THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate 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 REPLY BRIEF

April 23, 2018

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The City attempts to re-cast the issue before the Court. The issue before the Court is a purely state law question that no court has addressed, and the question is a narrow one with a plain answer supported by well-developed caselaw: Can the City of Columbia adopt an ordinance slamming shut the City Hall door to the appellant because he dispenses an adult message? The corollary question is one of straight forward statutory construction: Is the City of Columbia required to follow the definition of "may" provided in its ordinance, or can it adopt the opposite of its definition to slam shut the door on the appellant? As discussed throughout appellant's initial brief and briefly in reply here, the General Assembly created the Board of Zoning Appeals as a quasi-judicial Board to which it gave broad powers to hear "any person aggrieved" (§ 6-29-800) by a zoning decision. The City ignores the fact that this case is not an appeal from a hearing on the merits. This is an appeal from the City's decision to refuse to allow the appellant to be heard. By refusing to hear the appellant's grievance from a zoning decision to employ criminal process while denying the appellant the right to participate before the Board of Zoning Appeals, purely because of appellant's message, the City denies appellant its statutory right to be heard. Any discussion of the merits of appellant's case is foreclosed because the Board of Zoning Appeals decided—and this is the legal issue on appeal—that appellant could not be heard on the merits because it dispenses an adult message.

REPLY TO ARGUMENT I.
The legal issue in this case is not barred by *res judicata*

Throughout its brief, the City characterizes appellant's legal arguments as "scattershot." Appellant is not sure what this allegation means, but if it means that appellant's legal arguments are not

focused, perhaps the appellant's initial brief is insufficiently clear. Let us try to be clear here. The appellant's legal arguments are:

- The General Assembly created the Board of Zoning Appeals, and the General Assembly established its jurisdiction.
- The Board of Zoning Appeals is a quasi-judicial body.
- By its ordinance § 1-2, "Definitions and Rules of Construction," the City of Columbia defines the word "may" and the word "shall" as those words are to be applied to its ordinance: ***"Shall, may.* The word 'shall' is mandatory; the word 'may' is permissive."** R.O.A. Vol. 2, page 577
- The Board of Zoning Appeals in this case decided that the appellant had no right to appear before it and be heard, which is contrary to both state law and the City's Code of Ordinances.

The legal concept of *res judicata* has no application to these facts or to these legal issues. As the respondent correctly notes on page 9 of its brief, citing *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 834-35 (1997): "Claim preclusion . . . bars plaintiff from pursuing successive suits where the claim was litigated or could have been litigated." Here, the parties reach common ground, but what respondent neglects to address is that, for *res judicata* to apply, the parties must have had a full and fair opportunity to litigate the issue. Neither the legal issues raised here nor the parties, *i.e.* the Board of Zoning Appeals, have been before a court at any time. In 2003, this Court issued its opinion in *Nelson v. QHQ of South Carolina, Inc.*, 354 S.C. 290, 580 S.E.2d 171, which discussed the concept of *res judicata* and collateral estoppel in encyclopedic detail:

"The doctrine of *res adjudicata* (or *res judicata*) in the strict sense of that time-honored Latin phrase had its [354 S.C. 304] origin in the principle that it is in the public interest that there should

be an end of litigation and that no one should be twice sued for the same cause of action." *First Nat'l Bank v. United States Fid. & Guar. Co.,* 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.,* 308 S.C. 188, 417 S.E.2d 569 (1992); *Treadaway v. Smith,* 325 S.C. 367, 479 S.E.2d 849 (Ct.App.1996); *Foran v. USAA Cas. Ins. Co.,* 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993).

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 512 S.E.2d 106 (1999); *Rogers v. Kunja Knitting Mills, U.S.A.,* 336 S.C. 533, 520 S.E.2d 815 (Ct.App.1999). *Res judicata* prevents a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina,* 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); *accord Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 512 S.E.2d 106 (1999). "*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996).

