

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Robert E. Hood, Circuit Court Judge

RECEIVED

DEC 28 2017

SC Court of Appeals

Civil Action No. 2016-CP-40-03478
Appellate Case No. 2017-000561

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

v.

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

And

City of Columbia Zoning Administrator,.....Counterclaimant,

v.

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

**RESPONDENT’S MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO
STRIKE MATTER FROM, AND SUPPLEMENT, THE RECORD ON APPEAL**

Appellant served its Initial Brief and Designation of Matter on August 4, 2017.
Respondent served its Initial Brief and Designation of Matter on October 5, 2017.

On October 13, 2017, Appellant sought an extension of time in which to file its initial reply brief. Respondent did not oppose this request. Appellant filed its Initial Reply Brief on October 30, 2017. Along with the reply brief, Appellant filed a motion for an extension of time to file a final designation of contents of the record. In response, this Court issued an Order extending the time for serving the record on appeal and filing a proof of service until December

7, 2017.

Respondent received a copy of the record on Appeal on December 18, 2017. The proof of service indicates that the Record on Appeal was deposited in the mail on December 12, 2017. The postmark indicates that the record was placed in the mail on December 13, 2017. Upon information and belief, Appellant had not sought any further extension of time in which to serve the Record on Appeal. Appellant's service of the Record on Appeal was out of time and constitutes a failure to comply with the court's requirements.

Respondent now moves to dismiss this appeal on the grounds that Appellant has missed this Court's deadline for service of the Record on Appeal, and there is no good cause for this failure, especially where an extension had been earlier granted. This flagrant violation of the rules, together with the additional problems with the Record on Appeal as explained herein, has caused further delay in this matter. Every day of delay allows Appellant's business to remain open in violation of the City of Columbia's ordinances.

Appellant is currently operating its business in violation of the City of Columbia's Zoning Ordinance. Appellant challenged the City's sexually oriented business licensing and zoning ordinances in federal court. The district court denied Appellant a preliminary injunction (2014), granted the City summary judgment (2015), and denied Appellant's post-judgment motions (2016). The Fourth Circuit affirmed (676 Fed. Appx. 162), and the Supreme Court denied certiorari on October 2, 2017 (138 S.Ct. 116).

The current appeal involves Appellant's challenge to decisions of the City's zoning administrator and the City's Board of Zoning Appeals. Subsequent to the district court's grant of summary judgment, the zoning administrator issued a letter to Appellant instructing the business to come into compliance with the City's ordinances. The zoning administrator also refused to

accept Appellant's application for a special exception because the Zoning Ordinance specifically prohibits special exceptions for sexually oriented businesses. Appellant appealed these determinations to the Board of Zoning Appeals, which held a hearing and affirmed both. Appellant now appeals to this Court, and continues to operate its business in violation of the City's ordinances.

This Court is permitted to issue an order of dismissal “[w]henver it appears that an appellant . . . has failed to comply with the requirements of these Rules” Rule 260(a), SCACR. Appellant sought an extension to file the record on appeal. Appellant missed this deadline and has not set forth any good cause for the delay. Respondent respectfully requests that this appeal should be dismissed because of Appellant's failure to timely serve the record on appeal, thus causing further delay without explanation.

Respondent also moves to dismiss this matter because of serious, multiple errors found in the Record on Appeal, as discussed below. In the alternative, Respondent moves to have certain matters stricken from the Record on Appeal, and to supplement the record.

Rule 209, SCACR, addresses each party's duties in designating matter to be included in the Record on Appeal. At the time of filing an initial brief, each party shall designate the materials it desires to have included in the Record on Appeal. “The completed record should only include materials the parties designated for inclusion.” Jean Hoefler Toal et al., Appellate Practice in South Carolina 407 (3d ed. 2016) (citing Rule 209, SCACR). Rule 210(c), SCACR, instructs parties to an appeal that the “Record on Appeal shall include all matter designated to be included by any party under Rule 209” but that the “Record shall not . . . include matter which was not presented to the lower court or tribunal.”

