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 Tracking No.: 2017-000561

Cricket Store 17, L.L.C. 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.

RETURN TO RESPONDENT'S MOTION TO DISMISS

As authorized by Rule 240(e), Cricket Store 17, L.L.C. shows that the respondent's motion to dismiss should be denied for the following grounds:

Respondent asserts that appellant included matters in the Record on Appeal that were either "not designated by Appellant or were not presented to the lower court or tribunal." Motion at page 4. Neither is true.

As set forth in the appellant's motion for leave to file the Record on Appeal as filed, the appellant made numerous efforts to confer with respondent's counsel to solve questions. As shown in the accompanying motion to accept the Record on Appeal as filed, the respondent refused to communicate except through e-mail. Because the matter originated as an appearance before the Board of Zoning Appeals, and because the City, as argued throughout the briefs, refused to meet with appellant prior to the hearing,[1] the appellant was frozen out of the process. Thus, when the City suggests that the "Application for Special Exception" should not be part of the Record on Appeal, it is impossible to square the City's assertion with the following designation, which respondent helpfully attaches to his motion in Exhibit A as "Application to Zoning Administrator for Special Exception. (Respondent's motion, Exhibit A, page "32.")

Likewise, the appellant does not know how to respond to respondent's complaint about "page 2 of a letter from the City's Business License Division and photographs." (Motion page 4-5, Objection "b") These are respondent's designations, and the large number of color copies and the missing page 1 of the letter are just two of the reasons appellant's counsel sought to bring the Record on Appeal to respondent's counsel's office and spend 30 minutes going through it together. These documents are respondent's designations, not appellant's!

[1] As argued through the briefs, the City has adopted a policy of exclusion that extends not only to the appellant, but also to its counsel. The City (1) refused to meet with appellant prior to the hearing even though the application procedure **requires** such a meeting, (R.O.A. page Vol. 1, page 35) (2) the City refused to divulge its evidence until it made its presentation to the Board, (3) the City has refused and still refuses to provide simple information to the appellant or its lawyer, even demanding that his lawyer drive from Charleston to Columbia to pick up a compact disc, which the City refused to mail. The City will not accept phone calls from the appellant or his lawyer, will not schedule meetings with appellant or his lawyer, and its counsel refuses to take phone calls from opposing counsel. Both the appellant and his lawyer have been reduced to second class citizens in this case.

Respondent next complains (objection "c") about the inclusion in the Record on Appeal of Scott Bergthold's false statement to the Hearing Officer on November 21, 2013. (Motion page 5) Appellant submitted Mr. Bergthold's false statement to the Hearing Officer as part of its September 1, 2016, "Objection to application of Scott Bergthold." (R.O.A. Vol. 1, page 368). Respondent suggests that appellant never designated this pleading (or the Supreme Court's letters discussed below), which proves that respondent's counsel is as overworked as appellant's counsel and can be forgiven for overlooking the fact that, in an effort to solve the numerous questions about the designations, appellant sent respondent a proposed table of contents for the record on appeal on October 25, 2017. The e-mail reads:

> Pete,
>
> I think I can get you a pdf [of the Record on Appeal] by tomorrow, but it looks like I'm missing some of your designations. On the other hand, I think some of your designations are the same as your designations but with a slightly different name. Would you look at the attached Table of Contents and compare it against your Designation and see if I have everything? I know I'm missing Exhibits A and B attached to your Answer. (If you hadn't barred me from your office, we could have had this all straightened out. . . .)

Attached to this e-mail was the proposed Table of Contents, which is attached here as Exhibit A and incorporated by this reference. In short, there was much confusion because respondent's Exhibits A and B were—or so appellant thought—the entire record before the Board of Zoning Appeals. (Even the record before the Board of Zoning Appeals was contentious—See Record on Appeal Vol. 2, page 496.)

The point is that the respondent had appellant's designation well in advance of the deadline; in fact, respondent had an electronic version of the Record on Appeal after respondent's counsel

refused to meet with appellant's counsel (even by telephone) to review the record, and was aware of appellant's designations.

As to respondent's objection to the Supreme Court's letters being in the record (objection "d,") these documents were part of the appellant's objection to the admission of Scott Bergthold, which is fully discussed in the preceding paragraph. Appellant submitted them to Judge Hood as part of his objection and clearly designated them when appellant provided the respondent the actual record on appeal with the Table of Contents discussed above.

Respondent objects to the inclusion of Requests to Admit (objection "e") even though everything in them material to this appeal is contained in the Record on Appeal and almost all of them are matters that can be noticed judicially without any proof. See *S. C. Rules of Evidence*, Rule 201. The most important ones' deal with statements of law, not fact such as this example: "10. Admit that South Carolina Code § 6-29-800, provides that "any person aggrieved" may appear before the quasi-judicial body called the Board of Zoning Appeals. (R.O.A. Vol. 1, page 409.) The City could not bring itself to admit this. The Requests for Admission did not become important to appellant's case until after the trial court issued its Order on February 6, 2017 (R.O.A. Vol. 1, page 7) admitting Mr. Berthold *pro hac vice*. The Order offers nothing by way of explanation other than the unexplained conclusory statement: "Having considered the motion, the Verified Application for Admission *Pro Hac Vice*, the arguments of counsel at the October 28, 2016 hearing and related correspondence, the Court hereby GRANTS same." Since there were no discussions of the issues, the appellant moved for reconsideration (R. O. A. Vol 1, page 391); however, the circuit court denied reconsideration without granting the parties a hearing. To be fair to the City, considering the resolution of the federal court litigation, the only Requests for

Admission remaining relevant to this litigation are numbers 5, 6, 7, 8, 9, 10, 1112, 13, 14, 15, 16, 17, 18, 19 & 22.