To establish *res judicata*, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge,* 289 S.C. 543, 347 S.E.2d 504 (1986); *Rogers,* 336 S.C. at 537, 520 S.E.2d at 817; *Owenby v. Owens Corning Fiberglas,* 313 S.C. 181, 437 S.E.2d 130 (Ct. App.1993). Even when the defendant meets all of the required elements, *res judicata* will not be applied "where it will contravene other important public policies; the courts must [354 S.C. 305] weigh the competing public policies." *Johns v. Johns,* 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct.App.1992).

Collateral estoppel differs from *res judicata.* This distinction is explained in *Beall v. Doe,* 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984):

> The doctrines of *res judicata* and collateral estoppel are... two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, ... the second action is based upon a

different claim and the judgment in the first action precludes relitigation of only those issues "actually and necessarily litigated and determined in the first suit."

Id. at 369 n. 1, 315 S.E.2d at 190 n. 1.

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman,* 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986); *see also State v. Bacote,* 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) ("'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.'"); *McNaughton-McKay Elec. Co. of N.C. v. Andrich,* 324 S.C. 275, 482 S.E.2d 564 (Ct.App.1997) (noting that collateral estoppel will bar relitigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit). A party may assert nonmutual collateral estoppel to thwart relitigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue. *Wade v. Berkeley County,* 330 S.C. 311, 498 S.E.2d 684 (Ct.App.1998). [354 S.C. 306]

The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. *Pye v. Aycock,* 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. *Carrigg v. Cannon,* 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001); *Beall v. Doe,* 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984). Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. *Carrigg,* 347 S.C. at 80, 552 S.E.2d at 770.

There are numerous exceptions to the application of *res judicata* and collateral estoppel. In *Pye,* this court adopted the Restatement (Second) of Judgments section 28, which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a

subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; [354 S.C. 307] the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61.

In *Beall v. Doe,* this court adopted section 29 of the Restatement (Second) of Judgments:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other

circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

(1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are [354 S.C. 308] not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Beall, 281 S.C. at 371, 315 S.E.2d at 190-91.

In this case, the appellant never previously litigated against the Board of Zoning Appeals in any action anywhere, and no court has taken up the legal issue of the statutory construction of "may." Looking at the record in this case in the light most favorable to respondent—the opposite of the standard—it is both obvious and indisputable that the appellant has never had a "full and fair opportunity to litigate the issue in the first action" because: no previous pleadings raised the issue of the jurisdiction of the Board or the construction of the City's definition of "may." The Board of Zoning Appeals has never been a party. Finally, the federal court rejected the appellant's prior restraint argument because it found that the City provided adequate state protection for the appellant, and now the City is denying appellant a right to participate in the state procedure that exists "for any person aggrieved." The federal court never took up any legal issues between the appellant and the Board of Zoning Appeals because the legal issues here did not exist until after the federal court ruled. The appellant's request for a special exception was inchoate until after the federal court upheld the ordinance. Then, and only then, did appellant's need for a special exception arise and, because the City blocked the appellant from participating, the appellant had no opportunity to make his case, which includes his numerous efforts to tailor his operation to avoid the classification imposed on him by the City. It may be "scattershot," or it may be merely economical to say, but the City meets none of the elements of *res judicata*.

REPLY TO ARGUMENT II
Appellant has not waived any arguments

Once again, the City misapprehends the legal issue raised by this appeal. The appeal is from the Zoning Administrator's decision to invoke criminal process before the appellant could be heard and in refusing to allow appellant to be heard on the merits (and insisting that appellant comply prior to a hearing). That is the sole issue on appeal—besides the issue of admitting out-of-state counsel as

