THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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 FINAL BRIEF

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PRELIMINARY STATEMENT

This case is the latest round in Taboo Adult Superstore's quest to continue operating in violation of the City of Columbia's court-tested Zoning Ordinance. In 2013, Taboo challenged the City's sexually oriented business licensing and zoning laws in federal court. That court denied Taboo a preliminary injunction (2014), granted the City summary judgment (2015), denied Taboo's post-judgment motions (2016), and was affirmed by the Fourth Circuit (2017).

This appeal stems from two 2016 determinations of the City's Zoning Administrator. First, on January 28, 2016, the Zoning Administrator visited Taboo, took pictures, and determined that Taboo was continuing to operate a sexually oriented business—specifically, a "sexual device shop" as defined in the Zoning Ordinance—in an unlawful location. The Administrator issued Taboo a warning letter. Second, the Administrator refused to accept Taboo's application for a special exception because the Zoning Ordinance specifically prohibits special exceptions for sexually oriented businesses. Taboo appealed these determinations to the Board of Zoning Appeals ("BZA"), which held a hearing on April 12, 2016 and affirmed both. Based on substantial evidence in the record, the circuit court affirmed the BZA decisions.

Taboo's scattershot appeal is laced with constitutional claims and state-law arguments that are barred by res judicata. As to the two BZA decisions that are properly before this Court, Taboo has waived any challenge to the first (the January 28, 2016 determination) by failing to specifically challenge it. Taboo's challenges to the second determination—the Administrator's refusal to accept a special exception application—are premised on a flawed reading of both the City's Zoning Ordinance and the state law governing zoning ordinances.

Taboo also complains about not receiving pre-litigation mediation, but Taboo was not entitled to mediation and, in any event, did not timely request it. Finally, Taboo makes unprofessional, ad hominem attacks on the City's counsel that are without merit.

STATEMENT OF ISSUES ON APPEAL

I. **Res judicata.** Res judicata bars litigation of issues that were or could have been raised in a prior action. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201 (1997). Taboo lost its prior case against Columbia's sexually oriented business licensing and zoning regulations. *Cricket Store 17, LLC v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015), *aff'd* 676 F. App'x 162 (4th Cir. 2017). Does the prior judgment bar Taboo's challenges to the zoning regulations?

II. **Waiver.** An appellant waives arguments by not presenting them in its opening brief. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n.4 (Ct. App. 2009). Taboo's opening brief does not challenge the circuit court's order affirming the Administrator's January 28, 2016 determination that Taboo was operating a sexual device shop illegally (No. 16-010-AA). Has Taboo waived any challenge to that determination?

III. **Special Exception Prohibition.** Zoning Ordinance ("the Ordinance") § 17-374(a) specifies location requirements for sexually oriented businesses and states that "[n]o special exception regarding any of the requirements of this section may be granted." Section 17-112(2)(a)(i) allows the Board of Zoning Appeals ("BZA") to hear only the special exceptions it is specifically authorized to grant, so the BZA affirmed the Zoning Administrator's decision to not process Taboo's special exception application. Did the circuit court correctly affirm that decision?

IV. **Pre-litigation Mediation.** S.C. Code Ann. § 6-29-825 and § 6-29-820 (Supp. 2003) authorize property owners to request pre-litigation mediation within thirty days of an adverse decision from the BZA. Taboo has not alleged that it is a property owner, and it submitted a request for pre-litigation mediation three months after the thirty-day deadline. Did the circuit court properly reject Taboo's request for pre-litigation mediation?

V. **Pro Hac Vice Admission.** Rule 404, SCACR sets forth the requirements for out-of-state attorneys to be admitted pro hac vice. Mr. Bergthold met all of those requirements, so the trial court granted the City's motion to have him appear pro hac vice. Did the circuit court properly grant the City's motion?

STATEMENT OF THE CASE

A. Procedural history and background

In late 2011, Taboo obtained a general business license and opened its "adult superstore" at 4716 Devine Street. Taboo sells a variety of adult merchandise and offers hundreds of sexual devices, including dildos, vibrators, penis pumps, cock rings, and anal beads. (*See* R. pp. 161-168, Jan. 28, 2016 Pictures.)

On December 29, 2011, the City of Columbia adopted a sexually oriented business licensing ordinance with location restrictions. On November 13, 2012, the City adopted updated sexually oriented business zoning regulations ("the Ordinance"). *Cricket Store 17, LLC v. City of Columbia*, 996 F. Supp. 2d 422, 424-26 (D.S.C. 2014). Taboo did not conform to the location regulations, but was allowed to amortize its investment and move to a conforming location by December 31, 2013. *Id.* at 426. Taboo applied to extend the amortization period, but was denied because it failed to show that it had not reasonably recouped its investment. *Cricket Store 17*, 996 F. Supp. 2d at 426.

