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
JAN 17 2018
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.

CITY'S RETURN TO TABOO'S MOTION FOR LEAVE TO FILE RECORD ON APPEAL OUT OF TIME

Taboo's motion for leave "to file the Record on Appeal as filed" is a case-study in blame-shifting. Taboo admits that it filed its Record five days late, even *after* this Court granted Taboo three extensions, including a 10-day extension to file the Record itself. The City provided clear, precise feedback on how to fix all of the deficiencies in the Record, but Taboo disregarded that guidance and now attempts to blame the City for its own failure. Taboo's Record on Appeal is both late and grossly inadequate. For the reasons stated in the City's motion to dismiss, and those herein, the Court should deny Taboo's motion to file its Record on Appeal out of time.

It is beyond dispute that "the burden is on the appellant to provide the appellate court with an adequate record for review." *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 556, 555 (Ct. App. 2007). Taboo contends that the City hamstrung Taboo's efforts to timely file a correct Record. But Taboo's problems are self-inflicted. As explained in the City's reply in support of its motion to dismiss, Taboo's counsel has introduced substantial error into the Record at every step of the process.[1] The City provided clear, concise, and detailed feedback so that Taboo could address the Record's myriad deficiencies. (*See* City's Mot. Ex. C; City's Reply Ex. 1, Oct. 25 email.) But Taboo did not listen; instead it shirked its responsibility at great cost to the City.

Taboo alleges that a five-day delay causes no prejudice to the City, but this understates the actual harm. First, Taboo's actions have already cost the City substantial time and money to address. They have: (1) required the City to specify in mind-numbing detail the substantial errors in multiple drafts of the Record as well as the defective Record that was filed, (2) required the City to prepare tables of errors and repeated correspondence to Taboo regarding same, and (3) necessitated a motion to strike, a reply supporting that motion, and this return to Taboo's motion.

Second, Taboo's requested relief—"to file the Record on Appeal as filed"—promises more of the same. Rather than fix the Record on Appeal to conform to the Rules, Taboo is asking that the erroneous record it has compiled be accepted, so that it can continue to argue about extraneous matters and rely on documents that are not properly part of the Record on Appeal. Thus, Taboo's proposal would perpetuate the substantial problems Taboo has created.

---

[1] Many of Taboo's errors stem from their wrong decision to split the BZA Records up into their individual components, instead of presenting them as they were presented to the trial court: *in toto* as Bates-numbered exhibits. *See* Rule 210(c), SCACR (requiring documents to be organized by the type of file that was presented to the court below). The City notified Taboo of this error well in advance. (City's Reply Ex. 1, Oct. 25 email.) But Taboo compounded these errors by including items outside the trial court's record and by failing to include items designated by the City.

Additionally, Taboo's actions have caused substantial delay in the litigation. If Taboo had timely filed an adequate Record when it was initially due under the Rules, or even on the extended deadline of December 7, 2017, final briefing would have been completed by December 27, 2017. Even if the Court allows this appeal to continue, briefing cannot continue until after this Court rules on both outstanding motions occasioned by Taboo's failure to follow the Rules.

Taboo also claims that color copies of the BZA Records caused a technical delay. But it is not difficult print color copies of PDF photos that the City provided Taboo (City's Reply Ex. 2), especially since Taboo injected over thirty pages of color copies into the Record on Appeal that were never part of the trial court's record. (R. 286-317; *see* City's Mot. at 4-5, item b).

Taboo also claims that it had trouble renumbering the Record on Appeal. But it was Taboo who prematurely numbered a Record that was unnecessarily disjointed, included items outside of the trial court's record, and failed to include items properly designated by the City. Thus, Taboo should not be heard to complain that it was costly to fix its own mistakes.

Taboo had a simple job: compile files from the trial court (including the complete BZA records contained therein) that were designated by the parties on appeal.[2] Taboo failed, without excuse, to accomplish this job. The City spent considerable time and money to pore over the errors and correct the deficiencies in various drafts, but Taboo disregarded that advice at every turn. Now that Taboo has filed a grossly inadequate Record on Appeal that was also five days late, Taboo attempts to point the finger back at the City.

The City has shown that Taboo's attacks are baseless and that Taboo is without excuse for failing to present this Court with an adequate and timely Record on Appeal. Thus, the City respectfully asks this Court to deny Taboo's motion to file its Record on Appeal out of time.

---

[2] The City designated only 190 pages out of what has been filed as a 616-page Record.

Respectfully submitted,

Peter M. Balthazor, #68244
RILEY, POPE & LANEY, LLC
Post Office Box 11412
Columbia, South Carolina 29211-1412
(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@sdblawfirm.com

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

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
JAN 17 2018
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.

PROOF OF SERVICE OF CITY'S RETURN TO TABOO'S MOTION FOR LEAVE TO FILE RECORD ON APPEAL OUT OF TIME

I certify that on January 17, 2018, 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: January 17, 2018

Peter M. Balthazor
Counsel for Respondent

South Carolina
Riley Pope & Laney, LLC
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, SC 29205
Phone: 803.799.9993
Fax: 803.239.1414

RILEY POPE & LANEY LAW

North Carolina
Riley Pope & Laney, PLLC
4822 Albemarle Road
Suite 248
Charlotte, NC 28205
Phone: 980.201.3888
Fax: 704.625.9430

January 17, 2018

RECEIVED
JAN 17 2018
SC Court of Appeals

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201s

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:

Please find enclosed the original and six copies of the City's Return to Taboo's Motion for Leave to File Record on Appeal out of Time, with Proof of Service in the above-referenced matter. Please file the enclosed documents and return a filed copy with my runner.

Thank you for your kind assistance.

Sincerely,

Kimberly R. Bickford
Paralegal

/krb

Enclosures

Cc: Thomas R. Goldstein, Esquire