THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

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SC Court of Appeals

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

Cricket Store 17 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.

APPELLANT'S BRIEF

April 23, 2018

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STATEMENT OF THE CASE

In 2011, the appellant applied for a license to operate Columbia's only licensed adult business at 4916 Devine Street. Because the appellant met all applicable statutory and zoning requirements, the City issued the license on December 5, 2011. On December 19th, the City hired Scott Bergthold, a Tennessee lawyer who specializes in targeting adult businesses, and on December 22nd the City held a special meeting to pass first reading of a licensing ordinance prepared and presented by Mr. Bergthold to regulate adult businesses. The City passed second reading at a second specially called meeting on December 29, 2011. Subsequently, the City called again on Scott Bergthold to write a zoning ordinance to regulate adult business' locations. On November 13, 2012, City Council enacted the zoning ordinance.

The Bergthold zoning ordinance contains the following language, which this Court is now

called upon to apply.

> Sec. 17-374.—Location
> (a) No variance from any of the provision of this section **may** be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section **may** be granted by the zoning board of adjustment.
> (R.O.A., Vol. 2, page 579 [ordinance]
> (The emphasis on the word "may" is boldfaced here but not in the original.)

The appellant brought constitutional challenges against the City in the United States District Court. The District Court and the Fourth Circuit Court of Appeals rejected the appellant's constitutional challenges. However, the District Court refused to consider the plaintiff's state causes of action, and, in fact, ruled that the plaintiff's prior restraint claim failed because the ordinance provides state remedies, including, but not limited to, an automatic stay while the case was on appeal.

After appellant's federal claims failed, the City threatened criminal prosecution. As set forth in the City's "Staff Summary" submitted to the Board of Zoning Appeals: "On January 28, 2016, the Zoning Administrator delivered a written notice of violation letter to Taboo Adult Superstore located at 4716 Devine Street for operating a sexual device shop in violation of the Zoning Ordinance." (See R.O.A., Vol. 1, at page 33 for the January 28th letter and pages 259 and 327 of the Record on Appeal, Vol. for the Board of Zoning Appeals' "Staff Summary," and pages 35, 110, 171, 263 and 331 for the applications.) On February 15, the appellant filed two applications, one for appeal of the zoning administrator's decision to issue citations, and a second one for an application to the Board of Zoning Appeals for a Special Exception. (See pages 35 for application for special exception, 110 or 171, for Application for Administrative Appeal of criminal enforcement, and 263 and 331 for appellant's application for administrative appeal of Zoning Administrator's refusal to file request for special exception.) The City accepted the appellant's appeal of the Zoning Administrator's decision to issue

criminal citations, and this appeal became Case No. 16-010-AA. However, the City rejected and returned the appellant's application for special exception by letter dated February 26, 2016, stating the law prohibits the appellant from filing an application for Special Exception. Likewise, the City also refused to grant the appellant a "pre-application conference" that is required of such applications. (See page 274 R.O.A., Vol. 1, for the City's application rules.) When the City's Zoning Administrator refused to accept the appellant's filing for special exception, the appellant appealed the Zoning Administrator's refusal to accept the application, and this became Case No. 16-011-AA. (The "AA" stands for Administrative Appeal.) Thus, the merits of the appellant's application for special exception never reached the Board.

The City scheduled both administrative appeals for April 12, 2016, in Council chambers at City Hall. As the transcript of the hearing reveals (R.O.A., Vol. 2, pages 416- 490), the Board affirmed the Zoning Administrator's decisions on both counts. The Board affirmed the Zoning Administrator's right to use criminal prosecution, refusing to apply the automatic stay provision of the City's ordnance. The Board also refused to allow the appellant to be heard on the merits of his application for Special Exception even though § 6-29-800, S. C. Code, ann. allows "any person aggrieved" to be heard. The Board agreed with the Zoning Administrator on the ground that the above quoted section, § 17-734, does not allow an adult business owner to appear or be heard before the Board of Zoning Appeals. As discussed throughout this brief, and as the transcript of record demonstrates, only one member of the Board of Zoning Appeals understood the distinction between hearings on the merits as opposed to the question of whether the appellant is allowed to be heard on the merits. The transcript also reveals that Professor Hubbard, who is not the chair, dominated the hearing.

On April 12, 2016, the Board of Zoning Appeals took up the two issues

(1) whether the appellant was entitled to a stay, and

(2) whether the appellant was allowed to appear before the Board.

By written orders dated May 3, 2016 (R.O.A., Vol. 1, pages 1 and 4 [Orders], the Board concluded that the appellant had no right to a stay and no right to appear before the Board and be heard because § 17-734 excludes an adult business owner from participation before the Board.

