this meeting, the Board allowed an applicant to speak in favor of its request for a special request with no time limits and then imposed a three-minute limit on all subsequent speakers, including a spokesperson for opponents.¹³ At no point did anyone refer to the "Rules and Regulations,"¹⁴ which provides at Section II.10:

¹² Dennis v. City of Columbia, Board of Zoning Adjustment, CA. No. 08-CP-40-9138 (Feb. 19, 2009).

¹³ Board Case No. 09-024-SE (Request for a special exception to operate a retail establishment in excess of 10,000 square feet in MX-1-5P district).

¹⁴ I participated in this failure because I did not refer to the Rules. Instead, I objected to the limitation of time for the opponents' spokesperson on the basis of fairness. I adopted this approach because the Columbia Board follows the general practice of zoning boards and commissions, which consist largely of nonlawyers. The general practice to imposing time limits is to use informal standards of fairness rather than "technical" rules in structuring input from applicants and other members of the public. This approach is more flexible as to time than the Board's formal rules, but the informal practice is usually similar in its concern for rough parity in time between opposing positions. My objections on the basis of fairness and parity were not shared by other members of the Board, and the spokesperson for the opposition was severely limited in the time allotted. Thus, it appears (at least to me) that the common standard of informal fairness was not followed at the meeting. Consequently, I will adopt a technical, rules-based position from this point forward when the Board considers imposing time limits on presentations even

Order. At the hearing the order shall be as follows:

- a. Statement of the case by the Chairman or the Secretary,
- b. Administrative officer's side of the case,
- c. Appellant's side of the case,
- d. Interested property owner's/owners' side of the case,
- e. Appellant's rebuttal,
- f. Opposition's rebuttal.

Five minutes shall be allotted for the appellant's side of the case and for the opposition's side of the case. Parties interested shall direct their statements and arguments to the Board and shall not direct them to their opponents; however, the opportunity to cross-examine opposing witnesses may be freely extended when conducted in an orderly manner.¹⁵

D. Analysis of Substantive Rules Governing Special Exceptions

The South Carolina enabling act says very little about special exceptions. The act simply provides that a board has the power "to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance. . . ."¹⁶ The Columbia Ordinance, which is something less than a model of clarity, has a number of substantive provisions relating to the grant or denial of a special exception. Three of these are particularly important in nearly all decisions. First, section 17-112(2)a4 provides that one of the duties of the Board is to "[d]eny special exceptions when not in harmony with the intent and purpose of this

though the inflexibility of this approach may present more problems than a fair informal system. For example, the time limits are very short and it is not clear how to identify the person or persons who would receive the five minutes for the opposition's side. See *infra* note 15 and accompanying text.

¹⁵ These provisions appear to be designed for use in appeals from an administrator's decision. However, section III.4 indicates that they also apply to special exceptions and variances because this section provides:

Approvals Required by Ordinance[sic]. Where approval by the Board is specifically required by the Zoning Ordinance, each such case shall be considered an appeal to the Board and these rules and regulations shall apply.

¹⁶ S.C. CODE § 6-299-800A(3).

article.” Second, section 17-112(2)b4 provides that the Board “shall make a finding that it is empowered under the section of this article described in the application to grant the special exception and that the special exception will not adversely affect the public interest.” Third, section 17-112(2)c provides:

Criteria for Special exceptions. In addition to definitive standards in this article, the board of zoning appeals shall consider the following:

1. Traffic impact;
2. Vehicle and pedestrian safety;
3. Potential impact of noise, lights, fumes, or obstruction of air flow on adjoining property;
4. adverse impact of the proposed use on the aesthetic character of the environs, to include the possible need for screening from view; and
5. Orientation and spacing of improvements or buildings.

For purposes of discussion herein, the introductory phrase, “In addition to definitive standards in this article,” will be treated separately from the five criteria explicitly listed in section 17-112(2)c.

1. The five criteria explicitly listed

This discussion starts with the five listed criteria because these have been the main focus of the Board and of the city’s planning staff. More specifically, they are requirements on the City’s application form and on the city’s website. (The form also lists public interest; the website only lists the five criteria.) In addition, Board members are given a sheet listing them, along with public interest, and are urged to refer to them in making motions to grant or deny an application for a special exception.

Focusing on these criteria has an appeal because they seem so specific and concrete and thus appear to be less susceptible to manipulation and more amenable to objective review than concerns like “intent and purpose” and “public interest.” However, with the exception of the

direction to consider the impact of the proposed use on the "character of the environs," these criteria, by themselves, actually provide virtually no guidance to decisionmaking by the Board or to review of its decisions by a court. For example, if a traffic engineer provides objective empirical evidence to show that the "traffic impact" of a proposed use will be five hundred cars visiting the site for the proposed use over the course of a week, what does a Board member do with this concrete, specific bit of data? As a Board member, the list itself provides me with no measure or guidance as to whether five hundred is acceptable or is too high. Like the famous quote about pornography, my decision as a Board member would be based on my ability to recognize "too high" when I see it.

Some outside standard is needed because the literal language of Section 17-112(2)c requires only that the Board "consider" the listed criteria. Thus, the Board could satisfy this language simply by considering the criteria and could not be reversed for failure to "consider" them no matter what the consideration reveals and no matter how it decides. In order to avoid such an absurd result, the South Carolina Supreme Court was forced to devise a measure of "too much" traffic in *Bannum v. City of Columbia*,¹⁷ which appears to say that: (1) an applicant is allowed to select a use that is permitted as a matter of right; and (2) the application satisfies the "traffic impact" requirement so long as the proposed use has no greater impact than the selected use permitted as a matter of right.¹⁸ Though this approach provides a standard, it clearly results from judicial inventiveness rather than clear guidance from the ordinance.

¹⁷ 335 S.C. 202, 516 S.E.2d 439 (S.C. 1999).

¹⁸ See 516 S.E.2d at 440 n.4.