a temporary member of the South Carolina Bar. The issue is straightforward and narrow: is the appellant, a sexually oriented business, forbidden to appear before the Board of Zoning Appeals as an aggrieved citizen or not? The City's brief asserts that appellant is foreclosed from appearing before the Board of Zoning Appeals because the Zoning Administrator determined it is a "sexual device shop," which is exactly like saying: "we do not need a trial because we know the defendant is guilty." Whether the appellant is or is not a "sexual device shop," a disputed fact, does not go to the issue raised by this appeal. When the City affords the appellant an opportunity to be heard, the appellant will produce copious evidence of his efforts to tailor his operation to avoid the classification, but, of course, that issue was not before the Board, who decided—without appellant's participation—that appellant meets the definition of, for example, "regularly" selling devices or meets the 30% threshold of inventory to be considered a sexually oriented business. Even if the Board ultimately finds appellant is a sexual device shop after considering the evidence, then the Board is entitled to weigh the competing evidence as part of the process in deliberating on appellant's petition. The point raised by this appeal is that the Zoning Administrator denied the appellant the right to appear before the Board and prevented the Board from having an opportunity to make findings of fact, which the General Assembly requires it to do.§ 6-29-800(E) By doing this, the City foreclosed not only the appellant's right to be heard on the merits, but also foreclosed judicial review because there is no record regarding the merits of the appellant's application. Both are forbidden under South Carolina law:

> Our state's constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22.
>
> *EAGLE v. South Carolina Dept. of Health and Environmental Control*, 407 S.C. 334, 755

S.E.2d 444 (2014)

Here, the Board refused appellant an opportunity to be heard on merits, relying on its misreading of "may" and upon its view that the City ordinance trumps state law: "Further, § 17-374(a) states that no variance or special exception regarding any of the location requirements for sexually oriented business may be granted by the board, and no other section of the Zoning Ordinance of the City of Columbia allows a sexually oriented business to be permitted by special exception." R.O.A. page 4 [Order at page 2]

As to the first part of the Board's conclusion, its statement is merely begging the question being asked. As to the second part of the Board's conclusion, it is pure misdirection, ignoring the legal issue before the Board. The Board must hear the application on the merits; otherwise, there is no opportunity for judicial review. However, the Zoning Administrator prevented the appellant from having an opportunity to be heard on the merits and thereby deprived the appellant of all procedural due process. The Board's evaluation, for example, as to whether the appellant is or is not a "sexual device shop" is based on a term of art that requires evidence to answer. Moreover, state law—not municipal ordinances—establish the criteria for special exceptions. Had the Zoning Administrator allowed the case to go forward on the merits, appellant could demonstrate exactly why he is not a "sexual device shop." Under the City's ordinance,

> Sexual Device Shop means a commercial establishment **that regularly features sexual devices**. This definition shall not be construed to include any pharmacy, drug store, medical clinic, any establishment primarily dedicated to providing medical or healthcare products or services, or any establishment that does not limit access to its premise or a portion of its premises to adults only." Ordinance No.: 2011-105 § 11-602 Definitions. (emphasis added)

Appellant has much evidence available to show that it does not operate a "sexual device shop" as

defined by the City, but the appellant never got that far because the City slammed the doors in appellant's face and did not permit it an opportunity to be heard on the merits. And while it is not evidence in the ordinary sense, it is evidence of a denial of appellant's procedural due process, to show the City slamming the door applied not just to appellant's effort to be heard on the merits of his application, but just as importantly, present evidence of the City's refusal to communicate with appellant's counsel, which is necessary to have a meaningful hearing.

This entire appeal is about the City's decision to relegate appellant to the status of second class citizen, forbidden to appear before a quasi-judicial agency created by the General Assembly. Appellant thoroughly discussed this issue in its initial brief.

REPLY TO ARGUMENTS III A and B

The City of Columbia cannot deny the appellant the right to be heard on the merits under the plain terms of its ordinance or deny appellant's status as a person under § 6-29-800.

Argument III is the heart of this case, for it is the statutory construction of "may be granted" that controls this case. (Appellant replies to Part A and Part B in one argument.) The parties again reach common ground with the respondent's statement that "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Respondent's brief at page 12, citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Here, there are two statutory constructions that control.

The first is that the General Assembly created the quasi-judicial body known as the Board of Zoning Appeals. § 6-29-800, 830. The General Assembly explicitly requires the Board to hear "any person aggrieved" by a zoning decision. The City denies this right to this appellant solely based on

the City classifying it a sexually oriented business.