On June 6, 2016, the appellant asked the Circuit Court to reverse the Board and require the Board to allow the appellant to be heard on the merits. (R.O.A., Vol. 1, page 129 [complaint]) After the appellant filed an appeal to the Circuit Court, Scott Bergthold applied to the Court for admission *pro hac vice*. Appellant objected in writing on September 1, 2016, (R.O.A. page 368 [objection]), and on February 1, 2017, the Circuit Court admitted him over plaintiff's objection. (R.O.A., Vol. 1, page 7 [Order]) Prior to the hearing before the circuit court, the appellant filed on September 12, 2016, a demand for pre-hearing mediation under § 6-29-825, S. C. Code, ann. On February 6, 2017, the Circuit Court affirmed the Board's decision denying appellant a right to appear and denied the appellant's request for pre hearing mediation. The appellant timely filed a motion for reconsideration on February 21, 2017 (R.O.A., Vol. 1, page 391 [motion]) The Circuit Court denied this motion by written form order dated March 1, 2017, and on March 2, 2017, the appellant filed a Notice of Appeal with this Court. (R.O.A., Vol. 1, pages 391 and 403 [Order denying reconsideration and Notice of Appeal])

STATEMENT OF FACTS

The procedural statement of case is the essence of the statement of facts. The timeline of the City's response to appellant's opening demonstrates the City of Columbia acted with alacrity in

response to the appellant becoming the only licensed adult business in the City of Columbia. As set forth above, it took the City of Columbia 14 days, to determine it needed a consultant to address the City's sexually oriented business ordinances, to find Mr. Bergthold, hire Mr. Bergthold, and schedule and notice a Special Meeting for December 22, 2011. It took 17 days to pass his licensing ordinance, including its "2,200 pages of legislative history," at the City's 30-minute special meeting on December 22, 2011. As set forth in the statement of Case, the City then recalled Mr. Bergthold to bring them a zoning ordinance, which contains the language now before the Court.

The April 12, 2016, transcript of the Board of Zoning Appeals' hearing is in the Record on Appeal beginning at Vol. 2, page 416. The only two issues before the Board were: (1) Was the Zoning Administrator going to continue to invoke criminal prosecution, and (2) Was the Zoning Administrator going to allow the appellant to request a hearing for special exception? As the transcript demonstrates, the City did not provide appellant a meaningful forum. Prior to the hearing, the City of Columbia refused to meet the appellant at a pre-hearing submission conference it provides everyone else. (As discussed below on page 23, this refusal prejudiced the appellant.) Professor Hubbard, a member of the Board, but not the chairman, dominated the proceedings to such an extent that he prevented the appellant an opportunity to speak in a meaningful manner. The transcript of this hearing reveals that, other than Professor Hubbard, the Board failed to understand that the question before the Board was to decide whether the appellant is, or is not, allowed to be heard on the merits. Even though the issue before the Board was only a question of statutory construction, the City produced copious evidence related to appellant's inventory, which, not only is irrelevant to the question, but also by withholding that evidence from the appellant until the time of the hearing, prevented the appellant any meaningful opportunity to rebut the evidence. By denying the appellant the pre-hearing conference, the

City prevented the appellant an opportunity to know the Zoning Administrator's theory of his case. In other words, instead of addressing the issue before the Board—the question of statutory construction—the City went to the merits of appellant's application without appellant's participation. See appellant's written application at Vol. 1, page 35, which lists in detail how it meets all the statutory criteria for a special exception. Appellant also cited Professor Hubbard's 2009 "Zoning Comments," which lays out South Carolina law regarding the granting of special exceptions. In order to play upon Board members' prejudices, the Zoning Administrator mischaracterized the legal issue before the Board. Taboo's operation was not the issue before the Board, and therefore, the Zoning Administrator's presentation of selected adult items was designed to do nothing other than confuse the legal issue and disadvantage the appellant. The Zoning Administrator's actions caught the appellant by surprise who could not either object to it ahead of time or present evidence rebutting the Zoning Administrator's evidence. More importantly, the appellant could not address the six statutory factors that govern special exceptions because the issue was whether the Board was or was not going to permit appellant an opportunity to do so. See Professor Hubbard's "Zoning Comments." In short, appellant's appearance before the Board was a charade, and the Board never took up the main issue, which is whether the City can or cannot interpret its ordinance in such a way as to prevent a right afforded to "any person aggrieved" under state law.

The appellant filed his appeal with the Circuit Court on June 6, 2016 and filed an amended complaint on June 15, 2016. (R.O.A., Vol. 1, pages 117 and 128). The appellant served the City on June 21, 2016. After the appellant filed his notice of appeal, Scott Bergthold sought to be admitted *pro hac vice* to handle the case for the City of Columbia on August 17, 2016. On September 6, 2016, the appellant objected to Mr. Bergthold's participation in the case on several grounds, and on February 1,

2017, the Circuit Court admitted Mr. Bergthold over appellant's objection. (R.O.A., Vol. 1, page 7 [order]) On September 13, 2016, the appellant served the City with a Demand for Pre-Hearing Mediation in accordance with § 6-29-825, S. C. Code., ann., and the circuit court denied this application as well.

STANDARD OF REVIEW

The standard of review is crucial in resolving the legal issues here. Since the Circuit Court decided the appellant had no right to appear before the Board of Zoning Appeals on an application for special exception, the court's decision is akin to a motion to dismiss based on a lack of standing. The Circuit Court confused the procedure of the case, treating the case as if it were an appeal from a Board of Zoning Appeals on the merits. This is a palpable error. The circuit court writes at page 4 of its Order (R.O.A., Vol. 1, page 27) 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. . . . In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law."