The approach also raises questions about the process for considering applications for special exceptions. One question concerns the treatment of the other factors on the list. If an applicant picks a specific permitted use for comparing traffic, is the applicant bound to this same use for comparison with other factors on the list, or can the applicant pick and choose permitted uses for comparison as to each listed factor? In addition, there will be situations where this approach would not apply. For example, retail uses are permitted as a matter of right in an MX-1 (mixed use) district but only if the size of the use does not exceed 10,000 square feet.¹⁹ A special exception is required for stores larger than 10,000 square feet.²⁰ On the one hand, stores larger than 10,000 square feet will generate more customers, and thus more traffic. From this perspective, there is a negative impact on traffic. On the other hand, a 15,000 square foot store on a particular parcel of land will generate about the same amount of traffic as two 7,500 square foot stores on the same parcel of land. This view suggests no negative impact on traffic. Without some substantive measure, how does one determine which perspective to use in assessing traffic impact?

In practice, the Board appears not to follow the approach used in *Bannum*. Instead of comparing impact to that of permitted uses, the Board uses a variety of techniques to provide substantive content. Perhaps the most common technique is to make decisions to approve based simply on an ad hoc application of a de minimus approach. For example, negative traffic impact will be regarded as so small that there is no “real” impact given the amount of traffic currently

¹⁹ COLUMBIA CODE § 17-263(b).

²⁰ *Id.* A similar scheme is used for C-2 zoning, which requires a special exception for stores in excess of 5,000 square feet and prohibits stores larger than 10,000 square feet. COLUMBIA CODE § 17-263(a).

existing. This approach is consistent with a common tendency of people to discount or ignore small incremental changes. However, the cumulative effect of small changes can result in what can be viewed as "death by a thousand cuts." Global warming is an extreme example of such slow, gradual change resulting from multiple actions, none of which, by itself, causes the problem. Because of this problem of cumulative impact, it is important to consider not only the impact of a particular use in terms of some measure, but also the cumulative impact of such uses. For example, it is important to resist the urge to approve a new store larger than 10,000 square feet in an MX-1 district where most existing stores are less than 10,000 square feet by using a de minimus approach because, over time, the cumulative effect of such approvals would be that the general character of the district could become stores over 10,000 square feet.

2. "Definitive standards"

One logical approach to interpreting the phrase "definitive standards" in Section 17-112(2)c is to treat it as a reference to specific standards applicable to a particular special exception. For example, the requirements for off-site parking set forth at Section 17-345(b)(2). In the past, the Board has focused on the five listed criteria and given this phrase less, if any, concern. However, there is reason to believe more attention will be placed on this language in the future.

3. Public policy

The necessary substantive content for determining whether five hundred cars is too much impact on traffic under the first listed criteria could come from public policy. Prior to 2009, the Board occasionally relied on public policy as the basis for denying a request for special exception. However, at the May 2009 meeting of the Board, Board members and the zoning

administrator stated that the Board's present official position is that, based on advice of legal counsel, public policy is satisfied if the five criteria are satisfied. This position was reiterated at the start of the June 2009 meeting. Thus, the Board does not use public policy as an independent guide in considering applications for special exceptions. Though I do not agree with this view, I am very much in the minority in my view.

4. Intent and Purpose of this Article

The reference to "intent and purpose of this article" in Section 17-112(2)a4 could be used to provide both a separate, independent standard for granting or denying special exceptions and a substantive measure for assessing both public interest and the five listed criteria. For example, assessing an application for a special exception in the case of a store larger than 10,000 square feet in an MX-1 district could be addressed by reference to section 17-285, which discusses what the "MX-1 district is intended" to do and indicates a concern for promoting "pedestrian-oriented" streets in MX-1 districts.²¹ Currently, the only MX-1 district in Columbia is the Five Points area, which is subject to a "5P overlay district." (The zoning classification for Five Points is, therefore, MX-1-5P.) Section 17-284 provides, in part, as follows:

The 5P overlay district is intended to enhance the urban village character within the area known as Five Points. This character is defined by attributes such as mixed uses, pedestrian oriented buildings and signage, urban open spaces, and eclectic expressions of architecture and signage.

²¹ Section 17-258 provides:

The MX-1 district is intended to accommodate the development of a wide range of residential and compatible nonresidential uses along corridors and in neighborhood commercial contexts. To promote development that exhibits the physical design characteristics of pedestrian-oriented streets, the district provides flexibility from conventional use and bulk requirements of other zoning districts.

Considered together, sections 17-284 and 17-285 provide important guidance as to the “intent and purpose” of the zoning article in the City Code. Thus, they provide a standard for decisions regarding a special exception for a store larger than 10,000 square feet. Because smaller stores are allowed as a matter of right, it is clear that the city council has determined that size matters to promoting a pedestrian-friendly village feel. But larger stores are permissible; the ordinance allows stores larger than 10,000 square feet if a special exception is granted. Thus, the Board cannot simply reject all stores larger than 10,000 square feet. Instead, given the intent and purpose of sections 17-284 and 17-285, larger stores should be measured in terms of whether the increased size promotes a pedestrian-friendly urban village. If it does not, the application should be rejected. However, if, for example, the increased size promotes a pedestrian-friendly urban village because that increase is necessary for the commercial viability of a use that fosters a village feel, granting a special exception would be consistent with sections 17-284 and 17-285.

It was explicitly stated at the start of the June 2009 meeting that, based on advice of legal counsel, the Board does not accept this approach of using section 17-112(2)a4 in addressing applications for special exceptions. Instead, it considers only the listed criteria. As a result, the Board is prevented from doing such things as using section 17-112(2)a4 to incorporate sections 17-284 and 17-285 into the consideration of a store larger than 10,000 square feet in the MX-1-5P district. Because I believe the Board should use section 17-112(2)a4 in such a manner, I am clearly in the minority on this issue.

5. Conclusion

The Board’s current practice is to base its decisions solely on its consideration of the five listed factors. This approach is wrong in several respects. First, the Board generally considers

the factors without any reference or evidence relating to the comparison suggested by *Bannum*. As a result, it uses ad hoc techniques like the de minimus approach. Second, even if the Board did follow *Bannum* consistently, there would be many cases where the *Bannum* approach of comparison with a permitted use might not apply. Third, considering only the listed factors is, in effect, a decision to ignore separate, explicit language requiring the Board to “[d]eny special exceptions when not in harmony with the intent and purpose of this article” and to make a finding . . . that the special exception will not adversely affect the public interest.” Because the most logical reason to include this language in the ordinance is that the Board should use it in making decisions, refusing to use these requirements appears contrary to the legislative intent of the Columbia City Council, which adopted the language.