Instead of relocating, Taboo sued in federal court. In detailed orders, the district court upheld the City's ordinances. *Cricket Store 17, LLC. v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015) (summary judgment), *reconsideration denied*, 2016 WL 81807 (D.S.C. Jan. 7, 2016). The Fourth Circuit affirmed this year. 676 F. App'x. 162 (4th Cir. Jan. 25, 2017). The Supreme Court of the United States denied certiorari on October 2, 2017. 2017 WL 2340153.

Nevertheless, Taboo has continued to violate the Ordinance by operating a sexual device shop (one kind of sexually oriented business). On January 28, 2016, the Zoning Administrator provided a letter to Taboo stating that, because the federal court had rejected Taboo's claims, Taboo would now have to comply with the City's sexually oriented business regulations. (R. p. 179.) The Zoning Administrator also conducted a site visit on that date, took pictures inside the

establishment, and concluded that Taboo met the definition of a sexual device shop. (R. pp. 162-168.) The letter indicated that Taboo would be cited for ordinance violations if it did not comply with the regulations. (R. p. 179.)

On February 26, 2016, the Administrator also declined to process Taboo's application for a special exception to the Ordinance because § 17-374(a) states that no variance or special exception shall be granted for a sexually oriented business. (R. pp. 271-272.)

The special exception application states "[y]ou should schedule a pre-application conference with staff (803-545-3333) prior to the application deadline to discuss your specific case and its requirements." (R. p. 274.) There is no such corresponding language on the administrative appeal form. (R. p. 263.) At the BZA hearing, the City explained that Taboo's appeal was not of a special exception denial, but of the Zoning Administrator's interpretation that Taboo's special exception application could not be processed because the Zoning Ordinance prohibits special exceptions for sexually oriented businesses. (R. p. 483, lines 10-25.) The City also explained that even if a pre-application conference applied to an appeal of an administrative interpretation, such a hearing was unnecessary for this administrative appeal because the City "had all the information [it] needed to proceed with the administrative appeal in this particular case." (R. p. 485, lines 5-7.)

Taboo appealed the Administrator's decisions to the Board of Zoning Appeals. The BZA held a hearing on both appeals on April 12, 2016. At that hearing, the City presented evidence of Taboo's inventory. The City submitted photographs taken inside of Taboo on January 28, 2016. (R. p. 444, lines 19-23.) These photographs show that Taboo was selling hundreds of sexual devices and was thus still a "sexual device shop" under the Ordinance. (R. pp. 161-166, 186.)

On May 11, 2016, the BZA affirmed both of the Zoning Administrator's decisions. (R. pp. 156-158 (16-010), 257-258 (16-011).) On June 8, 2016, Taboo appealed those decisions to the circuit court. On July 8, 2016, the BZA and the City's Zoning Administrator answered and counterclaimed for a permanent injunction.

On September 1, 2016, the Chief Administrative Judge of circuit court granted the City's motion to admit attorney Scott D. Bergthold *pro hac vice*. (R. pp. 8-9.) The circuit court (Hood, J.) held hearings on October 28, 2016 and January 26, 2017. Also on January 26, 2017, Judge Hood granted the *pro hac vice* application for attorney Bergthold. (R. pp. 6-7.)

On February 6, 2017, the circuit affirmed the BZA's decisions and held that "Taboo was not entitled to continue operating a nonconforming sexually oriented business in violation of the zoning ordinance, and it was not entitled to a special exception from the zoning ordinance's requirements." (R. p. 28.) On March 2, 2017, the circuit court denied Taboo's motion for reconsideration. (R. pp. 31-32.)

B. Relevant Zoning Ordinance Provisions

The City of Columbia places a number of location requirements on sexually oriented businesses. In particular, Zoning Ordinance § 17-374(b) prohibits a person from operating a sexually oriented business outside of an M-1 or M-2 district. (R. p. 280.)

One type of sexually oriented business is a "sexual device shop," which § 17-372 defines as "a commercial establishment that regularly features sexual devices," with exceptions for pharmacies and similar establishments. (R. p. 279.) The Ordinance also defines "sexual device":

> *Sexual device* means any three dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be

construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy

(R. p. 279.)

The Ordinance also prohibits special exceptions for sexually oriented businesses. Section 17-374(a) specifies that "[n]o special exception regarding any of the requirements of this section may be granted by the zoning board of adjustment." (R. p. 280.) Section 17-112(a)(2) specifies that the board of zoning appeals shall "[h]ear 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." (R. p. 282.)