Of course, a jury never decides a standing issue or decides how to interpret an ordinance. The appeal to the Board of Zoning Appeals was an appeal from the Zoning Administrator's decision that the appellant is not entitled to be heard because of the "may be granted" language contained in § 17-734. This is the only argument the City asserts for refusing to hear appellant's case on special exception. Thus, while the circuit court recites the correct standard of review governing an appeal from a decision on the merits, this appellant never got to a hearing on the merits. The Board of Zoning Appeals

concluded that the appellant is not entitled to have a hearing on the merits. Therefore, the standard of review is as if the Board dismissed the case.

Therefore, since the record demonstrates this is an appeal from the Zoning Administrator's refusal to allow the appellant to file a request for Special Exception, the case arrives before the Court of Appeals as if it were dismissed under Rule 12. The Board's refusal to allow the appellant to be heard on the merits is nothing like a "finding of fact by a jury" (Order under review at page 4, R.O.A. page 27)

Therefore, the standard of review is *de novo*. In *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), the Supreme Court took up an appeal from a taxpayer who challenged government action through the *Freedom of Information Act*, alleging that Anderson County improperly acted in closed meetings. In reversing the circuit court's dismissal, the Supreme Court said: "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Constr. Co. v. Southerco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 161, (2008).

See also *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999). "This Court will not disturb the findings of the Board of Adjustment unless such findings or decision resulted from action of the Board which is arbitrary, an abuse of discretion, illegal, or in excess of lawfully delegated

authority." Such is the case here. For example, see *Eagle Container Co., L.L.C. v. County of Newberry*, 379 S.C. 564, 666 S.E.2d 892 (2008):

> Because we are called upon to construe the meaning of an unambiguous ordinance, our review does not track the fact-based summary judgment review path. Issues involving the construction of ordinances are reviewed a matter of law under a broader standard of review than is applied in reviewing issues of fact. *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. Of Adjustments & Appeals*, 321 S.C. 548, 550, 471 S.E.2d 142, 143 (1996). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (internal citation omitted) (quoting *Sea Island Scenic Parkway Coalition v. Beaufort County Bd. Of Adjustments & Appeals*, 316 S.C. 231, 235, 449 S.E.2d 254, 256 (Ct. App. 1994)). "the determination of legislative intent is a matter of law." *Id.*

Thus, the question presented here on appeal whether the Board's decision is correct as a matter of law, and the circuit court applied the wrong standard of review.

ARGUMENT

I THE LOWER COURT ERRED IN FAILING TO APPLY THE RULES OF STATUTORY CONSTRUCTION TO THE CITY'S ORDINANCE

The legal issue is narrow because the rules of statutory construction are so clear. As set forth above, the City's sexually oriented business ordinance says:

> Sec. 17-374.—Location
> (a) No variance from any of the provision of this section **may** be granted by the zoning board of adjustment. No special exception regarding any of the requirements of this section **may** be granted by the zoning board of adjustment. (R.O.A. Vol. 2, page 579 [ordinance])

The City defines the word "may" in § 1-2:

> *Shall, may.* The word "shall" is mandatory; the word "may" is permissive. (R.O.A. Vol 2, page 577)

The ordinance is clear, well-defined, and speaks for itself, but the Zoning Administrator and the Board of Zoning Appeals tortured it into a forced construction that rewrites the ordinance to conform to their view of what they think the City Council should have said instead of reading the plain meaning of City Council's ordinance. The Zoning Administrator did this in response to the appellant's message, and then piled on by refusing to accept phone calls, refusing to schedule a pre hearing conference, and through his use of criminal prosecution. Rather than address the legal issue of statutory construction, the circuit court adopted the error of the Board and spends the majority of the Order under review summarizing the procedural history of appellant's unsuccessful constitutional challenge to the City's ordinances. The circuit court held—and this is palpable error—that the federal court's decision is "*res judicata.*" See Order under review at page 28 of the Record on Appeal [page 5]: "Indeed, Taboo's entire argument was that it was being required to comply with the sexually oriented business zoning regulations, rather than continuing to operate in violation as a nonconforming use. (16-010-AA-0030). But the federal court rejected Taboo's challenges to the City's' application of its ordinances to Taboo, and the Fourth Circuit has recently affirmed that ruling. That final judgment in federal court is *res judicata* to Taboo's claims against the City's enforcement of the ordinance against its sexual device shop." This statement by the circuit court is clearly erroneous. First, the circuit court misstates appellant's case. Appellant's case is that the Zoning Administrator is misapplying City ordinances to Appellant. Second, the federal court dismissed appellant's prior restraint claim because the City provides state remedies, including an automatic stay, which the City is now refusing to obey. Third, the federal court declined appellant's request to include the state claims with the federal case. Fourth, and most important: this case has nothing to do with the appellant's constitutional attack on the ordinances in federal court. This case raises nothing more than the City's tortured reading of its own ordinance by

which it stands the rules of statutory construction on their head.

This case involved the fact that both the Zoning Administrator and the Board of Zoning Appeals substitute the word "shall" for the word "may" and thereby apply the word "may" as mandatory. The Zoning Administrator's pattern of discrimination includes not only re-writing the City's ordinance, but, as set forth above, denying the appellant the right to participate in the normal pre-hearing process—all because of the appellant's message. The circuit court erred because courts are required to apply the words as they are written, not rewrite them to change the meaning to justify a desired conclusion.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. V. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 261 (1998). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J,* 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995).) "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

. . .