APPENDIX TO ZONING COMMENTS

- A. Selections from South Carolina Local Government Comprehensive Planning Enabling Act of 1994 – Sections 6-29-780 through 6-29-860
- B. Selections from City of Columbia Code of Ordinances—Chapter 17, Planning, Land - Development and Zoning—Sections 17-111 through 17-114
- C. Rules and Regulations of the Zoning Board of Adjustment, Columbia, S.C. (rev. 2/11/97)

A. Selections from South Carolina Local Government Comprehensive Planning Enabling Act of 1994 – Sections 6-29-780 through 6-29-860

SECTION 6-29-780. Board of zoning appeals; membership; terms of office; vacancies; compensation.

(A) As a part of the administrative mechanism designed to enforce the zoning ordinance, the zoning ordinance may provide for the creation of a board to be known as the board of zoning appeals. Local governing bodies with a joint planning commission and adopting a common zoning ordinance may create a board to be known as the joint board of appeals. All of these boards are referred to as the board.

(B) The board consists of not less than three nor more than nine members, a majority of which constitutes a quorum, appointed by the governing authority or authorities of the area served. The members shall serve for overlapping terms of not less than three nor more than five years or after that time until their successors are appointed. A vacancy in the membership must be filled for the unexpired term in the same manner as the initial appointment. The governing authority or authorities creating the board of zoning appeals may remove any member of the board for cause. The appointing authorities shall determine the amount of compensation, if any, to be paid to the members of a board of zoning appeals. None of the members shall hold any other public office or position in the municipality or county.

SECTION 6-29-790. Board of zoning appeals; officers; rules; meetings; notice; records.

The board shall elect one of its members chairman, who shall serve for one year or until he is re-elected or his successor is elected and qualified. The board shall appoint a secretary who may be an officer of the governing authority or of the zoning board. The board shall adopt rules of procedure in accordance with the provisions of an ordinance adopted pursuant to this chapter. Meetings of the board must be held at the call of the chairman and at such other times as the board may determine. Public notice of all meetings of the board of appeals shall be provided by publication in a newspaper of general circulation in the municipality or county. In cases involving variances or special exceptions conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. The chairman or, in his or her absence, the acting chairman, may administer oaths and compel the attendance of witnesses by subpoena. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and shall keep records of its examinations and other official actions, all of which must be immediately filed in the office of the board and must be a public record.

SECTION 6-29-800. Powers of board of appeals; variances; special exceptions; remand; stay; hearing; decisions and orders.

(A) The board of appeals has the following powers:

(1) to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance;

(2) to hear and decide appeals for variance from the requirements of the zoning ordinance when strict application of the provisions of the ordinance would result in unnecessary hardship. A variance may be granted in an individual case of unnecessary hardship if the board makes and explains in writing the following findings:

- (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;
 - (b) these conditions do not generally apply to other property in the vicinity;
 - (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
 - (d) the authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.
- (I) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

A local governing body by ordinance may permit or preclude the granting of a variance for a use of land, a building, or a structure that is prohibited in a given district, and if it does permit a variance, the governing body may require the affirmative vote of two-thirds of the local adjustment board members present and voting. Notwithstanding any other provision of this section, the local governing body may overrule the decision of the local board of adjustment concerning a use variance.

(II) In granting a variance, the board may attach to it such conditions regarding the location, character, or other features of the proposed building, structure, or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety, or general welfare;

(3) to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance; and

(4) to remand a matter to an administrative official, upon motion by a party or the board's own motion, if the board determines the record is insufficient for review. A party's motion for remand may be denied if the board determines that the record is sufficient for review. The board must set a rehearing on the remanded matter without further public notice for a time certain within sixty days unless otherwise agreed to by the parties. The board must maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing must be mailed to these persons prior to the rehearing.

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(C) An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

(D) The board must fix a reasonable time for the hearing of the appeal or other matter referred to the board, and give at least fifteen days' public notice of the hearing in a newspaper of general circulation in the community, as well as due notice to the parties in interest, and decide the appeal or matter within a reasonable time. At the hearing, any party may appear in person or by agent or by attorney.

(E) In exercising the above power, the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit. The board, in the execution of the duties specified in this chapter, may subpoena witnesses and in case of contempt may certify this fact to the circuit court having jurisdiction.

(F) All final decisions and orders of the board must be in writing and be permanently filed in the office of the board as a public record. All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board which must be delivered to parties of interest by certified mail.

SECTION 6-29-810. Contempt; penalty.

In case of contempt by a party, witness, or other person before the board of appeals, the board may certify this fact to the circuit court of the county in which the contempt occurs and the judge of the court, in open court or in chambers, after hearing, may impose a penalty as authorized by law.

SECTION 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:

(1) as provided in subsection (A); or

(2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

(C) Any filing of an appeal from a particular board of appeals decision pursuant to the provisions of this chapter must be given a single docket number, and the appellant must be assessed only one filing fee pursuant to Section 8-21-310(11)(a).

SECTION 6-29-825. Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation.

(A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted, and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of appeals.

(B) The property owner or his representative, any other person claiming an ownership interest in the property or his representative, and any other person who has been granted leave to intervene pursuant to subsection (A) or his representative must be notified and have the opportunity to attend the mediation. The governmental entity must be represented by at least one person for purposes of mediation.

(C) Within five working days of a successful mediation, the mediator must provide the parties with a signed copy of the written mediation agreement.

(D) Before the terms of a mediation settlement may take effect, the mediation settlement must be approved by:

- (1) the local legislative governing body in public session; and
- (2) the circuit court as provided in subsection (G).

(E) Any land use or other change agreed to in mediation which affects existing law is effective only as to the real property which is the subject of the mediation, and a settlement agreement sets no precedent as to other parcels of real property.