STANDARD OF REVIEW

South Carolina Code § 6-29-840(A) specifies that "[t]he 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.... [T]he court must determine only whether the decision of the board is correct as a matter of law." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 479-80, 623 S.E.2d 373, 375 (2005) ("[A] factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings."). "Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances." *Clear Channel Outdoor v. Myrtle Beach*, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), *aff'd*, 372 S.C. 230, 642 S.E.2d 565 (2007). A court will not substitute its judgment for that of the reviewing body, even if it disagrees with the decision. *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

"A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010) (quoting *I'On,*

L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)). And "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

ARGUMENT

Taboo recycles already-rejected arguments and ignores governing law on appeal. That law and the undisputed record show that the Zoning Administrator properly (1) determined that Taboo was illegally operating a sexual device shop on January 28, 2016, and (2) refused to process Taboo's special exception application because § 17-374(a) of the Ordinance prohibits special exceptions for sexually oriented businesses. The circuit court also correctly held that res judicata prevents Taboo from raising the constitutional challenges scattered throughout its brief.

But even if this Court could consider Taboo's arguments, they are meritless. As to the first appeal (16-010), Taboo does not allege that the circuit court made any substantive error in affirming the Administrator's decision. Taboo thus waives any challenge to it. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n.4, 677 S.E.2d 32, 36 n.4 (Ct. App. 2009).

As to the second appeal (16-011), Taboo disputes the Zoning Administrator's determination to not process Taboo's special exception application (16-011). (Aplt. Br. Secs. I-III.) Taboo argues that the BZA can grant a special exception, (Aplt. Br. 12-17), but §17-374(a) is a clear prohibition against special exceptions for sexually oriented businesses: "[n]o special exception ... may be granted by the zoning board of adjustment." Thus, the Administrator's determination to not process Taboo's special exception application was correct.

Taboo also argues that § 17-374(a) conflicts with S.C. Code Ann. § 6-29-800 (Supp. 2003). (Aplt. Br. 17-23.) But § 6-29-800 does not limit the City's ability to restrict special exceptions. In fact, § 6-29-800(A)(3) contemplates that the City will set its own terms and conditions for

special exceptions, and states that the BZA may only grant special exceptions "subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance."

Taboo also argues that it was wrongfully denied a pre-hearing conference for its special exception application in case 16-011. (Aplt. Br. 23-25.) But as noted above, special exceptions are unavailable to sexually oriented businesses, so that procedure—which is not mandated by the Ordinance, but only suggested on the special exception application form—does not apply to sexually oriented businesses.

Taboo then brings two arguments raised for the first time in the circuit court. (Aplt. Br. Secs. IV-V.) It first states that it should have been allowed to pursue pre-litigation mediation under S.C. Code Ann. § 6-29-820 (Supp. 2003). (Aplt. Br. 25-26.) But Taboo did not show that it owns the property, so that section does not apply. In any event, Taboo missed—by more than three months—the thirty-day deadline for requesting mediation.

Finally, Taboo alleges that an attorney for the City was improperly admitted *pro hac vice*. (Aplt. Br. 26-29.) Instead of arguing that the attorney did not comply with Rule 404, SCACR—a rule that Taboo never mentions—Taboo asserts a series of wrong and irrelevant ad hominem attacks that ignore even a basic application of controlling law.

Thus, the circuit court correctly affirmed these BZA appeals.

I. Res judicata bars Taboo's state-law and constitutional challenges to the Ordinance.

Taboo raises a number of challenges to the Ordinance's sexually oriented business regulations. These include attacks on the City's prohibition on special exceptions for such businesses and scattershot constitutional challenges. But Taboo has already challenged the Ordinance and lost at every stage of federal litigation all the way up to the Supreme Court of the United States. Thus, all of Taboo's substantive challenges to the Ordinance are barred here because Taboo did raise them, or could have raised them, in its federal suit. The circuit court

below correctly held that res judicata barred Taboo's "claims against the City's enforcement of the ordinance against its sexual device shop." (R. p. 28.)

Res judicata prevents relitigation of issues that were addressed or could have been addressed in a former suit.

> The term res judicata encompasses two types of preclusion: claim preclusion and issue preclusion. *See Pedrina v. Chun*, 906 F. Supp. 1377 (D. Hawai'i 1995). "Issue preclusion and claim preclusion have historically been called collateral estoppel and bar or merger respectively." *Id.* at 1399. For the sake of simplicity, this Court will use the terms issue preclusion and claim preclusion.... "Claim preclusion ... bars plaintiffs from pursuing successive suits where the claim was litigated or could have been litigated." *Id.*

Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 216, 493 S.E.2d 826, 834-35 (1997).

To determine whether res judicata applies, "it must be first be decided if federal or state law controls." *Id.* When "a federal judgment is urged as the bar, federal law applies." *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 97 (1999) (citing *Crestwood Golf Club*, 328 S.C. 201). Federal law, in turn, will apply federal res judicata where the federal litigation was decided under federal question jurisdiction. *Blonder–Tongue Labs v. Univ. of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971).