The City's way around its dilemma is to ask this Court to ignore the statutory definition provided by the City: "May means permissive," § 1-2, City Ordinances—and instead apply the definition form Texas! First, appellant is not sure how the City stumbled upon the Texas definition of "may," but it is illogical to ask this Court to ignore the definition provided by the City of Columbia in favor of the definition provided by Texas. (The interesting historical footnote to this argument is that if we are applying Texas law to this case, then the right to sell a "sexual device" is a constitutionally protected activity! *Reliable Consultants, Inc. v. Earle*, 06-51067 (5th Cir. 2008)) If we are tasked with the application of the South Carolina rules of statutory construction, then we should resort to the definitions provided in state, especially because the Texas statute cited by respondent provides that the definition asserted by respondent is not absolute where "the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute." Texas General Statute § 311.016. Thus, the City's reliance on the Texas statute is not only grasping at straw, but also turns out to support the appellant because in South Carolina the General Assembly's requirement that the Board hear "any person aggrieved" would, under the Texas statute, "require a different construction."

Moreover, we cannot resort to the legislative history of Ordinance 2011-105 because there is none. Scott Bergthold wrote it and resisted all efforts by appellant to inquire into its composition or meaning. Absent a legislative history, we are left with nothing but the words in the ordinance, which are not ambiguous, and the requirement that the City's ordinance be read in harmony with the state statute. In short, rules of statutory construction require that the Board of Zoning Appeals may not

grant a special exception. Since "may" is permissive, it is just as likely that the Board may grant a special exception. According to Professor Hubbard's learned treatise on this subject, an applicant who demonstrates he meets the criteria is entitled to the grant of a special exception. See F. Patrick Hubbard, *Zoning Comments* (2009). Either way, the appellant is a "person" "aggrieved" by a decision of the Zoning Administrator, and as such he has the right to be heard on the merits. Since he meets all the statutory criteria (see application at pages 38-42 of the Record on Appeal, Vol. 1), he is entitled to a special exception. See *Zoning Comments* (2009) by Professor F. Patrick Hubbard. For reasons that are not clear, Professor Hubbard attempted to distance himself from the correct statements of law contained in his learned treatise.

Moreover, the record demonstrates Professor Hubbard was the only member of the Board who understood the legal issue. He acknowledged the City's ordinance is, at best, ambiguous. The rest of the Board had no idea what the issue was:

Prof. Hubbard: I'm not questioning whether there's injustice in the world and your client maybe has been given an injustice, but we don't—

Mr. Goldstein: You don't want to hear it. I understand.

Prof. Hubbard: Well, that's not our—gosh, we—

Mr. McMeeking: If we don't want to hear it, what have been doing for the last hour?

Mr. Goldstein: I'm asking for permission to be heard on a special exception, and we're debating on whether or not I'm gonna be allowed to be heard.

Prof. Hubbard: It looks like the City Council has told us not to. And if—you've—

Mr. Goldstein: Well—

Prof. Hubbard: you've got that preserved. We don't need to hear.

. . .

Mr. Young: I've got a question for staff. If it's clearly stated that we're not authorized to do it, why did it get on the agenda to come before us today?

. . .

Mr. Chairman: I know. I'm saying show me in the Ordinance right now where there's a –where there's anywhere that says in this Zoning that this property is zoned that a sexually oriented business is permitted by special exception.

R.O.A. Vol. 2, pages 480 & 487 [April 12, 2016 transcript, pages 65, 72]

Obviously, no one, except Professor Hubbard, understood that a Board of Zoning appeals is a quasi-judicial body with discretion. It is clear from the transcript taken as a whole that only Professor Hubbard understood the issue before the Board. As to the statutory construction of "may," even though appellant disagreed that the word is ambiguous, appellant emphasizes the analysis in reply, in the light most favorable to the respondent, to emphasize the point that "may" means exactly what the City defined it to mean. Professor Hubbard argued that the **intent** of the City is clear even though the ordinance clearly says the opposite:

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]