(F) If mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, a property owner may appeal by filing a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The petition must be filed with the circuit court within thirty days of:

(1) the report of an impasse as provided in the South Carolina Circuit Court Alternative Dispute Resolution Rules; or

(2) the failure to approve the settlement by the local governing body.

(G) The circuit court judge must approve the settlement if the settlement has a rational basis in accordance with the standards of this chapter. If the mediated settlement is not approved by the court, the judge must schedule a hearing for the parties to present evidence and must issue a written opinion containing findings of law and fact. A party may appeal from the decision:

(1) in the same manner as provided by law for appeals from other judgments of the circuit court; or

(2) by filing an appeal pursuant to subsection (F).

SECTION 6-29-830. Notice of appeal; transcript; supersedeas.

(A) Upon the filing of an appeal with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.

(B) The filing of an appeal in the circuit court from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper.

SECTION 6-29-840. Determination of appeal; costs; trial by jury.

(A) At the next term of the circuit court or in chambers, upon ten days' notice to the parties, the presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The 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 the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing. 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. In the event that the decision of the board is reversed by the circuit court, the board is charged with the costs, and the costs must be paid by the governing authority which established the board of appeals.

(B) When an appeal includes no issues triable of right by jury or when the parties consent, the appeal must be placed on the nonjury docket. A judge, upon request by any party, may in his discretion give the appeal precedence over other civil cases. Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of appeals, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

SECTION 6-29-850. Appeal to Supreme Court.

A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal in the manner provided by the South Carolina Appellate Court Rules.

SECTION 6-29-860. Financing of board of zoning appeals.

The governing authority may appropriate such monies, otherwise unappropriated, as it considers fit to finance the work of the board of appeals and to generally provide for the enforcement of any zoning regulations and restrictions authorized under this chapter which are adopted and may accept and expend grants of money for those purposes from either private or public sources, whether local, state, or federal.

SECTION 6-29-870. Board of architectural review; membership; officers; rules; meetings; records.

(A) A local government which enacts a zoning ordinance which makes specific

- B. Selections from City of Columbia Code of Ordinances—Chapter 17, Planning, Land - Development and Zoning—Sections 17-111 through 17-114



Everybody Counts, Everybody Contributes, Everybody Benefits

CHAPTER 17
PLANNING, LAND DEVELOPMENT
AND ZONING

CITY OF COLUMBIA
SOUTH CAROLINA

This pamphlet is a reprint of Chapter 17, Planning, Land Development and Zoning, of the Code of Ordinances of the City of Columbia, South Carolina, published by order of the City Council.

NOTICE:

This version of Chapter 17 of the Code of Ordinances is current as of November 8, 2006 (Supplement 6). For amendments passed after this effective date, please visit our website at

www.columbiadevelopmentservices.net

Sec. 17-88. Complaints regarding violations.

Whenever a violation of this article occurs, or is alleged to have occurred, any person may file a verbal complaint. The complaint, stating fully the causes and basis thereof, shall be filed with the zoning administrator. He shall record the complaint properly, investigate promptly, and take action thereon as provided by this article.

(Code 1979, § 6-3178)

Sec. 17-89. Remedies.

In case any building or structure is erected, constructed, reconstructed, altered, maintained or used in violation of this article or regulations in furtherance of this article, the city council, city attorney, zoning administrator or any person aggrieved may, in addition to other remedies provided by law, institute injunction, abatement or any other appropriate action or proceeding to prevent, enjoin, abate or remove such unlawful erection, construction, reconstruction, alteration, maintenance or use.

(Code 1979, § 6-3179)

Sec. 17-90. Penalty.

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any structure or land is used in violation of this article, or there is a violation of any condition or requirement in connection with special exceptions, variances or rezonings under the terms of this article, that violation shall constitute a misdemeanor, punishable, upon conviction, in accordance with section 1-5. Violation of this article or failure to comply with any of the requirements of this article shall be a misdemeanor. Each day such violation continues after due notice to discontinue that violation shall be considered a separate offense. The owner or tenant of any building, structure, premises or part thereof, and any architect, surveyor, builder, engineer, contractor, agent or other person who commits, participates in, assists in or maintains that violation, may each be found guilty of a separate offense and suffer the penalties provided in this section. Nothing contained in this section shall prevent the city from taking such other lawful action as is necessary to prevent or remedy any violation.

(Code 1979, § 6-3180)

Secs. 17-91—17-110. Reserved.**DIVISION 3. BOARD OF ZONING APPEALS*****Sec. 17-111. Organization and procedures.**

(a) *Establishment; membership.* A board of zoning appeals is hereby established, which shall consist of seven members appointed by the city council, a majority of which shall constitute a quorum. The members shall be appointed for staggered terms of five years and

*Editor's note—Ord. No. 99-011, § 2, adopted Apr. 21, 1999, changed the designation of div. 3 from "board of adjustment" to "board of zoning appeals."

until successors are appointed and qualified. Members may be removed for cause by the city council upon written charges and after a public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. The board shall elect one of its members chairman for a one-year term.

(b) *Meetings and rules of procedure; records.*

- (1) The board shall adopt rules necessary to the conduct of its affairs in accordance with the provisions of this article. Meetings of the board shall be held at the call of the chairman and at those other times as the board may determine. The chairman, or, in his absence, the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings shall be open to the public.
- (2) The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such facts, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the zoning administrator and shall be a public record.

(c) *Appeal procedure.* Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the city affected by any decision of the zoning administrator. That appeal shall be taken within 30 days by filing with the zoning administrator from whom the appeal is taken and with the board of zoning appeals a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. The board of zoning appeals shall fix a reasonable time for hearing the appeal, give public notice thereof as well as due notice to the parties in interest, and decide the appeal within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

(d) *Stay of proceedings pending appeal.* An appeal stays all proceedings in furtherance of the action appealed from, unless the zoning administrator from whom the appeal is taken certifies to the board of zoning appeals, after notice of appeal is filed with him, that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property. In that case, proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board of zoning appeals or by a court of record on application, on notice to the zoning administrator from whom the appeal is taken and on due cause shown. (Code 1979, § 6-3191; Ord. No. 99-011, § 2, 4-21-99)

Sec. 17-112. Powers and duties.