Under federal law, a "party invoking res judicata must establish three elements: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991 (internal citations and quotation marks omitted).

The preclusive effect of a prior judgment extends beyond claims actually presented in prior litigation, for "[n]ot only does res judicata bar claims that were raised and fully litigated, it prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Id.*

(internal citations and quotation marks omitted). Identity of cause of action exists where the claim asserted in the second action was available during the first. *Id.* The inquiry is "whether the new claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment." *Id.* (quoting *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986)).

Here, Taboo argues that § 17-374(a) is a permissive grant of discretion, that its prohibition on special exceptions for sexually oriented businesses would be the "third rail of constitutional infirmity," (Aplt. Br. 21), that it constitutes "arbitrary discrimination," etc. (*Id.* at 22).

Taboo's claims against the Ordinance in this action are plainly barred by res judicata.

First, the federal action resulted in a final judgment on the merits.

Second, Taboo's claims existed when Taboo sued the City in federal court. The transaction giving rise to Taboo's challenges to § 17-374(a) is the passage of that provision via Ordinance No. 2012-093 on November 13, 2012. (R. p. 187.) When Taboo sued the City in federal court in December 2013, Taboo failed to assert certain challenges. Instead, Taboo raised them months too late—at the summary judgment stage. *Cricket Store 17*, 97 F. Supp. 3d at 766 ("Taboo also raises arguments in its summary judgment briefings that the restriction in the ordinance on granting variances is contrary to state law and is an unconstitutional bill of attainder.... These claims were not presented in the Complaint, and Taboo cannot raise these claims for the first time in its summary judgment briefing."). The fact that Taboo was late in raising state-law claims does not diminish the res judicata effect of the federal court judgment as to claims against the Ordinance that existed when Taboo filed the federal action.

Third, there is identity of parties and their privies. In the federal action, Taboo sued the City of Columbia. Here, Taboo sues the City of Columbia and an arm of the City, namely its Board of Zoning Appeals.

For all of these reasons, res judicata plainly bars Taboo's constitutional claims.

But even if this Court could hear Taboo's arguments, they are meritless for the reasons explained below.

II. Taboo has waived challenges to the circuit court's affirmance in No. 16-010-AA by failing to assert any specific challenge in its opening brief.

Taboo failed to challenge the circuit court's ruling affirming the BZA's decision in No. 16-010-AA. Taboo has thus waived challenges to that decision.

On January 28, 2016, the Zoning Administrator personally visited the site, took pictures of a multitude of sexual devices, and issued a letter notifying Taboo that it needed to comply with the Ordinance. (R. pp. 161-166, 179.) Taboo appealed to the BZA, which affirmed based on the extensive record evidence showing that Taboo was operating as a sexual device shop on January 28, 2016. (R. pp. 28-29, Feb. 6, 2017 Order ("Order") at 5-6.) The circuit court therefore properly affirmed the BZA's decision. (R. p. 29 ("Because evidence in the record supports the Board's decision—which is entitled to substantial deference—and because Taboo has shown no error of law, the Court affirms the Board's decision upholding the Zoning Administrator's determination.").)

Taboo has not challenged this holding at all in its opening brief on appeal. Thus, Taboo has waived any challenge to the court's holding affirming the decision in No. 16-010-AA. *See Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n.4, 677 S.E.2d 32, 36 n.4 (Ct. App. 2009) (holding that argument not presented in appellant's brief was waived on appeal); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("'Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.'") (quoting Rule 208(b)(1)(B), SCACR). This Court should therefore affirm in that case.

III. The circuit court properly affirmed the Administrator's decision not to process Taboo's special exception application (No. 16-011-AA) because the BZA lacked jurisdiction to hear it.

Taboo makes three arguments against the circuit court's affirmance of the BZA's decision on No. 16-011-AA. First, Taboo argues that the BZA should have considered its application for a special exception because § 17-374(a) is a permissive grant of discretion enabling the BZA to grant special exceptions to the Ordinance. Second, it argues that a complete prohibition on special exceptions would violate S.C. Code Ann. § 6-29-800 and would be unconstitutional. Finally, Taboo argues that it was wrongfully denied a pre-hearing conference referenced on the City's special exception application form. The first two arguments are barred by res judicata for the reasons stated above. All three arguments are without merit for the reasons stated below.

A. Section 17-374(a) prohibits any special exception from the sexually oriented business location requirements; Taboo's reading of that provision as discretionary is wrong.

Zoning Ordinance § 17-374 details the location requirements for sexually oriented businesses, and subsection (a) states that "[n]o special exception regarding any of the requirements of this section may be granted." (R. p. 348.) Taboo nevertheless argues that the BZA had jurisdiction to consider, and grant, Taboo's request for a special exception from the location requirements. This argument fails.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.... 'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). "In interpreting a statute, words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Durham v. United Companies Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (S.C. 1998).