Of course, we are not in a game, and none of this is fun. However, the City is required to read and apply the ordinance in accordance with the definitions the city provides, and since the City

of Columbia provides a clear definition of "may," the Board is obligated to follow it. It is a stretch to argue that definitions provided in Texas control, but even the Texas statute explains "may not" does not necessarily mean "shall not," and if we are reading the ordinance to harmonize with the requirements of the state statute, then respondent's tortured reading of its ordinance cannot be correct. Thus, the circuit court erred in authorizing the City of Columbia's municipal limits on the state created Board of Zoning Appeals' jurisdiction. The City has no authority to veto a state statute creating a quasi-judicial Board established to hear "any person aggrieved." In order to deny the appellant, the right to be heard, the City takes a page from George Orwell and characterizes appellant separately from "any person" because appellant operates a sexually oriented business. Allowing appellant its statutory right to be heard will not produce any negative secondary effect on the City or its citizens, which is the only condition under which the City may distinguish a sexually oriented business from any other business.

REPLY TO ARGUMENT III C
The appellant is entitled to be treated as any other citizen.

The respondent's argument here is circular. Surprisingly, the City argues, first, that it can discriminate against its citizens, and second whether it did so or not is irrelevant because "the Zoning Administrator properly declined to process the application." (Respondent's brief at page 16) According to Professor Hubbard's *Zoning Comments* (2009), when an applicant meets the statutory criteria for a special exception, the Board is obligated to grant it: "Prior to 2009, the Board occasionally relied on public policy as the basis for denying a request for special exception. However, at the May 2009 meeting of the Board, Board members and the zoning administrator stated that the Board's present official position is that, based on advice of legal counsel, public policy is satisfied if the five criteria are

satisfied." (F. Patrick Hubbard, "Zoning Comments," copyright 2009, pages 11-12) Professor Hubbard's comments are supported by caselaw and are a correct statement of law. See *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999). Moreover, as seen by reference to the appellant's application for special exception, he meets all the statutory criteria. (R.O.A., Vol. 1 pages 38-42) However, in this case, because appellant is not a "person," the Zoning Administrator refused to process the appellant's application, and that is the issue on appeal. The appellant's re-classification as sub person even allowed the City to refuse to communicate with the appellant or his lawyer so appellant could be properly prepared for the April 12th hearing before the Board. Right up to the moment the Zoning Administrator made his remarks to the Board of Zoning Appeals, the appellant thought he was before the Board on a dispute over statutory construction—and that is what this case is about. Had appellant been forewarned the issue was his inventory, he could have produced for the Board copious evidence of the appellant's efforts to communicate with the Zoning Administrator about his effort to adjust inventory in order to operate as a general retail store like Spencer's at the Columbia Mall. However, the Zoning Administrator refused (and still refuses) to communicate with the appellant and rebuffed every effort to tailor his operation to conform to the City's ordinances. The Zoning Administrator never returned a single phone call to appellant or counsel, and the first time counsel the Zoning Administrator spoke to counsel was by way of introduction, leaving Judge Hood's courtroom. When appellant's counsel sent a F. O. I. A. request to the City in this case, the staff replied by e-mail, informing counsel that the City would make the material available at the front desk at City Hall for pick-up. The City refused every suggestion for mailing the material, including, rejecting a proposal to sending them a prepaid envelope, all part of a pattern to discriminate against the appellant. This is what follows from designating the appellant as less than a person. The only reason appellant's counsel was

not forced to drive 206 miles to pick up a c.d. disc because the City refused to mail it was because the City's local attorney—who has been the epitome of cooperation in the best traditions of the Bar—interceded and persuaded the City to mail the envelope.

It is obvious from this record that that City embarked on a policy to exclude the appellant, keep him in the dark as to how the City would present its case and then attempt to derail the process from an examination of the plain meaning of the City's ordinance and its relation to § 6-29-800 into a referendum on appellant's mild adult message. The charade continued right through the appearance before the Board of Zoning Appeals, and the transcript paints a clear picture of government discrimination. Torturing the plain meaning of "may" is just part of the plan.

REPLY TO ARGUMENT IV
The appellant was entitled to pre-hearing mediation

The reply argument here is like Reply Argument III. The City argues that the appellant is not a property owner and therefore denied the right to participate in mediation, and that the appellant's application came too late.