The board of zoning appeals shall have the following powers and duties:

- (1) *Administrative review.* The board of zoning appeals shall hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by the zoning administrator in the enforcement of this article, provided that those appeals must be taken within 30 days after the order, requirement, decision or determination which is alleged to be in error is made.

(2) *Special exceptions.*

a. *Duties.* Duties of the board are as follows:

1. Hear and decide only the applications for special exceptions as the board of zoning appeals is specifically authorized to pass upon by terms of this article;
2. Decide the questions as are involved in determining whether special exceptions should be granted;
3. Prescribe appropriate conditions and safeguards in conformity with this article; and
4. Deny special exceptions when not in harmony with the intent and purpose of this article.

b. *Procedures in consideration of special exception applications.*

1. A written application for a special exception shall be submitted indicating the section of this article under which the special exception is sought and stating the grounds on which it is requested.
2. Notice of public hearing shall be posted on the property for which special exception is sought and shall be published at least 15 days prior to the public hearing in a newspaper of general circulation in the city.
3. The public hearing shall be held. Any party may appear in person, or by agent or attorney.
4. The board of zoning appeals shall make a finding that it is empowered under the section of this article described in the application to grant the special exception and that the special exception will not adversely affect the public interest.
5. The board of zoning appeals shall not vary the conditions and/or provisions of sections 17-259 through 17-274 that establish specific standards that must be met prior to the establishment of several principal uses that require a special exception.
6. The board of zoning appeals may prescribe a time limit within which the action for which the special exception is required shall be begun or completed, or both.

c. *Criteria for special exceptions.* In addition to definitive standards in this article, the board of zoning appeals shall consider the following:

1. Traffic impact;
2. Vehicle and pedestrian safety;
3. Potential impact of noise, lights, fumes, or obstruction of air flow on adjoining property;
4. Adverse impact of the proposed use on the aesthetic character of the environs, to include the possible need for screening from view; and

5. Orientation and spacing of improvements or buildings.

d. *Effect of failure to meet conditions.*

1. Violation of conditions and safeguards prescribed in conformity with this article, when made a part of the terms under which a special exception is granted, shall be deemed a violation of this article, punishable under the penalties established in this article.
2. Failure to begin or complete, or begin and complete, an action for which a special exception is required, within the time limit specified, when such time limit is made a part of the terms under which the special exception is granted, shall void the special exception.

(3) *Variances.*

a. *Duties.* Duties of the board are as follows:

1. It shall be the duty of the board to authorize upon appeal in specific cases a variance from the terms of this article as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this article will, in an individual case, result in unnecessary hardship, so that the spirit of this article shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that the conditions listed under subsection (3)b of this section have been met.
2. No nonconforming use of neighboring lands, structures or buildings in the same district, and no permitted use of lands, structures or buildings in other districts, shall be considered grounds for the issuance of a variance.
3. In granting any variance, the board may prescribe conditions and safeguards in conformity with this article.

b. *Procedures in consideration of request for variance.*

1. A written application for a variance shall be submitted demonstrating that:
 - (i) There are extraordinary and exceptional conditions pertaining to the piece of property;
 - (ii) These conditions do not generally apply to other property in the vicinity;
 - (iii) Because of these conditions, the application of this division to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
 - (iv) The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.
2. The board may not grant a variance the effects of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to

extend physically a nonconforming use of land, or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably should a variance be granted, may not be considered grounds for a variance.

3. Notice of public hearing shall be given as described in subsection (2)b.2 of this section.
4. The hearing shall be held. Any party may appear in person, or by agent or by attorney.
5. The board of zoning appeals shall make findings that the requirements of subsection (3)b.1 of this section have been met by the applicant for a variance.
6. The board of zoning appeals shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure.
7. The board of zoning appeals shall further make a finding that the granting of the variance will be in harmony with the general purpose and intent of this article, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
8. The board of zoning appeals may prescribe a time limit within which the action for which the variance is requested shall be begun or completed, or both.

c. *Effect of failure to meet conditions.*

1. Violation of conditions and safeguards prescribed in conformity with this article, when made a part of the terms under which the variance is granted, shall be deemed a violation of this article, punishable under penalties established in this article.
2. Failure to begin or complete, or begin and complete, an action for which a variance is granted, within the time limit specified, when such time limit is made a part of the terms under which the variance is granted, shall void the variance.

(4) *Joint applications for special exception and variance(s).* Whenever in conjunction with an application for special exception, an applicant files an application for variance, the board of zoning appeals may combine the applications and consider them simultaneously, provided that the procedures established for special exceptions and variances within this section 17-112 shall not be varied.

(Code 1979, § 6-3192; Ord. No. 99-011, §§ 2, 3, 4-21-99; Ord. No. 2004-058, 7-21-04)

Sec. 17-113. Actions and decisions of board in favor of applicant.

(a) Upon appeal of a decision of the zoning administrator, the board of zoning appeals may, in conformity with the provisions of this article, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have the powers of the zoning administrator from whom the appeal is taken.

(b) All final decisions and orders of the board shall be in writing and be permanently filed in the office of the zoning administrator as a proper record. All findings of fact and conclusions of law shall be separately stated in final decisions or orders of the board.
(Code 1979, § 6-3193; Ord. No. 99-011, § 2, 4-21-99)

Sec. 17-114. Appeals from decisions of board.

Any person who may have a substantial interest in any decision of the board of zoning appeals, or any officer or bureau of the city having authority, may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of such court a petition in writing setting forth plainly, fully and distinctly wherein such decision is contrary to law. Such appeal shall be filed within 30 days after the decision of the board is rendered.
(Code 1979, § 6-3194; Ord. No. 99-011, § 2, 4-21-99)

Secs. 17-115—17-130. Reserved.

DIVISION 4. AMENDMENTS

Sec. 17-131. Authorized.

The city council may, from time to time, amend any part of the text or map of this article.
(Code 1979, § 6-3201)

Sec. 17-132. Initiation.