Appellant served its Designation of Matter on August 4, 2017. A copy of Appellant's

Designation of Matter is attached hereto as Exhibit A. Respondent served its Designation of Matter on October 5, 2017. A copy of Respondent's Designation is attached hereto as Exhibit B. Respondent submits that it clearly and concisely set forth the materials that it proposed to be included in the Record on Appeal by description and date of filing. Appellant did not file or serve an additional designation after the service of its Initial Reply Brief.

The Record on Appeal filed by Appellant contains numerous items that were either: (a) not designated by Appellant, or (b) were not presented to the lower court or tribunal. The Record on Appeal also fails to include some materials designated by Respondent. The problems with the Record on Appeal were easily avoidable and were made clear to Appellant prior to Appellant filing and serving the Record.

After submission of the parties' respective designations of matter, but prior to the filing of the Record on Appeal, the parties conferred about the contents of the record. Appellant forwarded to Respondent in .pdf format a "draft" of the proposed Record on Appeal on November 2, 2017. Respondent took the time to carefully review the draft of the proposed Record and on November 12, 2017, provided detailed objections, comments and suggestions to Appellant. (The email exchange between Appellant and Respondent is attached hereto as Exhibit C.)

First, Respondent pointed out to Appellant the numerous items in the proposed Record that had not been presented to the lower court or tribunal. Respondent objected to these items and requested that they be deleted from the Record. Nevertheless, some of those materials are now included in the Record on Appeal. Those materials are as follows:¹

- a. pp. 35-42; Application for Special Exception
- b. pp. 287-318; page 2 of a letter from the City's Business License Division and

¹ The page numbers listed correspond to the actual page numbers in the Record on Appeal.

photographs (these materials are not separately set forth in the Table of Contents leading one to believe they are a portion of Exhibit B to City's Answer and Counterclaim)

- c. pp. 384-386; transcript from a hearing dated November 21, 2013 (these materials are not separately set forth in the Table of Contents leading one to believe that this transcript may be part of City's Reply to Plaintiff's objections to *pro hac vice* admission)
- d. pp. 387-389; letters between Appellant's counsel and Clerk of Supreme Court (incorrectly listed in Table of Contents as starting on page 385)
- e. pp. 405-415; Respondent's Responses to Plaintiff's Requests to Admit
- f. pp. 583-616; F. Patrick Hubbard, Zoning Comments (2009).

Items b. through e. listed above were not designated by Appellant for inclusion in the Record on Appeal. Moreover, items a. through f. were not presented to the lower court or tribunal. Therefore, all of these materials should be stricken from the Record on Appeal.

In addition to including materials that had not been designated or presented to the lower court or tribunal, Appellant failed to include an item in the Record that had been designated by Respondent. Respondent designated a Letter confirming receipt of co-counsel's *pro hac vice* application. This letter was designated as #6 on Respondent's Designation of Matter. This letter is attached hereto as Exhibit D, so that it may be included in the Record on Appeal.

Appellant also included a copy of an Application for Administrative Appeal at pages 115-16 that is unsigned, undated, and differs from that found at pages 264-65 of the Record on Appeal. The Application found at pages 264-65 is part of the certified record provided to the circuit court as required by S.C. Code Ann. 6-29-830(A). The version of the Application at

pages 115-16 should be stricken.

Appellant, even after being warned, has blatantly failed to follow this Court's rules concerning both the substance and the deadline for filing the Record on Appeal.² Fixing the Record on Appeal will unduly and prejudicially delay this matter. Thus, the Court should dismiss this appeal. In the alternative, the Court should order all materials that were not part of the record below or that were not designated by Appellant to be stricken from the Record on Appeal, and that the items properly designated by Respondent be added thereto.