The canon of construction *"expressio unius est exclusio alterius"* or *"inclusio unius est exclusio alterius"* holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Black's Law Dictionary* 602 (7th ed. 1999).

. . .

"The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted). (By adopting the definition of "may," into their Code of Ordinances, the City excluded all other applications.)

. . .

If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956) When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)

Here, the circuit court's order does not discuss or apply the rules of statutory construction, but instead relies on the "findings" of the Board of Zoning Appeals. However, even the Board of Zoning Appeals, speaking through Professor Hubbard, acknowledged that it was twisting the plain language of the City's ordinance to justify a result it arrived at independent of the rules of statutory construction:

Prof. Hubbard: Well, would you like to respond to my, you know, I think it's an interesting point you've raised, the "may" vs. "shall," probably would have been better to say "shall." So now we're in the wonderful game of statutory interpretation. Do you want to make a record on that or just. . .
Mr. Goldstein: Well, the rules of statutory construction are so clear that –
Prof. Hubbard: Oh.
Mr. Goldstein: --that when an ordinance is clear, you can't apply a forced construction to it. You've gotta give the words their ordinary and plain meaning. And when the –when your ordinance says "may not," well it doesn't say "shall not." So "may" is permissive by reference to City of Columbia's Ordinance defining—
Prof. Hubbard: Okay, fine—
Mr. Goldstein: --and rules of construction.
Prof. Hubbard: I—that's a great argument, first, but not following it complicates everything because it's "may"—if they had said they "may" grant it, the we would be—but when it says "may not," that makes it not so clear. If we get to not so clear, we're gonna read the thing as a whole, right? That's another—that's fun about statutory interpretation."
R.O.A., Vol. 2, pages 474-475 [tr. Pages 59-60]

In reviewing the dispute that Professor Hubbard calls an "interesting point," the circuit court devoted a single conclusory paragraph on page 7 of its Order. (R.O.A. page 30). There, the circuit court decided: "The City, through its zoning ordinances, has decided not to give the Board the

authority to permit special exceptions for sexually oriented businesses." Obviously, the Board's error is in deciding that the City does not allow the appellant to apply for a special exception. In reviewing the Board's actions for error, the circuit court simply begged the question. Appellant pointed out this error to the circuit court by way of a motion for reconsideration. See pages 391-394 of the Record on Appeal for appellant's February 21, 2017, motion for reconsideration: "The [Circuit] Court applies the wrong standard of review. The issue is the application of a clear state statute and city ordinance, and that is the only issue. Before the Board of Zoning Appeals, plaintiff argued that the plain language of both allow it to appear and be heard. As discussed throughout, the court substitutes "shall" for "may," a mistake that is an error of law, not fact." Since the appeal involves the construction of an ordinance, the court should review the decision as a matter of law *de novo*: 'Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*.' "*Town of Summerville, v. City of N. Charleston*, 378 S.C. 107, 662 S.E.2d 40, 41 (2008)." (R.O.A., Vol. 1, page 392) Leaving aside the obvious statement that the circuit court failed to consider or apply the rules of statutory construction, the circuit court's conclusion begs the question being asked. In essence, the circuit court says: since the answer to your question is known before you ask it—that is, you will lose on the merits—you have no right to ask it. This is analogous to a court granting summary judgment because the judge thinks the non-moving party will lose on the merits. The circuit court cannot possibly know that "the City, through its zoning ordinances, has decided not to give the Board the authority to permit special exceptions for sexually oriented businesses" when: A) the ordinance says "may," and B) the Board has not even heard the evidence supporting the request. Judges do not grant summary judgment because they doubt the outcome on the merits, but that is what the Board of Zoning Appeals did here. (And, as discussed in more detail below, only one Board member appreciated the distinction, and it is

an important distinction.) If the Board "may not" grant the appellant's request, then it is possible that the Board "may" grant the appellant's request.

This record demonstrates that the circuit court's order is controlled by an error of law and must be reversed. As discussed the in the next section, the Board's refusal to hear the applicant's request on its merits is about as hostile to even handedness as can be imagined. "Any person aggrieved" has the statutory right to appear and be heard in a meaningful manner.

II THE LOWER COURT ERRED IN FAILING TO REMAND THE APPLICATION TO THE BOARD OF ZONING APPEALS AS REQUIRED BY § 6-29-800, S. C. CODE, ANN.

The application of § 6-29-800 is clear. In 1994, the General Assembly attempted to bring uniformity to the function of Boards of Zoning Appeals, and the *1994 Local Comprehensive Planning Enabling Act* established a state-wide procedure creating uniformity among the Counties. Part of that Comprehensive Planning Enabling Act included systematizing the applications before the Board of Zoning Appeals. As the Act makes clear "any person aggrieved" by a zoning decision can appear before the Board. (§ 6-29-830, S. C. Code.)

However, the Zoning Administrator of the City of Columbia decided, based on **his** reading of § 17-734 of the City of Columbia ordinances, an adult business owner is uniquely excluded from participation before the Board of Zoning Appeals on an application for special exception. The Zoning Administrator excluded the appellant from a right to participate in a state statutory procedure open to every other citizen of the state.