- (a) *Text amendments.* Amendments to the zoning text may be initiated by:
 - (1) Adoption of a motion by the planning commission.
 - (2) Application by a member of the city council.
 - (3) The zoning administrator or city manager.
 - (b) *Map amendments.* An amendment to the zoning map may be initiated by:
 - (1) Adoption of a motion by the city planning commission.
 - (2) Application by a member of the city council.
 - (3) The zoning administrator or city manager.
 - (4) The filing of an application by the property owner or his authorized agent.
- (Code 1979, § 6-3202)

Sec. 17-133. Contents of application.

The application for amendment shall contain at least the following information:

- (1) Name, address and telephone number of the applicant;
- (2) Tax map reference (sheet, block and lot numbers) and street address of the property;

Sec. 17-260. Warehousing (SIC 4227 and 424).

(a) *Private commercial storage (SIC 424).* Warehousing, or other storage of wares, is permitted in the various districts as follows:

(1) *C-1 and C-6 districts.* In C-1 and C-6 districts, warehousing is permitted as an accessory use not involving over 2,000 square feet of area;

(2) *C-2 districts.* In C-2 districts, warehousing is permitted as an accessory use not involving over 2,000 square feet of area, and as a special exception it may be permitted as an accessory use not involving over 3,000 square feet of area;

(3) *C-3, C-4, and MX-1 districts.* In C-3, C-4, and MX-1 districts, warehousing is allowed as a permitted principal use or as an accessory use not involving over 8,000 square feet of area, and as a special exception involving not over 12,000 square feet of area; and

(4) *C-5 district.* In the C-5 district, warehousing is a permitted accessory use, but it must not involve the storage of goods to be wholesaled in excess of 2,000 square feet of gross floor space.

(b) *Miniwarehousing (SIC 4227).* Miniwarehouses are allowed subject to the following provisions:

(1) *Buffer yard.* Where the lot is adjacent to a residential zoning district, a buffer yard shall be provided on the property line adjacent to the residential zoning district in accordance with section 17-313 and table 3.

(2) *Fencing or walls.* Fencing or walls shall be required around the open perimeter of the project. The fence or wall shall be a minimum of six feet in height. Where the lot is adjacent to a residential zoning district, the fence or wall shall be constructed of materials approved by the board of zoning appeals.

(3) *Setback.* Any side of the building providing doorways to storage areas shall be set back from the property line not less than 25 feet (in addition to that setback required in subsection (b)(1) of this section, if applicable).

(4) *Parking requirements.* Off-street parking shall be required as follows:

a. One space for each ten storage cubicles. This parking requirement can be accomplished with the parking lanes as set forth in subsection (b)(5) of this section;

b. Two spaces for the manager's quarters; and

c. One space for every 50 storage cubicles, to be located at the project office for use of prospective clients.

(5) *Driveway widths.* On-site driveway widths shall be required as follows:

a. All one-way driveways shall provide for one ten-foot parking lane and one 15-foot travel lane. Traffic direction and parking shall be designated by signing or painting.

b. All two-way driveways shall provide for one ten-foot parking lane and two 12-foot travel lanes.

c. The parking lanes may be eliminated when the driveway does not serve storage cubicles.

(6) *Prohibited uses.* Retail or wholesale uses and storage of hazardous materials shall be prohibited in miniwarehouses, and notice of such prohibition shall be given to customers by a conspicuous sign posted at the entrance of the property, or by provisions in the lease agreement, or both.

(7) *Storage of vehicles, boats, etc.* Any outdoor storage area for vehicles, trailers, campers, boats or the like shall be separate from any structures and located to one side of or to the rear of the development. In no case shall these spaces be construed to meet the parking requirements of this subsection.

(8) *Lighting.* All lights shall be shielded to direct light onto the uses established and away from adjacent property, but lighting may be of sufficient intensity to discourage vandalism and theft.

Sec. 17-263. Retail trade (SIC 52-59).

(a) *C-2 district.* In C-2 zoning districts, any retail trade activities must not occupy in excess of 5,000 square feet in area. Retail trade occupying between 5,000 and 10,000 square feet may be permitted as a special exception. Retail trade occupying in excess of 10,000 square feet is prohibited. Gasoline pumps may be added as an accessory use by special exception.

(b) *C-6 and MX-1 districts.* In C-6 and MX-1 zoning districts, all retail trade activities are allowed as a permitted use up to 10,000 square feet in area. Retail trade occupying more than 10,000 square feet may be allowed as a special exception by the board of zoning appeals.

ORIGINAL
STAMPED IN P

Sec. 17-284. -5P five points district.

The 5P overlay district is intended to enhance the urban village character within the area known as Five Points. This character is defined by attributes such as mixed uses, pedestrian oriented buildings and signage, urban open spaces, and eclectic expressions of architecture and signage. Development within the 5P area must comply with design guidelines adopted by City Council on June 18, 2008, entitled "Future Five, Design Development Guidelines, January, 2008."

The 5P area consists of approximately 65 acres in the area generally bounded to the north by Gervais Street, to the west by the Southern RR, to the south by parcels fronting Blossom Street, to the east by Hilton Street and continuing in a straight line northerly to Lee Street, along Pavilion Street; continuing north mid block behind Pavilion Street to Stark Street, along Walnut Street to Senate Street and behind parcels fronting Harden Street to Gervais Street.

The 5P area is further delineated as Upper Five Points and Lower Five Points. Upper Five Points is described as the area north of Greene Street, but not to include parcels or portions of parcels fronting Greene Street. Lower Five Points includes all parcels south of Greene Street, in addition to the parcels or portions of parcels north of Greene that abut the Greene Street right-of-way.

These boundaries are outlined on the official City of Columbia zoning map.

Sec. 17-285. MX-1 mixed-use district corridor/neighborhood.

The MX-1 district is intended to accommodate the development of a wide range of residential and compatible non-residential uses along corridors and in neighborhood commercial contexts. To promote development that exhibits the physical design characteristics of pedestrian-oriented streets, the district provides flexibility from conventional use and bulk requirements of other zoning districts.

Sec. 17-286. Motor vehicle, boat, and recreation vehicle dealers.

Motor vehicle dealers (new and used), Motor vehicle dealers (used only), Boat dealers, Auto and home supply stores, and Recreational and Utility Trailer dealers are permitted in MX-1 districts provided that no merchandise or equipment shall be displayed or stored outside of an enclosed structure.