"It is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

"Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances." *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.' *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)." *Id.* at 466.

The phrase in § 17-374(a) that "[n]o special exception ... may be granted" is a clear prohibition, not a permissive grant of discretion. (R. p. 348.) Thus, the BZA thus had no discretion to consider what the Zoning Ordinance prohibits. As the circuit court explained:

> The Board's determination was correct because the zoning ordinance authorizes the Board to hear only the applications for special exceptions that the Board is specifically authorized to pass upon by the terms of the zoning ordinance. (City Code § 17-112; 16-011-AA_0032.) .... The City, through its zoning ordinances, has decided not to give the Board the authority to permit special exceptions for sexually oriented businesses.
>
> Therefore, the Board correctly applied the City's zoning ordinances to uphold the Zoning Administrator's decision to return the special exception application as unprocessed.

(R. p. 30, Order at 7.)

Taboo offers no refutation of the circuit court's straightforward conclusion. It merely argues that the provision is discretionary, but it plainly is not. *See, e.g.*, *In re Brandt*, 437 B.R. 294, 298 (M.D. Tenn. Bankr. Ct. 2010) ("When used in conjunction with 'not,' however, 'may'

is not deemed to connote discretion, rather 'may not' most often is construed as if it were 'shall not.'"); Tex. Gov't Code Ann. § 311.016(1) (West 2017) ("'May not' imposes a prohibition synonymous with 'shall not.'").

Taboo's statements about Professor Hubbard's comments are also unavailing. Professor Hubbard *rejected* Taboo's interpretation. (R. p. 489, line 20-p. 490, line 1 ("I think the most correct interpretation of the language at issue about the special exception is pretty darn clear that we are not supposed to consider—even consider this because we cannot grant them ... it's a fairly simple thing.").)

In fact, Taboo's claim that the BZA had the power to hear and grant its special exception request is doubly wrong. In addition to § 17-374(a)'s specific prohibition on special exceptions for sexually oriented businesses, § 17-112(d)(a)(1) provides that the BZA can "[h]ear and decide **only** the applications for special exceptions as the board of zoning appeals is specifically authorized to pass upon by" the Zoning Ordinance. (R. p. 282 (emphasis added).) Taboo points to no language specifically authorizing special exceptions for sexually oriented businesses, so Taboo's claim that the BZA could grant it a special exception is infirm for this second, separate reason.

For these reasons, the Court should affirm the decision below in No. 16-011-AA.

B. The Zoning Ordinance's prohibition on special exceptions for sexually oriented businesses does not violate S.C. Code Ann. § 6-29-800.

Taboo next argues that S.C. Code Ann. § 6-29-800(B) grants "any person aggrieved" an immutable right to appeal a zoning decision to the BZA. But this ignores the distinction between the BZA's subject matter jurisdiction (set forth in subsection (A)), and the delineation of who can bring cases that fall within that jurisdiction (which is set forth in subsection (B)).

Under § 6-29-800(A)(3), the BZA may only "permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance." *Id.* Section 17-374(a) of the Zoning Ordinance specifically prohibits the granting of a special exception from the location requirements for sexually oriented businesses. Thus, the Ordinance does exactly what the statute contemplates when it prohibits special exceptions for a certain type of use.

The circuit court correctly understood this: "The Board's enabling statute provides that a board of zoning appeals has the authority only to permit uses by special exception subject to the terms and conditions for the uses set forth for such uses in the zoning ordinance." S.C. Code Ann. § 6-29-800(A)(3) (Supp. 2015)." (R. p. 30, Order at 7.) Thus, § 6-29-800(B), which governs *who* may bring an appeal ("any person aggrieved"), does not expand *what* may be appealed.

The BZA has no authority to hear an application for a special exception that, if granted, would violate the City's zoning regulations. S.C. Code Ann. § 6-29-800(A)(3). The BZA exists "[a]s a part of the administrative mechanism designed to *enforce* the zoning ordinance." S.C. Code Ann. § 6-29-780(A). Thus, the City Council makes zoning law; the BZA applies and enforces it. In affirming the Zoning Administrator's decision to not process an application for a special exception that could not be granted, the BZA did just that.

City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991), is inapposite. There, the City's thirty-day mandatory minimum sentence for marijuana possession conflicted with the state's sentencing guidelines which allowed for lesser punishment. This directly conflicted with Article VIII, § 14 of the South Carolina Constitution, which prohibits local governments from adding to or subtracting from state "criminal laws and the penalties and sanctions in the transgression thereof...." By contrast, § 6-29-800(A)(3) specifically authorizes

the City to set its own guidelines for when special uses may and may not be permitted. Taboo can point to no conflict with state law.