Such open discrimination seldom reaches the South Carolina Supreme Court because, usually, government authorities are not so open about discriminating against citizens based solely on their

message. In a case that can be cited just as persuasively in argument 1, regarding the rules of statutory construction, the Supreme Court said in *Eagle Container v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005) reversed on other grounds at 379 S.C. 564, 666 S.E.2d 892 (2008):

> Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Id.* (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Kirikakedes v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Id.*

In reversing the Court of Appeals, the Supreme Court expressed harmony with the Court of Appeals' statements regarding the purpose of statutory construction; that is: "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation, and the court has no right to look for or impose another meaning," citing *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

The absurd result here is obvious. The City, in Orwellian fashion, concludes that when the General Assembly wrote "any person aggrieved," it meant "any person aggrieved except for those persons disqualified by municipalities who disseminate a message the City Council does not like." When the General Assembly created uniform Boards of Zoning Appeals as a forum for "any person aggrieved," it made clear it was including everybody. Even in appeals from the Board of Zoning Appeals, the General Assembly extended the right to participate in the case to any person who could claim an "interest" in the case. See § 6-29-825: "A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of appeals." Thus, if the statute were ambiguous (and it is not), then Professor Hubbard is correct, and the statutes must be read in harmony, or, as he said: "If we get to not

so clear, we're gonna read the thing as a whole, right? That's another—that's fun about statutory interpretation." (R.O.A., Vol. 2, page 475 [tr. Page 60]) It makes no sense for "any person aggrieved" to be cut down by the City via municipal ordinance when the General Assembly expressed so clearly its intention to make the process as broad as possible.

Even the South Carolina Supreme Court is subject to dangerous interpretation in response to unpopular messages. In 1978, the South Carolina Supreme Court disciplined a lawyer because she was informing women that they had claims against the State for involuntary sterilization. The State did not like that message, and the State brought an action against the lawyer, designed to curb her participation in the judicial system based on what the State viewed as an improper message. After the South Carolina Supreme Court issued a public reprimand to her, which guaranteed she would not disseminate that message further, the United States Supreme Court granted *certiorari* and issued its opinion, *In Re Primus*, reversing the South Carolina Supreme Court's discipline of her. In its well-publicized opinion, the South Carolina Supreme Court issued a public reprimand to Ms. Primus as follows:

> After a hearing on January 9, 1976, the full Board approved the panel report and administered a private reprimand. On March 17, 1977, the Supreme Court of South Carolina entered an order which adopted *verbatim* the findings and conclusions of the panel report and increased the sanction, *sua sponte,* to a public reprimand. 268 S.C. 259, 233 S.E.2d 301.
> *In Re Primus*, 436 U.S. 412 (1978)

While the decision in *Primus* turns on an analysis of the rules governing solicitation by lawyers, the "solicitation" in *Primus* is the legal equivalent to the appellant's dissemination of an adult message. The people who control the City do not like it. Interestingly, it is only politicians who take offense at the appellant's message. The general public does not, or as the Seventh Circuit said in its opinion, *Six Star Holdings, LLC, and Ferol, LLC v. City of Milwaukee*, ___ F.3d ____ (No. 15-1608, April 13,

2016): "This case requires us to visit the world of strip clubs—establishments that no one seems to want, officially, but that are somehow quite lucrative." The right to practice law by speaking freely in *Primus* is legally equivalent to the right of those, like appellant, to speak in a judicial system established for "any person aggrieved." However, unlike *Primus*, the issue raised by this appeal is not a First Amendment Constitutional challenge; rather, it is a straightforward question of statutory construction and a straightforward application of the General Assembly's "any person aggrieved" to the City of Columbia's ordinance, which merely says a special exception "may not" be granted. Despite the fact that the legal issue here is a simple application of a clear ordinance, the outcome would be the same if the City's ordinance said "shall not" instead of "may not." If Professor Hubbard is correct, and the City can apply the ordinance as if it said "shall," then, under the holding of *Primus*, the result would be the same because the City lacks the authority to bar the City Hall door to this appellant because it disagrees with his message. In other words, the City cannot make him less of a "person" because it disagrees with his message.

In 1990, the City of North Charleston attempted to overrule state law when it adopted an ordinance that forbid its municipal judges to suspend any portion of the a maximum 30-day sentence imposed on any defendant who pled guilty or was found guilty of possessing marijuana. When a defendant challenged the City's right to overrule state law in criminal matters, the South Carolina Supreme Court reminded the City that it had no authority to overrule state law.

> Local governments derive their police powers from the state. *S.C. Const.* Art. VIII, § § 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities. S. C. Code § 5-7-30 (1976). This is recognition that more stringent regulation often is needed in cities than in the state as a whole. *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943). However, the grant of power is given to local governments with the proviso that the local law not conflict with state law. *City of Charleston v. Jenkins*, 243 S.C. 205, 133 S.E.2d 242 (1963). A city ordinance conflicts with

> state law when its conditions, express or implied, are inconsistent or irreconcilable with the state law. *Town of Hilton Head v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662, 664 (1990) (quoting *McAbee v. Southern Rwy. Co.*, 166 S.C. 166, 169-70, 164 S.E.444, 445 (1932)). Where there is a conflict between a state statute and a city ordinance, the ordinance is void. *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).
> *City of North Charleston v. Harper*, 306 S. C.153, 410 S.E.2d 569 (1991)