In short, the respondent cannot object to a designation when the Court denied appellant an opportunity to introduce them into the record.

Respondent's final objection ("f") is an objection to including the published treatise called "Zoning Comments" by the law professor F. Patrick Hubbard. The appellant made this learned treatise a centerpiece of his attempt to convince the Board that he had a right to be heard on the merits:

> Mr. Goldstein: That is not correct. With all—and I know—I know it's a rare privilege to be allowed to lecture to a law professor, but let me disabuse you of that notion, and let me tell you the authority that I'm relying on is the *Zoning Comments* published by Professor Patrick Hubbard. This is the document I am relying on. As you point out in this document—
> Prof. Hubbard: I'm flattered you think that's authority for anything—
> Mr. Goldstein: It is authoritative.
> Prof. Hubbard: I don't even—that was written so long ago.[2] I don't even remember what I said. So, let's move on.

At the hearing before the Board of Zoning Appeals, appellant came armed with multiple copies of Professor Hubbard's treatise, but, as argued extensively in the briefs, the City shut the door on the appellant and his lawyer so what happens to appellant's exhibits to the Board of Zoning Appeals is anyone's guess. It is a hard sell to freeze a litigant out of the process and then complain that he is not following the process.

The respondent's final complaint—that appellant's appeal to the Board of Zoning Appeals is not signed, but the one in respondent's Exhibit A is—makes no sense. It does illustrate the

[2] The Copyright is 2009. R.O.A. Vol 2, page 583

insurmountable barrier the City placed before appellant by freezing him out of the process and then complaining about his absence. The appellant has no idea what the City did with his documents once he forwarded them to the City for filing. (In fact, just since appellant filed this appeal, appellant now must file a second *Freedom of Information Act* claim against the City to force it to turn over documents appellant is entitled to receive.)

In summary, the City of Columbia has not dealt in good faith with the appellant from the beginning, and the current dilatory tactic is but the latest salvo. It has erected every barrier in appellant's path. It will not communicate. It will not turn over documents, and this debate over the Record on Appeal is just another dilatory tactic adopted by the City to prevent appellant from having an opportunity to be heard.

In summary, the appellant provided a detailed designation of contents of record to the appellant, including, but not limited to a preview of the entire assembled record on appeal. The City knows no bounds to its duplicitous conduct, even possessing the chutzpah to assert, albeit mildly in a footnote, that the Record on Appeal contains "unnecessary duplication." The "unnecessary duplication" was the primary motivation to appellant to reach out to respondent, offering to drive to respondent's counsel's office with the Record on Appeal in hand to solve this and other problems, but the respondent refused. Instead it issued ambiguous and confusing instructions via e-mail, which only complicated the case. There is no doubt that the Record on Appeal is unnecessarily repetitive, and appellant did confuse some page numbers trying to decipher the City's opaque instructions. However, the deficiencies are minor inconveniences, and the indisputable fact is that overnight designated by the City is contained in the Record. The respondent should not be heard to complain about confusion it created. What the City is really trying to do is hobble the discussion the better to hide behind obfuscation as cover for the

deplorable treatment it handed out to the appellant and his lawyer, reducing them to second class citizens. For these reasons, the appellant renews its request set forth in the accompanying Motion for Leave to File the Record as Received. This case raises an important substantive right over a well-defined principle of law of statutory construction, and this Court should not allow the City to delay the disposition of this case on its merits through dilatory tactics.

Respectfully submitted,

January 7, 2018

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EXHIBIT A

Thomas Goldstein

From: Thomas Goldstein
Sent: Wednesday, October 25, 2017 6:11 PM
To: Pete Balthazor
Subject: Record on Appeal
Attachments: Record on Appeal (Oct. 25, 17).docx

Pete,

I think I can get you a pdf by tomorrow, but it looks like I'm missing some of your designations. On the other hand, I think some of your designations are the same as my designations but with a slightly different name. Would you look at the attached Table Of Contents and compare it against your Designation and see if I have everything? I know I'm missing Exhibits A and B attached to your Answer. (if you hadn't barred me from your office, we would have had this all straightened out. How can you live in Columbia and be so discriminatory against Gamecocks?)

Tommy

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In The Court of Appeals

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PROOF OF SERVICE

I certify that I have served the Motion for Leave of Court to Accept Record on Appeal as filed and appellant's Reply to Motion to Dismiss on the Respondent, City of Columbia, by depositing a copy of it in the United States Mail, postage prepaid, on January 7, 2018, addressed to its attorney of record, Peter M. Balthazor, Riley, Pope & Laney, L.L.C. at P. O. Box 11412, Columbia, S. C. 29205.

January 7, 2018

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January 7, 2018

Hon. Jenny Abbott Kitchings,
South Carolina Court of Appeals,
ATTN.: Jessica, case manager
1220 Senate Street
Columbia, S. C. 29201

Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478
Appellate Tracking Number: 2017-000561

Dear Ms. Kitchings,

I enclose an original and seven copies of a Motion for Leave to File the Record on Appeal Out of Time and a Return to respondent's Motion to Dismiss. I also enclose a certificate of service and our firm's check in the amount of $25.00 to cover the filing fee for the Motion. Would you be so kind as to file the original and return one copy of each marked filed in the envelope provided? By copy of this letter I am providing a copy to opposing counsel. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/
enclosure: Motion to File Record On Appeal, Return to Motion to Dismiss, certificate of service, check No.: 18150
cc: Mr. Peter M. Balthazor, Esq. (with enclosure)
Mr. Peter M. Balthazor
Riley, Pope & Laney, L.L.C.
P. O. Box 11412
Columbia, S. C. 29211

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