If the Court chooses the latter approach, Respondent respectfully requests that the time to serve and file final briefs be held in abeyance until the Court has ruled on this motion.

Respectfully submitted,



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(803) 799-9993 – Office
peteb@rplfirm.com

Scott D. Bergthold, admitted *pro hac vice*
LAW OFFICE OF SCOTT D. BERGTHOLD, PLLC
2290 Ogletree Avenue, Suite 106
Chattanooga, Tennessee 37421-8828
(423) 899-3025 – Office
sbergthold@sdblwf.com

Attorneys for City of Columbia
Board of Zoning Appeals and City of
Columbia Zoning Administrator

² In addition to the errors and omissions addressed in this motion, it should also be noted that the page numbering as set forth in the Table of Contents does not correspond with the contents. For example, "Exhibit A to City's Answer & Counterclaim" can be found on pages 150-250 of the Record, and "Exhibit B to City's Answer & Counterclaim" is found at pages 251-286. Looking at the Table of Contents, one would conclude that these materials were found on pages 150 through 354. (Pages 319-354 are an unnecessary duplication of Exhibit B to City's Answer & Counterclaim.) Another example is the "City's Reply to plaintiff's objections to admission *pro hac vice*" which is found starting on page 395 rather than page 375. Pages 43 through 107 are also duplicates of materials found in "Exhibit A to City's Answer & Counterclaim."

Exhibit A

**THE STATE OF SOUTH CAROLINA
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**APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas**

Robert E. Hood, Circuit Court Judge

**Case No. 2016-CP-40-03478
2016**

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

vs.

City of Columbia Board of Zoning Appeals, Respondent.

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

August 4, 2017

**Thomas R. Goldstein, S. C. Bar No. 2186
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net**

ORDERS

Board of Zoning Appeals Order on Administrative Appeal, May 10, 2016

Board of Zoning Appeals Order on Administrative Appeal, May 10, 2016

Circuit Court Order Affirming Board of Zoning Appeals

Circuit Court Order Denying Reconsideration

Circuit Court Order Granting Admission *Pro Hac Vice*

PLEADINGS

Application to Zoning Administrator on Stay

Application to Zoning Administrator for Special Exception

Appeal to City of Columbia Board of Zoning Appeals on Stay

Appeal to City of Columbia Board of Zoning Appeals on Special Exception

TESTIMONY

Transcripts:

April 12, 2016 Board of Zoning Appeals

October ____, 2016 hearing before Court of Common Pleas

January 26, 2017 hearing before Court of Common Pleas

EXHIBITS

Municipal Ordinance 1-2

Municipal Ordinance 17-734

Patrick Hubbard "Zoning Comments," (2009)

Zoning Administrator's January 11, 2016, correspondence

Appellant's February 11, 2016, correspondence

Planning Director's February 26, 2016 correspondence

Appellant's March 1, 2016 correspondence

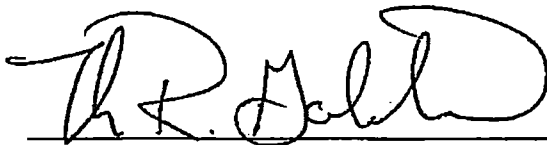
Planning Department's Staff Summary

Video Recording of April 12, 2016 hearing before Board of Zoning Appeals



Thomas R. Goldstein, S. C. Bar No. 2186
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, SC 29415-1121
(843) 554-4291
Attorneys for Appellant

I certify that no designation is irrelevant to the issues raised in this appeal.



Thomas R. Goldstein, S. C. Bar No. 2186
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

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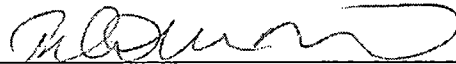
**RESPONDENT’S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

In addition to content included in the Appellant’s Designation of Matter, the Respondent designates the following materials to be included in the Record on Appeal:

1. Taboo’s Summons & Amended Complaint, filed June 15, 2016.
2. City’s Answer and Counterclaim for Injunctive Relief, filed July 8, 2016.
3. Exhibit A to City’s Answer and Counterclaim, BZA Order and Record for case 16-010-AA, filed July 8, 2016.
4. Exhibit B to City’s Answer and Counterclaim BZA Order and Record for case 16-011-AA, filed July 8, 2016.
5. Taboo’s Reply to Counterclaim, filed August 9, 2016.