As to the first, whether the appellant is or is not a property owner must be decided on the merits. Since the appellant did not raise that argument at a hearing, the City has no idea if the appellant is or is not a property owner. Because the record is undeveloped—because the Court denied appellant an opportunity to participate—the record does not show that appellant holds a long-term lease on the property with an option to purchase. The only reason appellant has not exercised the option to date is because of the City's unremitting hostility to the appellant. The City cannot raise this objection at this late date, and even if it could, it is a question of fact that the City prevented appellant from addressing.

As to the second, lawyers amend pleadings frequently, and there is no doubt that an amendment

relates back. "Whenever the claim or defense asserted in the amended pleading arouse out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. Rule 15(c), *South Carolina Rules of Civil Procedure*. "Any amendment under this rule relates back to the original pleadings " *Arant v. Kressler*, 327 S.C. 225, 489 S.E.2d 2006 (1997) As the Supreme Court explained in *Arant,* the only time the rule does not apply is when the amendment attempts to add a cause of action for which the statute of limitations has expired. The statute of limitations here is 30 days to appeal from the Board to the Circuit Court. Appellant met that deadline. The issues in the case were not joined until appellant filed his reply on August 9, 2016 (R.O.A., Vol. 1, page 355), 34 days prior to appellant mailing his demand for pre-hearing mediation on September 12, 2016. (R.O.A., Vol. 1, page 390) Adding in the five days for mailing as allowed by Rule 6(e), makes appellant's request sent within 30 days of the issues being joined. More importantly, the City cannot identify any prejudice by the parties participating in mediation. By asking for pre-hearing mediation, the appellant was not adding a cause of action, only requesting a procedural remedy provided by statute as part of the appeal. He was not adding a new party. He was not adding a new cause of action. The 30-day requirement is a procedural step not a substantive step, and the appellant did not waive it by not including it in his original pleading, which the City admits was timely filed and served.

REPLY ARGUMENT V
Scott Bergthold should not be admitted *pro hac vice* in this case.

The parties again reach common ground on Rule 404. Where the parties part company is, ironically, on the word "may." Rule 404 provides that an out-of-state lawyer **may** be admitted *pro hac vice*. Mr. Bergthold is not entitled to be admitted in South Carolina as a matter of right. So, while all

the procedural requirements of Rule 404 may be met, that does not end the inquiry. The reasons Mr. Bergthold should not be admitted in this case are clear from this record:

First, he is obviously a witness in this case. It is undisputed that he created the ordinance that is the subject of this lawsuit. In the federal litigation, appellant spent many fruitless, unproductive hours attempting to find anyone who could shed light on the legislative history of the Bergthold ordinance. Of course, there is none because Mr. Bergthold created it, and he sells it nationwide as a template to municipalities and counties attempting to quash an adult message. The legislative history of the ordinance is locked up in the consciousness of Mr. Bertghold and remains undiscoverable so long as he maintains that he is acting as counsel for the City which purchases the ordinance. Rule 404 addresses this in section (f): "An attorney may not appear *pro hac vice* if the attorney is regularly employed in South Carolina, or is regularly engaged d in the practice of law or in substantial business or profession activities in South Carolina, unless the attorney has filed an application for admission under Rule 402, SCAR. Notwithstanding any other provision herein, an attorney who files more than six applications for admission *pro hac vice* in a calendar year, including applications for the purposes of Rule 404(k), is considered regularly engaged in the practice of law in South Carolina."

As set forth in appellant's original written objection, (R.O.A., Vol. 1, page 368), Mr. Bergthold has appeared in the state several times. At the appellant's November 21, 2013, hardship hearing, Mr. Bertghhold told the hearing officer he had applied for admission and been admitted. We now know this is not true. He even appeared on April 12, 2016 at the hearing before the Board of Zoning Appeals and attempted to present the case. After appellant inquired about his admission, he limited his role to passing notes to the Zoning Administrator, Brian Cook. Since he is the undisputed that Bergthold is the author of the City's zoning and licensing ordinances, the City cannot dispute that he is "regularly

engaged in the practice of law or in substantial business or professional activities in South Carolina." This indisputable fact combined with less than complete statement to the Hearing Officer on November 21, 2013, demonstrates that he should not be admitted *pro hac vice*.