Because the language in the City's ordinance "conflicts with state law," it cannot stand. Likewise, the language North Charleston adopted in is marijuana ordinance sought to make municipal law more stringent in the same way the City of Columbia wants its interpretation of "may" to be read as "shall" so as to prevent the appellant from participation in a process created by state law. In the North Charleston case, the ordinance said the municipal judge "shall" sentence the defendant to thirty days without suspending any of the sentence. Thus, as mentioned in argument 1 above, even if the City ordinance said "shall not" grant a special exception, as Professor Hubbard argued makes "more sense," then the ordinance would be just as unlawful as the ordinance the Supreme Court struck down in *Harper* for the same reasons. The City does not possess the authority to amend § 6-29-800 by municipal ordinance. Because Mr. Bergthold travels the country selling his pre-packaged ordinance, he knows to avoid the third rail of constitutional infirmity by avoiding "shall not" in the ordinance in order to shield against a constitutional attack. He substitutes "may not" in a calculated maneuver to avoid usurping state authority, but the effort is transparent and ineffective. Moreover, since the City has been locked in litigation with the appellant over this ordinance since 2013—and even amended its ordinance once to correct a defect identified by appellant—the City had ample opportunity and time to amend the ordinance to clarify it if they believe they can, as Professor Hubbard suggested, that the ordinance is "ambiguous." The City's failure to do this is revealing and shines a bright light on the City's

opaqueness regarding appellant's message, and the City's avoidance of "shall not." When the City amended its ordinance in 2012, in response to appellant's challenge, the City chose to keep the permissive language in the ordinance pertaining to the granting of special exceptions to sexually oriented businesses. If the ordinance said "shall not," instead of "may not," then its language would draw an obvious constitutional challenge. The only author of this ordinance is Scott Bergthold, who, as a Tennessee lawyer, is unfamiliar with the *Local Government Comprehensive Planning Enabling Act of 1994*, which empowers the "Board of Appeals" to permit uses by special exception. The City wants to have its cake and eat it too.

Finally, if the City sincerely desires to sail into what it believes might be a sail the safe harbor of "shall not," it has had ample opportunity to do so. However, the Supreme Court cautioned the Columbia Board of Zoning Appeals against such arbitrary discrimination in *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999): "After reading the entire record in this case, it is inescapable to us that the ZBA's decision was based, not on the requirements of the 'special exception' ordinance, but upon the fears of neighboring residents who did not want 'those type of people' in their neighborhood.'" In *Bannum*, the Board of Zoning Appeals at least allowed the applicant to be heard, and as Professor Hubbard so elegantly wrote in his 2009 "Zoning Comments," where an applicant demonstrates he meets the six statutory requirements for a special exception, the Board is obligated to grant it. See Professor Hubbard's 2009 "Zoning Comments." Here, the Zoning Administrator's prejudice and the Board's prejudice is so great that they prevent the appellant from its right to have even a meaningful hearing, illogically, because its ordinance says a special exception "may" not be granted, which is at variance with the case law collected and digested by Professor Hubbard in his "Zoning Comments." Here, the Board of Zoning Appeals failed the appellant by refusing him an

opportunity to be heard, and the circuit court, **applying the wrong standard because the Board never reached the merits of appellant's application**, failed to give proper scrutiny to the Board's imposing an irrational and unfounded restriction on appellant in direct violation of statutory authority. In short, the Board denied the appellant a right afforded to everyone else, reducing him to something less than a "person."

III THE LOWER COURT ERRED IN FAILING TO REMAND THE APPLICATION TO THE BOARD OF ZONING APPEALS TO ALLOW THE APPELLANT TO PARTICIPATE IN THE PRE-HEARING SUBMISSION CONFERENCE AS REQUIRED BY § 13-0, CITY OF COLUMIBA ORDINANCE

Because the City's Zoning Administrator denied the appellant a pre-hearing submission conference that it requires of everyone else, the appellant was both surprised and unprepared to meet the allegations of the Zoning Administrator who offered evidence of the appellant's inventory at the hearing. As part of every appearance before the Board, every applicant is required to meet with staff to review the submission in advance of the hearing. The City's application for Special Exception is found in the Record on Appeal at Vol. 1, pages 35 and 274 [application] and contains this language:

> Applications for Special Exception are due on or before 4:00 p.m. on the due date (see attached calendar). Please review the following checklist to ensure that your application is complete. **You should schedule a pre-application conference with staff (803-545-3333) prior to the application deadline to discuss your specific case and its requirements. Failure to submit a complete application or to provide requested documentation may result in your application being returned or your case scheduled for a later date.**
> (emphasis in original)

The applicant made numerous attempts to reach the Zoning Administrator who refused to return

calls or respond to written requests. The appellant's February 11, 2016, letter to the Zoning Administrator (R.O.A. page ___) says in applicable part:

> . . . I also telephoned your office (803-545-333) *sic.* To schedule a "pre application conference with staff prior to the application deadline to discuss your specific case and its requirements." To date, I have not received a return call. I understand the filing deadline is Monday, February 29th (the 30th day falling on Saturday the 27th. . . . I will look forward to hearing from your office to schedule a pre-application conference with staff.
>
> R.O.A., Vol. 1, page 338 [February 11, 2016, letter]