Sec. 17-287. Used merchandise stores.

Used Merchandise Stores are permitted in C-3, C-3A, C-4, C-5, C-6, and MX-1 districts, subject to the following conditions:

- (1) No merchandise or equipment shall be displayed or stored outside of an enclosed structure;
- (2) If donations are accepted, merchandise shall only be received during normal business hours, and signs shall be posted alerting donors that donations are not accepted except during normal business hours,
- (3) No weapons or ammunition of any type, including knives, shall be sold, bartered, traded, or otherwise processed.

Sec. 17-288. Offices and clinics of other health practitioners including therapeutic massage.

(a) Offices And Clinics Of Other Health Practitioners including Therapeutic Massage are permitted in C-1, C-2, C-3, C-3A, C-4, C-5, C-6, and MX-1 district provided that a massage therapist must show proof of licensure through the SC Department of Labor, Licensing, and Regulation.

**RULES AND REGULATIONS
OF
THE ZONING BOARD OF ADJUSTMENT
COLUMBIA, SOUTH CAROLINA**
(Revised 2/11/97)

ORGANIZATION

Section I

I. 1—**Chairman – Vice Chairman.** At annual meetings of the Board in January of each year, the Board shall elect one of its members as Chairman and one of its members as Vice-Chairman, each to serve for a period of twelve (12) months. These officers may not be elected to serve more than two (2) consecutive terms. However, the Chairman and Vice-Chairman may be re-elected after a time interval of one (1) year.

I. 2—**Secretary.** The Zoning Administrator, or in his absence, the Zoning/Planning Coordinator, shall serve as Secretary of the Board.

I. 3—**Chairman to Preside.** The Chairman shall preside at all meetings of the Board, except in the event of his absence or disability the Vice-Chairman shall preside.

I. 4—**Procedure.** The Chairman, subject to these rules, shall decide all points of procedure unless otherwise directed by a majority of the board in Session at the time. Any points not addressed in these Rules and Regulations will be covered by Robert's Rules of Procedure.

I. 5—**Supervision of Secretary.** The Chairman shall supervise the work of the Secretary.

I. 6—**Duties of the Secretary.** The Secretary, subject to the direction of the Board Chairman, shall conduct all correspondence of the Board, receive and file all appeals, attend all meetings of the Board and all hearings, scrutinize all appeals to insure that these rules are complied with, prepare and keep calendars, dockets and summary minutes of each meeting and hearing shall be signed by the secretary and the Chairman.

I. 7—**Minute Book.** The Secretary shall keep a minute book and keep the same recorded to date, showing all important facts pertaining to each meeting and hearing, and including a copy of each resolution acted upon by the Board, the vote of each member upon each resolution or those absent or failing to vote, and such other details as the Board or its Chairman shall direct. The minutes of each meeting and hearing shall be signed by the secretary and the Chairman.

I. 8—**Docket.** The Secretary shall keep a docket of each case, name and address of appellant, brief description of the premises involved, date of filing appeal and final disposition of the case.

I. 9—**Index.** The Secretary shall maintain an index systems indicating by address all cases coming before the Board and the docket number of each. All record of appeal shall be kept in the office of the Secretary and in such manner as to be accessible to the public at all reasonable hours.

I. 10—**Inspections.** When not feasible for the entire membership of the Board to make personal inspections, the Chairman may designate not less than two members to make such inspections, when such are deemed necessary by the Board. When requested by the Chairman, the members so designated shall file with the Board a written report of the findings.

MEETINGS

Section II

II. 1—**Time.** Regular meetings of the Board shall be held on the second Tuesday of each month, at 10:00am., in the Council Chambers at City Hall. The regular meeting in January shall be the annual meeting of the Board.

II. 2—**Cancellation.** Whenever there are no appeals to be considered, and there appears to be no other business to be transacted by the Board at any regular meeting, other than the annual meeting the Chairman may dispense with such meeting by notifying each member of the Board not more than five (5) days, no less than twenty-four (24) hours prior to the time for such meeting.

II. 3—**Hearings.** Hearings of appeals may be held at regular or special meetings of the Board, at such hours as shall be determined by the Board.

II. 4—**Open to the Public.** All regular meeting shall be open to the public, except that the Board may go into executive session in accordance with the provisions of Section 1-20 of the Code of Laws of South Carolina as amended May, 1976.

II. 5—**Quorum.** A quorum for a meeting by the Board shall consist of four (4) members, but a lesser number may meet and adjourn a meeting a specified time.

II. 6—**Appearances.** The appellant or any party in interest may appear in person or by agent or attorney.

II. 7—**Proof of Ownership.** Owners of neighboring property appearing for or against the granting of appeal shall upon request furnish the Board with descriptions of the neighboring property, which they own and with affidavits of such ownership; or in the absence of such descriptions and affidavits of ownership may, after being sworn, testify thereto.

II. 8—**No Appearances.** In the absences of any personal appearance on behalf of the appellant, or in opposition thereto, or both, the Board may proceed to dispose of the matter on the record before it, or may postpone action on affirmative vote of three members present.

II. 9—**Oath.** All parties presenting testimony shall be under oath, except when granted an exception by a majority of the members of the Board present.

II. 10—**Order.** At the hearing the order shall be as follows:

- a. Statement of the case by the Chairman or the Secretary,
- b. Administrative officer's side of the case,
- c. Appellant's side of the case,

- d. Interested property owner's / owners' side of the case,
- e. Appellant's rebuttal,
- f. Opposition's rebuttal.

Five minutes shall be allotted for the appellant's side of the case and for the opposition's side of the case. Parties interested shall direct their statements and arguments to the Board and shall not direct them to their opponents; however, the opportunity to cross-examine opposing witnesses may be freely extended when conducted in an orderly manner.

II. 11—**Special Meetings.** Special meetings may be called by the chairman at the request of two members or by the secretary at the request of two members, provided that notice of the same shall be mailed to each member of the board at least forty-eight (48) hours prior to the time set for such meeting. Provided further, however, that the announcement of a special meeting at which a quorum is present shall be sufficient notice of such meeting.