In the November 21, 2013, hardship hearing, which is quoted on page 42 of appellant's initial brief, Mr. Bergthold told the appellant he had applied for and received permission to handle the case. The fact is that Mr. Bergthold did not apply for admission *pro hac vice* for that hardship hearing, which was clearly adversarial. Mr. Bergthold's explanations for this have taken two paths: one, that he applied for admission *pro hac vice* to the City's hearing officer and that admission was not necessary because it was a municipal appearance. As to the first, appellant believes the parties can agree that the Supreme Court is the only organization in South Carolina that can admit persons to the practice of law. Whether Mr. Bergthold mislead the hearing officer on November 21, 2013, or simply misspoke is a conclusion this Court must reach based on its review of the evidence. The second explanation Mr. Bergthold has advanced is that an appearance before an administrative hearing does not require admission *pro hac vice*. This explanation does not square with the representations made to the Hearing Officer, and even if the appellant were to concede this point, the hardship application was an adversary proceeding that involved opening statements, cross-examination, presentation of evidence, and closing arguments. These activities fall into the area of conduct regarded as practicing law.

Finally, the practice of law has evolved over thousands of years, being refined countless times along the way. The practice of law does not occur in a vacuum, but in a finely tuned equilibrium. Lawyers contribute thousands and thousands of hours of their time to their communities in any number of ways: appointed cases, service on governmental Boards without pay (such as Boards of Appeal), mentoring students and contributing in thousands of other ways. The jurisprudential constant in the

practice of law follows from the inescapable fact that lawyers realize today's adversaries are tomorrow's allies. Thus, despite being engaged in an adversary system, lawyers necessarily arrive at a collegial equilibrium—call it the courtesy constant—in same manner as economic competitors described by Jonathan Nash in groundbreaking work on economic competition. In 1947, when asked what is a lawyer, the U. S. Supreme Court answered: "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients." *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947)

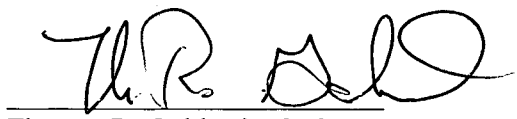
Mr. Bergthold's involvement in this case shows what happens when lawyers are permitted to appear at will in far flung jurisdictions to sell a product. Leaving aside that the City's local counsel possesses the highest expertise in this area, Mr. Berthold, by contrast, is unfamiliar with state law, as evidence by the fact that his ordinance refers to the "Board of Zoning Appeals" as the "Board of Adjustment," and with his unfamiliarity with the South Carolinas Local Comprehensive Planning Act of 1994 or with the City of Columbia's statutory definition of "may." Finally, it is fundamentally unfair for the City of Columbia to purchase Bergthold's off-the-shelf ordinance and then foreclose the appellant from all information about the legislative history surrounding the ordinance because its author does double duty as counsel for the City.

CONCLUSION

Therefore, as set forth in the initial brief, the lower court erred in not requiring the Board of Zoning Appeals to grant the appellant an opportunity to be heard on the merits based upon the plain and unambiguous language of the City of Columbia's ordinance, which states only that a special exception "may" not be granted. The appellant has a statutory right to be heard as to whether he does or does not meet the six statutory criteria for a special exception as set forth in § 6-29-800, S. C. Code, ann. In

addition, since Mr. Bertghold is the author of the ordinance in question, the circuit court erred in admitting him as attorney for the City of Columbia especially where the legal issues involve only matters of state law, and the City's local counsel is well qualified to represent the City. 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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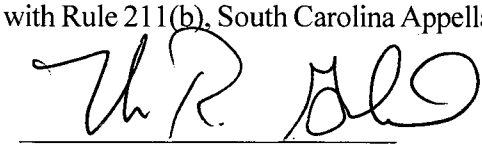
CERTIFICATE OF COUNSEL

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



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