At the hearing, when appellant pointed out to the Board that the City denied appellant the opportunity for the pre-hearing conference, Professor Hubbard engaged in a disingenuous colloquy with the Zoning Administrator to create an illusion of a justification for discrimination:

> **Prof. Hubbard:** So the normal proceedings are—where you would have the conference would be with the variance or special exception on appeal of a decision by the Administrator, is that correct?
> **Mr. Cook:** That is accurate. And even with a special exception or a variance, we don't always talk to the applicant For example, the daycare we heard earlier, I've never met the people, you know, if Andrew, you know, a colleague spoke with them so it's not a standard that every individual applicant gets to speak, you know, unless they would like to speak. And again, most of our dialogue in this case was in the form of e-mail or letters, cause we wanted to actually create a, you know, a paper trail of what we're talking about with the understanding that we probably would end up before you today.
> **Prof. Hubbard:** If—I'm assuming that they knew you were in the store taking pictures?
> **Mr. Cook:** Yes.
> **Prof. Hubbard:** The evidence that was presented today?
> **Mr. Cook:** Yes, correct.
> **Prof. Hubbard:** Thank you.
>
> R.O.A., Vol. 2, pages 451-452 [tr. 36-37]

The above colloquy is extraordinary and demonstrates either a mockery of ordinary hearing procedures or a disingenuous grandstanding to pull the wool over the eyes of the non-lawyers on the Board. Professor Hubbard's comment: "I'm assuming that they knew you were in the store taking pictures," is a comment so fraught with absurdity, legal error, and logical non-sequiturs, that Professor

Hubbard might fail one of his students for advocating such absurdity. The Board of Zoning Appeals is a quasi-judicial body. The issue before the Board was one of statutory construction and application of § 6-29-800 to the appellant's application, which the Zoning Administrator and Professor Hubbard turned into a referendum on adult material. Appellant had no forewarning that his inventory was an issue before the Board, and Professor Hubbard's assertion that the appellant's right to rebut, without prior notice, afforded him due process demonstrates his unfamiliarity with the most fundamental legal principles of due process, notice, relevance, rules of evidence, not the least of which is the rule against speculation and the proper use of leading questions. Not to put too fine a point on it, but Professor Hubbard attempted to paper over the fundamental flaws by speculating about what "they" knew. Had the appellant been afforded notice that the Zoning Administrator's legal defense to his administrative rulings was the appellant's inventory, the appellant would have been in a position to A) object on the grounds of relevancy prior to its introduction, and B) been armed with inventory data that contradicted the Zoning Administrator's false impressions. The circuit court therefore erred in not remanding this matter back to the Board with instructions to provide to appellant the same rights the City affords to every other applicant.

IV THE LOWER COURT ERRED IN REFUSING TO SEND THIS CASE TO PRE-HEARING MEDIATION AS REQUIRED BY § 6-29-825 S. C. CODE, ANN.

The General Assembly amended the *Local Government Comprehensive Planning Act* in 2003 to create the pre-hearing mediation procedure. It did so for obvious reasons. It encourages the resolution of contested cases, and this is especially true where, as argued in the next section, Mr. Bergthold might have divided loyalties between defending his product and representing the City. The

circuit court was not entirely clear on why it was refusing to send the case to mediation, although the City argued the September 12, 2016, demand was untimely. On page 519 of the R.O.A., Vol. 2 [October tr. Page 29], the City argues that the appellant is precluded from demanding pre-hearing mediation because he did not demand it within thirty days of the Board of Zoning Appeals' decision, relying on § 6-29-820. Section 820 does in fact place a thirty-day time deadline on an appellant, but not to demand mediation, but to file an appeal. The following section is the section, § 825, that sets forth the requirements for mediation, and it says:

> (A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of appeals.

The circuit court gave appellant's application short shrift, compounding the City's error in refusing the appellant an opportunity to participate in a process open to anyone—even an intervenor. The thirty-day deadline sets the time threshold for an appeal and has no relevance to a demand for mediation, and the circuit court erred in refusing to allow appellant to participate.

V THE LOWER COURT ERRED IN ADMITTING SCOTT BERGTHOLD *PRO HAC VICE* IN THIS CASE

The appellant objected to Mr. Bergthold's admission *pro hac vice* in this case. (See appellant's September 6, 2016, written objection at pages 368-374, Vol. 1, of the record on appeal [written objection]. As set forth in that written objection, this matter involves a matter of pure state law,

including the state rules of statutory construction and the uniformity of the statewide process that is the Board of Zoning Appeals. It is not disputed that Mr. Bergthold is the author of the ordinance in question, and it is likewise not disputed that he sells the ordinance nationwide as a pre-packaged ordinance.