Nor is *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999), relevant. There, the local Zoning Board of Adjustments ("ZBA") had the discretion to grant the plaintiff's special exception to operate a residential care facility, but disregarded the relevant procedures in the Zoning Code when denying plaintiff's application. "[T]he ZBA's decision was based, not on the requirements of the 'special exception' ordinance, but upon the fears of neighboring residents ...." *Id.* at 207. Here, the BZA has no discretion to hear Taboo's request at all because Taboo seeks a special exception that is flatly prohibited under the Ordinance. Unlike the ZBA in *Bannum*, the BZA here is complying with its Ordinance.

The circuit court correctly determined that City Code § 17-374(a) does not conflict with S.C. Code Ann. § 6-29-800.

C. Taboo was not entitled to "a pre-application conference" on its application for a special exception—which special exception is barred by § 17-374(a).

Taboo's last argument against in No. 16-011-AA is that Taboo was wrongly denied a "pre-hearing conference." Taboo points to language on the City's *special exception* application form stating that a special exception applicant "should schedule a pre-*application* conference ... prior to the application deadline to discuss your specific case and its requirements." (R. p. 342.) But Taboo cites no authority—whether a statute, ordinance, or binding rule—entitling it to a conference with City staff before the BZA hearing on Taboo's appeal of the Zoning Administrator's decision to not process Taboo's special exception application.

There is no such authority. This is reason alone to reject Taboo's argument.

Taboo also misunderstands the purpose of a pre-application conference, which is for the City to "find out what exactly they're looking to do on a specific case." (*See* R. p. 482, lines 19-

22.) "In this case, it was outlined specifically by the application, back and forth e-mails and letters." (R. p. 482, lines 22-24.) Those documents made it clear that Taboo was seeking a special application to operate a sexually oriented business in a location where one is prohibited. Because § 17-374(a) prohibits this, the Zoning Administrator properly declined to process the application. But even when an application can go forward under the Zoning Ordinance, a conference is not necessary. (*See also* R. p. 451, lines 19-21 ("And even with a special exception or a variance, we don't always talk to the applicant.").)

Taboo also complains that the lack of a conference created unfair prejudice when the Zoning Administrator presented the pictures that it took inside the store, in the presence of employees, on January 28, 2016. But that (undisputed) evidence was not presented in the special exception appeal (No. 16-011-AA), but in the enforcement appeal (No. 16-010-AA). (*See* R. p. 443; lines 7-13, p. 444, lines 19-23, p. 446, lines 5-11; *see also* R. p. 446, lines 17-21.)

In any event, Taboo had ample notice that its operation as a sexual device shop (one kind of a sexually oriented business) would be at issue. To enforce its Ordinance against Taboo, it is axiomatic that the City show that Taboo is a sexual device shop. (*See* R. p. 179, Jan. 28, 2016 Letter from Zoning Administrator; R. pp. 339-340, Feb. 26, 2016 Letter from Zoning Administrator.). And Taboo had been litigating over its right to operate as a sexually oriented business since 2013. Thus, the BZA correctly concluded that Taboo could not be surprised by its own inventory, which is what makes it a sexual device shop under the Ordinance. (R. p. 461, lines 8-9 ("Mr. McMeekin: Well then, why can't you tell us [the makeup of your client's inventory]? Mr. Goldstein: "I can—you can look at the photos."); *see* R. pp.161-166 (photos).)

Finally, Taboo complained only that it had no opportunity to prepare photos to support its (risible) claim that *other* stores have the "exact same inventory." (R. p. 454, lines 17-24.) But

this meritless equal protection argument is outside of the BZA's jurisdiction, is otherwise barred by res judicata, and is waived on appeal.

Thus, this Court should reject Taboo's argument about a "pre-hearing" conference.

IV. Taboo is not a property owner entitled to pre-litigation mediation and, in any event, Taboo missed the thirty-day deadline for requesting mediation.

Taboo's pre-litigation mediation argument ignores key statutory requirements for seeking mediation—requirements that Taboo did not meet.

South Carolina Code § 6-29-820(B) provides that:

> (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.

(Emphasis added).

Here, the BZA mailed its decision on May 11, 2016. Taboo filed its "Complaint" on June 6, 2016, and an "Amended Complaint" on June 15, 2016. Taboo did not file its "Demand for Pre-Hearing Mediation" until three and a half months later, on September 20, 2016.

Taboo continues to press its claim that it was entitled to pre-litigation mediation, but fails to cure the defects that are fatal to its claim.

First, Taboo never presented evidence that it is a property owner entitled to pre-litigation mediation. Taboo's appellate brief fails to confront this problem. For this reason alone, Taboo was not entitled to pre-litigation mediation.