6. Letter confirming Scott D. Bergthold's application for admission *Pro Hac Vice*, filed August 24, 2017.
7. City's Motion in Support of *Pro Hac Vice* Application, filed September 1, 2016.
8. Verified Application for admission *Pro Hac Vice*, filed September 1, 2016.
9. Order Granting Attorney Scott D. Bergthold's Admission *Pro Hac Vice*, filed September 1, 2016.
10. Taboo's Demand for Pre-Hearing Mediation, filed September 12, 2016.
11. Order Granting Attorney Scott D. Bergthold Admission *Pro Hac Vice*, filed January 26, 2017.
12. Order Affirming Zoning Board Decisions, filed February 6, 2017.

I certify that this Designation contains no matter which is irrelevant to this appeal.



Peter M. Balthazor #68244
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peteb@rplfirm.com

Attorney for City of Columbia
Board of Zoning Appeals and City of
Columbia Zoning Administrator

Columbia, South Carolina

October 5, 2017

Pete Balthazor

From: Pete Balthazor
Sent: Sunday, November 12, 2017 4:30 PM
To: 'Thomas Goldstein'
Subject: RE: Hula Dogs
Attachments: 20171112161903839.pdf; 20171112162058572.pdf

Tommy:

I have attempted to review the proposed record as best I can, and I give you my comments. First, the page numbering is incorrect between the table of contents and the documents in the record. When I refer to a page number in this email, I am referring to the page number in the pdf. Second, there are numerous items included in the record that were not presented to the lower court or tribunal. We object to their inclusion in the record. Those items will be listed below. Third, numerous items that the City designated have not been included in the proposed record, and some of the items designated by the City and included in the record are incomplete.

I prepared comments on the Table of Contents and I have included those here as an attachment.

Items included in the Record by Appellant that were not presented to the lower court or tribunal, and need to be deleted from Record:

- pp. 22 – 31; application for special exception not presented to lower court or tribunal (pp. 32-94 are extraneous and are included in City's Exhibit A)
- pp. 274 – 305; letter (incomplete) and photos not presented to lower court or tribunal
- pp. 371 -376 transcript and letters not presented to lower court or tribunal
- pp. 392-402 – Requests for Admissions not presented to lower court or tribunal
- pp. 535-538; ordinance not presented to lower court or tribunal (relevant code sections are included in Exhibit A and B of City's Answer and CC)
- numerous ordinances and state code sections starting at p. 558 not presented to lower court or tribunal (why would it be necessary to submit state code sections?)
- p. 542; Texas ordinance not presented to lower court or tribunal (but if it is public record why does it need to be included in record?)
- pp. 543 – 557; Hubbard's comments not presented to lower court or tribunal
- video recording of December 11, 2011 Special meeting

Items designated by City and not included in Record:

- Letter confirming application for PHV (August 24, 2016) (designated as #6 on City's designation)
- Order granting PHV (September 1, 2016) (designated as #9 on City's designation)

Items included in Record that are incomplete/out of order/etc.:

- Order granting PHV (February 1, 2017) at p. 10 (this should included as a two-page order)
- City' Reply to plaintiff's objections to admission PHV at p. 382 (the version included in the record is undated and incomplete; the complete, dated version is attached hereto)

In addition, the following items are extraneous and can be deleted, making the record significantly shorter:

- pp. 20-21

- pp. 32-94
- pp. 97-103
- pp. 306-341

Please refer to the marked-up Table of Contents attached here for additional information.

