

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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

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**RECEIVED**  
MAR 12 2018  
SC Court of Appeals

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.

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REPLY TO CITY'S MARCH 5, 2018 RETURN TO  
MOTION FOR LEAVE TO SUPPLEMENT THE RECORD ON APPEAL  
AND HOLD FILING DEADLINE IN ABEYANCE PENDING RULING  
RULE 212 *SOUTH CAROLINA APPELLATE COURT RULES*

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As authorized by *Appellate Court Rule 240(f)*, the appellant offers this brief reply.

**I. Rule 212 allows supplements**

The City's argument against allowing the appellant to supplement the record is an attack on counsel rather than addressing the merits of the modest request to supplement. The Rules of Appellate

Procedure authorize a party to request leave of Court to supplement the record. Rule 212(b) As set forth in appellant's original request, appellant acknowledges there is no mechanism for rehearing a motion; however, Rule 212(b) allows a party to request leave to supplement the record, and the Court has not previously addressed that request. The appellant's request for leave to supplement the record as presently bound is based on the application of the rule and economic considerations. The Record on Appeal as it presently exists cost over \$2,700.00 to print and bind, and while this sum may be insignificant to the largest city in the State of South Carolina, it is significant to a litigant. Therefore, mindful of economic pressures, appellant's counsel used his best judgment in attempting to address the issue as allowed by the Rules and in a cost-effective manner. Whether the Court does or does not allow the appellant to supplement the record, the appellant is entitled to ask and entitled to make his request in the most cost-effective method possible.

Moreover, as set forth in the attached memorandum, the issue in objecting to a motion to supplement the record is whether the party resisting the supplementation will or will not be prejudiced. *4 C.J.S. Appeal and Error* § 598. The City identifies no prejudice to appellant's modest request, and the request to have a correct record only serves the Court in its truth-seeking function. The City's real prejudice is that it fears for this Court to have a full understanding of the facts.

As for the three items appellant wishes to include, they were part of the record. The appellant's application for special exception is indisputably part of the record because that pleading is the first document the appellant filed with the City, and it is the request for hearing that the Zoning Administrator refused to set for a hearing. Likewise, Mr. Bergthold's admission record in South Carolina was part of the record below.

## II. Appellant's request is allowed by the rules and is ethical.

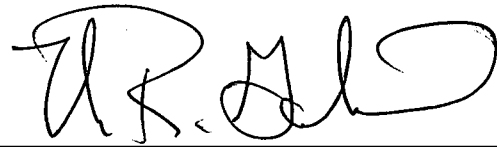
The second part of the City's response is another request for sanctions against appellant's counsel. (This case contains more requests for sanctions against appellant's counsel than the previous 36 years of practice combined.) Apparently, the City of Columbia makes appeals for sanctions a standard of practice, but a lawyer should be allowed to use his or her independent judgement to advise his or her client and make decisions on how to handle a case without being threatened with sanctions throughout the case. Appellant's motion cannot possibly be interposed for delay, because (1) the *Rules of Appellate Procedure* allow a litigant to make a request to supplement the record, and (2) whether the Court grants or denies the request, the disposition of the case is not delayed. Moreover, it is routine in such cases to hold the printing in abeyance to allow a streamlined and cost-effective record preparation based on the Court's decision. In addition, as set forth above, the City can identify no prejudice from such a routine request. The request for minor supplementation to the record is resolved more quickly and more efficiently if the appellant is allowed to utilize a record that is already bound. By raising the specter of sanctions, the respondent is really saying that appellant's counsel is acting in bad faith without specifying how. In evaluating who is or is not acting in good faith, it is important to know that both the City and its counsel refuse to communicate with the appellant or owner. In the same way that the Board of Zoning Appeals refused to allow appellant to be heard on the merits—which is the issue in this appeal—the City refuses to communicate with counsel, or with the owner to allow owner to understand what changes the City contends are necessary to resolve **all** of this litigation. On this question of good faith/bad faith, the lack of communication has deteriorated to such a level that appellant's counsel's most recent effort was to send to counsel a "ballot," with a self-addressed, return envelope, on February 28<sup>th</sup> (copy attached) in another effort to persuade the City to communicate with the appellant so the parties can end this dispute. While the attached ballot

is not part of the record on appeal, it goes to the believability of the City's accusations against counsel. This Court can give this ballot whatever weight it thinks is appropriate, but the fact remains that appellant continuously begs the City to communicate to make this litigation unnecessary, and the City routinely refuses to cooperate. Thus, the City's allegations of improper actions are not supported by the rules or the facts.