Mr. Bergthold's zeal in defending his ordinance has led to questionable activity that makes him an inappropriate candidate for admission *pro hac vice*. For example, when appellant's two-year amortization period ended in 2013, it was Mr. Bergthold who appeared on behalf of the City at that administrative hearing, which would determine if the appellant could carry on as a legal non-confirming use. Mr. Bergthold acted as prosecutor for the City of Columbia, which included making opening and closing statements, presenting evidence, and cross-examining the appellant. At that hearing, Mr. Bergthold informed appellant on the record that he had been admitted *pro hac vice*, which was not true. Mr. Bergthold did not make an application with the Supreme Court to be admitted *pro hac vice*, and when appellant pointed out this lack of candor, Mr. Bertghold's explanation shifted from what he represented to the Hearing Officer on November 21, 2013. Now he claims he is not required to apply for an admission to prosecute an "administrative" hearing. Appellant disagrees because the hardship hearing was an adversary proceeding, and Mr. Bergthold made opening and closing statements, presented evidence, and cross examined the appellant. However, whether appellant disagrees or not is irrelevant because Mr. Bergthold led the tribunal to believe that the Supreme Court admitted him *pro hac vice* when it had not. As set forth in the appellant's written objection, the appellant was relying on a transcript from the hardship hearing, which contained the following:

HEARING OFFICER: Okay. All right. Mr. Balthazor?
MR. BALTHAZOR: Yeah. Ms. Pike, if I may real quick at the beginning of the hearing, my name is Peter Balthazor. I'm here on behalf of the City of Columbia and just to make the record clear, Mr. Bergthod—Scott Bergthold is here also on behalf of the City of Columbia. He has filed an application

for admission *pro hac vice*. I just wanted to get that on the record that that has been received and accepted before he proceeded in this matter.
HEARING OFFICER: Yes. I checked on that actually this morning and that is accurate.
MR. BALTHAZOR: Okay. Great.
MR. WHITE: Can I have some clarity on what that means?
HEARING OFFICER: Mr. Bergthold is not licensed in the State of South Carolina, so in order to practice in South Carolina, he has to apply to the South Carolina Supreme Court—
MR. WHITE: Okay.
HEARING OFFICER: --an application—it's an application *pro hac vice* and as a result—and he has to have an associated attorney, which would be Mr. Balthazor.
MR. WHITE: Okay. Thank you.
HEARING OFFICER: So that is what this is.
MR. WHITE: Thank you very much.

R.O.A., Vol. 1, pages 38-383 for Appellant's September 1, 2016, written objection

The trouble with this statement is that it is not true. The Supreme Court never admitted Mr. Bergthold in October 2016.

Before the circuit court, Bergthold argued he did not require admission for a municipal appearance, but his November 21, 2013, statement speaks for itself, and the Court can draw its own conclusions based on the facts as they exist. Mr. Bergthold even appeared at the April 12, 2016, hearing before the Board of Zoning Appeals. He was prepared to handle this case as well, until appellant inquired if he had been admitted *pro hac vice*. Only after that inquiry, did Mr. Bergthold re-think his position and allowed Mr. Cook, the Zoning Administrator, to handle the case—as he usually does—but Bergthold actively participated in the case as may be seen by reviewing the video recording of the hearing. (R.O.A. page 617—inside back cover of Vol. 2)

Finally, even though he is the undisputed author of the ordinance and the undisputed author of the language now being examined, he maintains he cannot be examined about his creation even though it is a pre-packaged product sold nationwide. When the City originally adopted the Bergthold

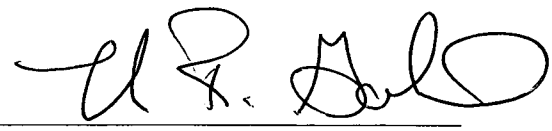
ordinance on December 22, 2011, the City gave Mr. Bergthold all the credit, thanked him for preparing it, and then passed it unanimously without discussion. Since that date, Mr. Bergthold has insured that the litigation will continue as long as possible, inserting himself into every facet of the case, even here, when the issues are matters of state law and the state rules of statutory construction. This litigation is lasting much too long, and the potential for mutually agreeable resolution is so great that the Court should not allow an out-of-state lawyer, with no ties to the community other than the protection and defense of his prepackaged ordinance, to disrupt the equilibrium of the practice of law. There are too many qualified South Carolina lawyers who are well prepared to provide legal services to the City of Columbia to allow Mr. Bertghold's continued involvement in this case. The circuit court erred in admitting him *pro hac vice* over the appellant's objection.

CONCLUSION

Therefore, the lower court erred in not allowing appellant an opportunity to be heard on the merits based upon the plain language the plain language of the City of Columbia's ordinance, which in no way prohibits a sexually oriented business owner from making application and being granted a special exception. The appellant is entitled to be heard as to whether the applicant does or does not meet the six statutory criteria for a special exception as set forth in § 6-29-800, S. C. Code, ann. The circuit court erred in admitting Scott Bergthold as attorney for the City of Columbia. This Court should reverse the decision of the Board of Zoning Appeals and remand this matter back to the Board with instructions to allow the appellant to be granted the pre-hearing submission conference it affords to all other applicants, and thereafter be granted the right to be heard on the merits. In the event the Court remands the matter back to the circuit court, this Court should instruct the circuit court to grant the appellant the right to participate in pre-hearing mediation. And finally, the lower court erred in

admitting out of state counsel *pro hac vice*, and the order admitting him should be reversed.

Respectfully submitted,



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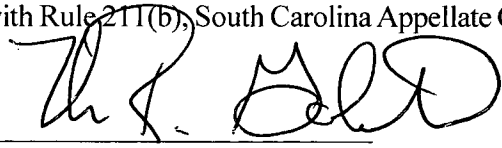
I certify that this Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.



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