Second, Taboo is wrong to claim that the thirty-day deadline does not apply to the request for pre-litigation mediation. The last sentence of § 6-29-820(B) is clear: "Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked." Thus, even if Taboo had shown ownership of the property, its claim for pre-litigation mediation—filed four and a half months after the BZA decision was postmarked—was untimely.

Taboo's reference to § 6-29-825(A) is unavailing. It provides that if "a property owner files a notice of appeal with a request for pre-litigation mediation," then the mediation is to be conducted in a certain manner. It also provides for a non-owner to "petition to intervene." But nothing therein negates either the requirement that "a property owner" file the request for pre-litigation mediation, nor that the request be filed within the thirty-day time limit specified in § 6-29-820(B). Indeed, ignoring the timing requirement would allow a party to obtain *pre*-litigation mediation months *after* litigation has begun. Taboo provides no support for this absurd result.

V. The circuit court properly admitted counsel *pro hac vice* under Rule 404, SCACR, and Taboo's arguments—which ignore the rule—are contrary to governing law.

Taboo argues that the circuit court wrongly admitted Scott Bergthold *pro hac vice* in this case, but ignores the controlling rules and relies on baseless *ad hominem* attacks.

A. The admission *pro hac vice* was proper under Rule 404, SCACR, a rule that Taboo never mentions.

Rule 404, SCACR explicitly provides for out-of-state counsel to be admitted in a South Carolina court case and provides forms toward that end. Subsection (a) of the Rule states:

> **(a) Motion for Admission Pro Hac Vice; Tribunal Defined.** Upon written motion, an attorney who is not admitted to practice law in South Carolina and who is admitted and authorized to practice law in the highest court of another state or the District of Columbia may be admitted pro hac vice in any action or proceeding before a tribunal of this state. Except as provided by Rule 244(d), a person may not be admitted pro hac vice unless a regular member of the South Carolina Bar in good standing is associated as attorney of record with that person. The motion shall be filed with a completed

application form specified in (d) below (including the certificate of good standing). For the purpose of this rule, a "tribunal" includes any court of this state, the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310.

Mr. Bergthold's completed, verified *pro hac vice* application shows that Mr. Bergthold: (1) is in good standing in TN, GA, and AZ bars, (2) has never been disciplined by any agency or court, and (3) obtained associated local counsel (Mr. Balthazor). (R. pp. 357-367, Aug. 17, 2016 PHV App.)

Thus, all the requirements of Rule 404 were met according to the Court's internal check list for *pro hac vice* admissions, and on September 1, 2016, the Chief Administrative Judge issued an order granting the City's motion to admit attorney Bergthold *pro hac vice*.

After the order granting admission was entered, Taboo filed objections. The trial court (Hood, J.) heard Taboo's arguments during appeal hearings that occurred on October 26, 2016 and January 26, 2017. On the latter date, January 26, 2017, Judge Hood issued a *second* order granting the City's motion.

Taboo never cites any portion of Rule 404 with which the application did not comply—indeed, it never mentions Rule 404—nor does it identify any error in the Chief Administrative Judge's order granting the application. For that reason alone, Taboo's objections to the order should be overruled.

B. Taboo also ignores Rule 5.5, RPC, which authorized Mr. Bergthold to appear before a municipal hearing officer in 2013.

Taboo ignores Rule 5.5, RPC which authorized Mr. Bergthold to appear before a municipal hearing officer in 2013. Ignoring Rule 5.5, Taboo wrongly argues that Mr. Bergthold told the municipal hearing officer that he had "been admitted *pro hac vice*" by "mak[ing] an application with the Supreme Court to be admitted *pro hac vice*" in the municipal hearing. But the Supreme Court's *pro hac vice* rule (Rule 404, SCACR) does not apply to a municipal-level proceeding,

because a municipal-level hearing officer is not a "tribunal" under subsection (a) of Rule 404. So Mr. Bergthold did not file an application with the Supreme Court, nor did he say that he did so. Rather, out of an abundance of caution Mr. Bergthold filed an application *with the municipal hearing officer* (only) to appear in that municipal-level proceeding.

Before litigation ensues, temporary practice by an out-of-state attorney is governed by Rule 5.5, RPC which provides for the multijurisdictional practice of law and states, in relevant part:

> (c) a lawyer in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; [or]
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; ....

Mr. Bergthold satisfied these requirements when he appeared before the municipal hearing officer in 2013. He was and is admitted in Georgia, Tennessee, and Arizona, and has not been disbarred or suspended from practice in any jurisdiction.

Per subsection (c)(1), Mr. Bergthold associated and worked closely with South Carolina attorney Peter Balthazor. Mr. Balthazor (at that time) was Assistant City Attorney for the City of Columbia and actively participated in the Taboo matter.