CASES BEFORE THE BOARD

Section III

III. 1—**Form of Appeal.** Every appeal shall be made upon the form furnished by the Secretary, which form shall have been approved by the Board. The information and data called for in such form shall be supplied in sufficient detail so as to afford all the information necessary for a clear understanding and considered action by the Board. If additional information is deemed necessary, it shall be supplied by the appellant upon request of the Chairman or Secretary of the Board. Any failure or refusal on the part of the appellant to furnish such additional information as may be reasonably required by the Chairman or Secretary may be grounds for dismissal of the appeal by the Board.

III. 2—**Insufficient Notice.** Any communication purporting to be an appeal or application to the Board for a permit shall be regarded as a mere notice of intent to seek relief until it is made in the form required.

III. 3—**Who May Appeal.** Each appeal shall be made by the owner of the property affected or the owner's authorized agent and shall deal with a specific case. This rule shall not prevent the bringing of an appeal by an aggrieved neighboring property owner or lessee who is seeking the renovation of a permit, which he deems to have been improperly issued by the Zoning Administrator.

III. 4—**Approvals Required by Ordinance.** Where approval by the Board is specifically required by the Zoning Ordinance, each such case shall be considered an appeal to the Board and these rules and regulations shall apply.

III. 5—**Public Notices.** The property shall be posted not less than fifteen (15) days prior to the date of the hearing; with notice of intent to appeal for relief; such notice shall be posted on or near the property lines, and shall be in full view of the public. A notice of appeal to the Board shall be published in a local newspaper of general circulation in the City of Columbia at least fifteen (15) days prior to the meeting. Such

notice shall state the name of the appellant, location of the property, zoning district, and describe the nature of the appeal.

CALENDAR AND DOCKET

Section IV

IV. 1—**Docketing Cases.** Each appeal filed on the proper form shall be numbered serially, docketed, and shall be placed on the calendar of the Board by the Secretary for hearing. The serial numbers shall begin anew on January of each year and shall be hyphenated with the number of the year in which the appeal is filed.

IV. 2—**Time of Hearing.** All cases docketed more than twenty (20) days preceding a regular meeting day, shall be automatically set for hearing at such meeting. Cases docketed less than twenty (20) days prior to a regular meeting day may be set for hearing on the second regular meeting day after such docketing, unless a different date be specifically set for such hearing by the Board.

IV. 3—**Order of Hearing.** Appeals shall be heard by the Board in the order in which they are set for hearing on the calendar, except that an appeal may be advanced or postponed for hearing by order of the Board upon good cause there being shown.

IV. 4—**Adjournments.** When all appeals cannot be disposed of on the day set, the Board may adjourn from day to day or to a day certain as it may order, and such adjournment day shall be constructed as a continuance of the meeting and no further notice need be given thereof.

FINAL DISPOSITION OF CASE

Section V

V. 1—**Form.** The final disposition of any appeal shall be in the form of a motion granting, reversing, varying or modifying the order, requirement, decision or determination appealed, or affirming the order and denying the appeal, or dismissing the appeal for lack of jurisdiction or prosecution. Such motion may show the reasons for the board's determination, but must receive a majority vote of the participating board members to carry. In the event of a tie vote, an alternative motion may be made. If no affirmative action on a motion is taken by the board, it will be determined that the appeal did not receive the requested relief from the board, and therefore the appeal is denied.

V. 2—**Conditions.** Wherever the Board authorizes any variation or imposes any condition with respect to a permit so as to carry out the intent and purpose of the Zoning Ordinance, such variation and condition shall be specifically stated in the motion referred to in paragraph 5.1 and also in the zoning permit issued pursuant thereto by the Zoning Administrator. Such permit shall remain valid only as long as the conditions upon which it was granted are conformed or maintained.

V. 3—**Laying Over.** In any case where only four members of the Board are present and the vote stands three in favor and one against the appellant, the matter shall be laid over for consideration and final determination at the next meeting of the Board.

Notice of such fact shall be given to absent members of the Board, the appellant, and the spokesman for the opponents at least three days prior to the date of the next meeting.

V. 4—**Withdrawal.** Any appellant may automatically withdraw his appeal prior to action thereon, if such request for withdrawal is received in writing by the Zoning Administrator or the zoning office. This written request must be received prior to the Board meeting. Any request for withdrawal will be subject to the Board's approval.

V. 5—**Rehearing.** No request to grant a rehearing within six months of its dismissal or denial by the Board shall be entertained unless substantial new evidence is submitted which could not reasonably have been presented at the previous hearing. In all cases, the request for a rehearing shall be in writing, reciting the reasons for the request, and shall be duly verified and accompanied by the necessary data and reasons for the request. The party requesting the rehearing shall be notified to appear before the Board on a date to be set by the Board, of which he shall be notified. If motion to grant a rehearing receives the affirmative vote of four (4) or more members of the Board, the case shall be put on the calendar for a rehearing. Rehearing shall be subject to the same requirements as to notices as the original hearing.

V. 6—**Authentication.** The minutes of every meeting shall be signed by the Chairman or Vice-Chairman and attested by the Secretary as evidence of the action of the Board.

AMENDMENTS TO RULE

Section VI

VI. 1—**Amendments to Rules.** Amendments to these rules and regulations may be by the Board at any regular meeting or at any special meeting, provided notice in writing thereof has been given to each member of the Board at least five days prior to such meeting, or provided such amendment was read at the last preceding regular meeting of the Board. The suspension of any rule or procedure may be ordered at any meeting by vote of not less than four members of the Board.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate Case No.: 2017-000561

Cricket Store 17 d/b/a Taboo,..... Appellant,

vs.

City of Columbia Board of Zoning Appeals, ... Respondent,

and

City of Columbia Zoning Administrator, ... Counterclaimant,

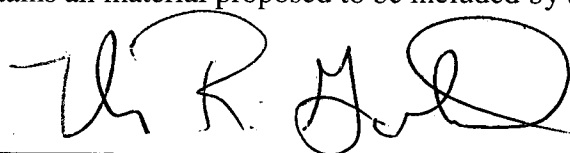
vs.

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

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 4, 2017



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