Thanks, Pete

From: Thomas Goldstein [mailto:tgoldstein@COBBLAW.NET]
Sent: Thursday, November 02, 2017 1:21 PM
To: Pete Balthazor
Subject: FW: Hula Dogs

Finally! Here is the pdf. Look it over and let me know what changes you need or want or what errors are there.

From: Chris Davis [mailto:chris@prolegaldiscovery.com]
Sent: Thursday, November 02, 2017 12:23 PM
To: Thomas Goldstein <tgoldstein@COBBLAW.NET>
Subject: Hula Dogs

Hi Tommie,

Here is the link to the scanned and numbered pages:

<https://prolegaldiscovery.sharefile.com/d-sd58481c6b8b40fd9>



Chris Davis
212 Huger St.
Charleston, SC 29403
(843) 853-2888 - office
(843) 270-2379 - mobile
chris@prolegaldiscovery.com



Exhibit D

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-0394

August 18, 2016

Clerk of Court
Richland County
P.O. Box 192
Columbia, SC 29202

2016 AUG 24 AM 10:47
RICHLAND COUNTY
FILED
JEANETTE V. McBRIDE
C.C.P. & G.S.

RE: Cricket Store 17, L.L.C v. City of Columbia Board of
Zoning Appeals
Case No: 2016-CP-40-3478

Dear Clerk of Court:

I certify that the Office of Bar Admissions has received a verified application requesting Scott D. Berathold be admitted *pro hac vice* in the above action. The \$250 filing fee for the applicant for the above action has been paid.

Yours truly,

Deputy Clerk for Bar Admissions

GBW/st

THE STATE OF SOUTH CAROLINA
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Robert E. Hood, Circuit Court Judge

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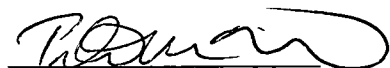
Cricket Store 17, LLC d/b/a Taboo,..... Counterdefendant.

PROOF OF SERVICE OF RESPONDENT’S MOTION TO DISMISS APPEAL OR, IN THE
ALTERNATIVE, TO STRIKE MATTER FROM, AND SUPPLEMENT, THE RECORD ON
APPEAL

I certify that on December 28, 2017, I have served all counsel in this action with a copy of the foregoing by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A.
Post Office Box 711121
North Charleston, South Carolina 29415-1121
Attorneys for Cricket Store 17, LLC d/b/a Taboo

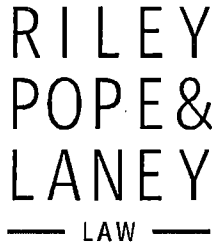
Dated: December 28, 2017



Peter M. Balthazor
Counsel for Respondent

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Post Office Box 11412 (29211)
Columbia, SC 29205
Phone: 803.799.9993
Fax: 803.239.1414



North Carolina

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4822 Albemarle Road
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Charlotte, NC 28205
Phone: 980.201.3888
Fax: 704.625.9430

December 28, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

DEC 28 2017

SC Court of Appeals

Re: Cricket Store 17, LLC d/b/a Taboo v. City of Columbia Board of Zoning Appeals AND
City of Columbia Zoning Administrator v. Cricket Store 17, LLC d/b/a Taboo
Civil Action No.: 2016-CP-40-03478
Appellate Case No.: 2017-000561
Our File No.: 5253.00114

Dear Ms. Kitchings:

Enclosed is one (1) original and six (6) copies of Respondent's Motion to Dismiss Appeal or, in the Alternative, to Strike Matter From, and Supplement, the Record on Appeal in connection with the above-referenced matter, along with Certificate of Service for filing. A filing fee check for \$25.00 is also enclosed. Please file same and return a filed copy to our courier.

Please contact me if you have any questions or comments concerning this correspondence or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter M. Balthazor".

Peter M. Balthazor

PMB/ppa

cc: Thomas R. Goldstein, Esquire