Additionally and independently, Mr. Bergthold was permitted under (c)(2) to provide legal services "reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction....." The City was aware that Taboo would likely sue in federal court, which Taboo did the following month, in December 2013. Mr. Bergthold "reasonably expect[ed] to be [] authorized"—and was authorized—to appear in that proceeding.

Taboo simply ignores Rule 5.5, RPC, and its arguments fail for that reason.

After litigation ensues, temporary practice by an out-of-state lawyer is governed by Rule 404, SCACR. Taboo simply ignores the definition of "tribunal" in Rule 404 when it argues that Mr. Bergthold was required to apply with the Supreme Court to appear in a municipal-level proceeding. For the purpose of Rule 404, a "tribunal" is "any court of this state, the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310." Section 1-23-310 in turn defines an agency as "each *state* board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases." (Emphasis added).

The municipal hearing officer provided for in the City of Columbia's Code is not a "tribunal" as defined in Rule 404(a), SCACR. Our courts have consistently interpreted § 1-23-310 of the Administrative Procedure Act to apply only to *state* agencies, not quasi-judicial local government bodies. *See Taylor v. Town of Atlantic Beach Election Comm'n*, 363 S.C. 8, 15, 18 (2005) (applying provisions in Title 7 of the South Carolina Code, not § 1-23-310(2) or (3) of the APA, to a decision by a municipal election commission); *cf. Kores Noric (USA) Corp. v. Sinkler, Gibbs & Simons*, 284 S.C. 513, 516 (Ct. App. 1985) (holding that South Carolina Fee Disputes Board was "part of the judicial branch of the government" and that it therefore was "not an agency subject to the provisions of the Administrative Procedures Act"); *see also Rowe v. City of West Columbia*, 334 S.C. 400, 405 (Ct. App. 2005) ("Clearly, neither the City nor the Committee can be considered a state board, commission, or department [under § 1-23-310(2)]."); *Hous. Auth. of City of Charleston v. Olasov*, 282 S.C. 603, 607 n.3 (Ct. App. 1984) ("A municipal housing authority condemnation board is not a state agency as defined in Section 1-23-310(1) ....").

Mr. Bergthold was thus not required to make application with the Supreme Court under Rule 404 to appear in a municipal-level proceeding, where appearance would normally be governed by Rule 5.5, RPC, and any informal procedure that the local hearing officer or quasi-judicial body might establish. Nevertheless, out of an abundance of caution, Mr. Bergthold sent an application to *the hearing officer* to appear at the November 21, 2013 municipal-level proceeding because it was the first hearing of its kind under the City's sexually oriented business ordinance, and no informal practice or procedure had been established.

At the beginning of that hearing, Mr. Balthazor mentioned Mr. Bergthold's *pro hac vice* application submitted to the hearing officer, and "wanted to get that on the record that that had been received and accepted" before proceeding. The hearing officer answered: "Yes. I checked on that actually this morning and that is accurate," confirming that she had received and accepted the application. After Mr. White asked for more information, the hearing officer talked about having to apply to the South Carolina Supreme Court and having to associate with local counsel. But technically, there was no need to file an application with the Supreme Court because the hearing was not before a state court or a state-level agency. This misunderstanding is understandable because Rule 404, SCACR addresses "pro hac vice" admission, even though it does not apply to every context in which an out-of-state attorney may seek to appear.

Thus, Taboo not only ignores the relevant rules, but also misrepresents the record to re-argue unsupported *ad hominem* attacks that the trial court rejected after conducting two separate hearings.

Taboo also wrongly asserts that Mr. Bergthold appeared at the April 12, 2016 BZA hearing. This argument is doubly wrong. Mr. Bergthold did not make an appearance before, or address

the BZA. But even if he had, such appearance would have been permitted under RPC 5.5, the multi-jurisdictional practice rule.

Finally, Taboo argues that Mr. Bergthold's admission is inappropriate because this case involves "a matter of pure state law" (Aplt. Br. 26.) But there is no "pure state law" exception to Rule 404, SCACR. Indeed, many clients hire out-of-state counsel for their experience in a particular kind of matter (e.g. traumatic brain injury), even though the legal issues are governed under state law (e.g., tort law). Further, Taboo defeats its own argument by arguing that Mr. Bergthold drafted the Ordinance because this would show that Mr. Bergthold has substantial experience in the local legal issues at stake in this case.

For all of these reasons, Taboo's arguments against Mr. Bergthold's *pro hac vice* admission fail. The circuit court correctly granted the City's motion under Rule 404, SCACR.

CONCLUSION

For all these reasons, this Court should affirm the circuit court's decisions below.

Respectfully submitted,

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Columbia Zoning Administrator

April 23, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I do hereby certify that the FINAL BRIEF OF RESPONDENT is in compliance with SCRCP Rule 211(b).

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