### Conclusion

As set forth in the motion to supplement, the matters sought to be included are part of the record below, and the appellant should be given leave to supplement the record to aid this Court in its search for the truth.

Respectfully submitted,



March 8, 2018

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Attorneys for Appellant

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**RETURN BALLOT**

\_\_\_\_\_ YES, the City will meet with representatives of Taboo and its legal counsel to discuss what deficiencies remain to obtaining a general retail license. Please contact \_\_\_\_\_ at \_\_\_\_\_ to arrange a date and time.

\_\_\_\_\_ YES, the City will meet with representatives of Taboo, but NOT its legal counsel to discuss what deficiencies remain to obtaining a general retail license. Please contact \_\_\_\_\_ at \_\_\_\_\_ to arrange a date and time.

\_\_\_\_\_ NO, the City will not meet with representatives of Taboo or its legal counsel to discuss what deficiencies remain to obtaining a general retail license.

Brian Cook left employment with the City of Columbia on \_\_\_\_\_, 2018.

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MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT  
REPLY TO CITY'S MARCH 5, 2018 RETURN TO  
MOTION FOR LEAVE TO SUPPLEMENT THE RECORD ON APPEAL  
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South Carolina has a paucity of case law on this subject, but the rule itself references 4 *C.J.S., Appeal and Error*, § 598 “Amendments and Additional Assignments.” This section says:

Although the right to amend has been denied because of the absence of legislative authority for such procedure, the right to amend assignments of error, or statements of ground, or reasons of

appeal is very generally recognized, providing appellee is not misled. If a proper amendment has been made to obviate the grounds of an objection, the objection will be overruled.

It is usually essential that the amendment be made by leave of court obtained on proper and timely application or motion in which the party asking for permission to make the amendment must show good cause therefore.

Amendments should be filed in time to give the opposite party property notice of what is claimed to constitute error. If delay in filing is likely to result in prejudice to the opposite party, the amendment should not be permitted, but delay in filing an amended assignment with the time allowed therefore is not jurisdictional, and if appellee is not prejudiced thereby, the appeal will not be dismissed, and the amendment will be considered.

Respectfully submitted,



March 8, 2018

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Attorneys for Appellant

STATE OF SOUTH CAROLINA  
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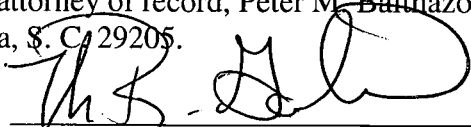
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PROOF OF SERVICE

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I certify that I have served the Reply and Supporting Memo to the City's Return to Appellant's Motion to Supplement the Record and hold the filing deadline in abeyance on the Respondent, City of Columbia, by depositing a copy of it in the United States Mail, postage prepaid, on March 8, 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.

March 8, 2018



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March 8, 2018

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

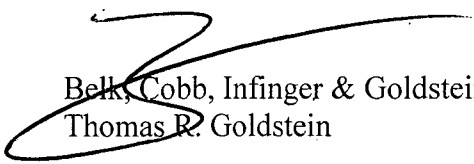
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SC Court of Appeals

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 Reply to the City's Return to Motion for Leave to Supplement the Record on Appeal and hold the filing deadline in abeyance. I also enclose a certificate of service and a supporting memorandum. 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: Reply to City's Return to Motion to Supplement Record on Appeal, Memorandum of Law, return envelope

cc: Mr. Peter M. Balthazor, Esq. (with enclosure)

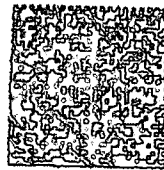
Mr. Peter M. Balthazor

Riley, Pope & Laney, L.L.C.

P. O. Box 11412

Columbia, S. C. 29211

FIRST-CLASS



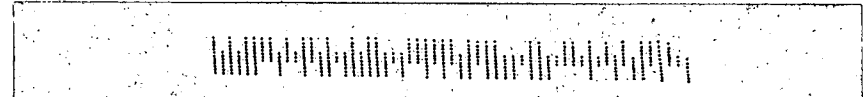
02 1P \$003.10<sup>00</sup>  
0001168646 MAR 08 2018  
MAILED FROM ZIP CODE 29405

# First Class Mail

Belk, Cobb, Infinger & Goldstein, PA  
P. O. Box 71121  
Charleston, S. C. 29415-1121

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Hon. Jenny Abbott Kitchings,  
South Carolina Court of Appeals,  
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Columbia, S. C. 29201



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