

Cricket Store 17, LLC d/b/a Taboo

City of Columbia Board of Zoning Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Newman, J.

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

2018 MAR -8 PM 02:09
JEANETTE E. WOODRUFF
RICHLAND COUNTY
FILED

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$ RECEIVED
		\$ JUN 01 2018
		\$ SC Court of Appeals

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jaclyn Newman
Circuit Court Judge

2757
Judge Code

March 8, 2018
Date

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Cricket Store 17, LLC d/b/a Taboo,

Plaintiff,

v.

City of Columbia Board of Zoning Appeals,

Defendant

and

City of Columbia Zoning Administrator,

Counterclaimant,

v.

Cricket Store 17, LLC d/b/a Taboo,

Counterdefendant.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-40-03478

ORDER GRANTING PERMANENT INJUNCTION

AGAINST

CRICKET STORE 17, LLC D/B/A TABOO

RECEIVED

JUN 01 2018

SC Court of Appeals

RICHLAND COUNTY
FILED
2018 MAR -8 PM 12:05
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

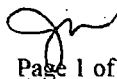
This matter comes before the Court upon Motion for Permanent Injunction filed by Defendant on October 2, 2017. A hearing was conducted at the Richland County Judicial Center on February 9, 2018. Plaintiff was represented by Thomas R. Goldstein, Esquire; and Defendant was represented by Peter M. Balthazor, Esquire and Scott D. Bergthold, Esquire.

For the reasons set forth below, the permanent injunction is GRANTED.

FINDINGS OF FACT

I. Background

In late 2011, Plaintiff Cricket Store 17, LLC obtained a general business license from the City of Columbia ("the City"). Thereafter, Plaintiff opened and began operating "Taboo," a retail



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Order Granting Permanent Injunction
Cricket Store 17 v. City of Columbia Board of Zoning Appeals

store which offers certain sexual devices¹ for sale. On December 29, 2011, the City adopted new ordinances regulating sexually oriented businesses such as Taboo.

In November 2012, the City also adopted new zoning regulations for sexually oriented businesses. See *Cricket Store 17, L.L.C. v. City of Columbia*, 996 F. Supp. 2d 422, 424-26 (D.S.C. 2014). Taboo did not conform to the location regulations, but was allowed to continue operating there to amortize its investment until December 31, 2013. *Id.* at 426. Taboo applied to extend its amortization period but was denied because the court found that it failed to show that it had not reasonably recouped its investment. *Id.*

Taboo sued the City in federal court, but was unsuccessful. Instead, the court upheld the City's ordinances and determined that there had been no violation of Taboo's constitutional rights as had been alleged. *Cricket Store 17, L.L.C. v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015) (summary judgment), *reconsideration denied*, 2016 WL 81807 (D.S.C. Jan. 7, 2016), *aff'd*, 676 Fed. Appx. 162 (4th Cir. 2017), *cert. denied*, 138 S.Ct. 116 (2017).

During the pendency of those appeals, on January 28, 2016 the City's zoning administrator determined that Taboo was operating a sexual device shop on that date. The administrator also returned Taboo's application for a special exception. Taboo appealed both matters to the board of zoning appeals, which affirmed the administrator's decisions.

The instant action commenced on June 15, 2016, when Taboo appealed to the Circuit Court seeking review of the zoning decisions made by the City. The City answered and filed a counterclaim seeking injunctive relief. The Circuit Court affirmed the zoning decisions by Order dated February 1, 2017 (and filed on February 6, 2017); however, the City's counterclaim was specifically excluded from that Order, and no decision was rendered regarding injunctive relief.

¹ As defined by COLUMBIA, S.C., CODE OF ORDINANCES §11-732.

Taboo filed Notice of Intent to Appeal the zoning decisions on March 7, 2017; and on October 2, 2017, the City filed its "Motion and Brief in Support of Defendant's/Counterclaimant's Motion for Permanent Injunction" and requested an expedited hearing on the same.²

II. February 7, 2018 Hearing

During the hearing, the City offered the testimony of City Zoning Administrator Brian Cook as well as seven exhibits – a copy of the City's ordinances regarding sexually oriented businesses; photographs of the interior of the Taboo store which were taken on September 29, October 5, and December 21, 2017; screenshots of Taboo's website; and photographs of merchandise offered for sale at Taboo in January 2018. Taboo did not present any witnesses but offered fifteen exhibits into evidence at the hearing – fourteen photographs of merchandise sold at a different store, Spencer's Gifts, and one receipt from purchases made there on February 28, 2017.³

The evidence offered at the hearing establishes that Plaintiff operates the Taboo retail store at 4716 Devine Street, which is within a C-3 district in the City. The store is also located within 900 feet of a residential district and within 900 feet of a residential use.

Based on the photographs and testimony, the Court concludes that Taboo is a sexually oriented business, as is defined by City ordinance.⁴ Cook testified that when he visited the store on September 29, it appeared that at least forty percent of Taboo's floor space was dedicated to

² Because the Circuit Court specifically excluded injunctive relief from its decision, this Court rejects Plaintiff's argument that it lacks jurisdiction to hear this matter. Because no ruling was made on this issue, it is not the subject of the pending appeal; rather, this is a matter "not affected by the appeal."

³ After the hearing, with the Court's permission, Taboo provided the Affidavit of Larry Boyer (filed on February 16, 2018), which attests that he took the pictures and made the purchases at Spencer's Gifts on February 28, 2017.

⁴ Although Plaintiff denies this, it offered the Court no evidence to the contrary.

sexually explicit DVDs, causing Taboo to qualify as an “adult bookstore.” During that visit and during subsequent visits on October 5 and December 21, 2017, Cook took pictures of sexually explicit DVDs and sexual devices, causing Taboo to also qualify as a “sexual device shop.” Cook also testified that he observed entire walls and racks displaying sexual devices, lighted display cases highlighting sexual devices, and signage promoting sexual devices during each of his visits to Taboo.

According to Cook, when he visited Taboo on September 29 he also observed signage that limited admittance to the store to persons over the age of eighteen. Taboo continued to impose an age requirement to enter the store on updated signage in early 2018.

Finally, Taboo’s internet websites – “tabooadultstore.com” and “taboosc.com” – promote the Taboo store at 4716 Devine Street and the kinds of sexual devices displayed and offered for sale at that location. On Facebook, Taboo describes itself as an adult novelty and smoke shop by the name “Taboo Adult Superstore.” On Yelp, Taboo describes itself as an “adult superstore.”

CONCLUSIONS OF LAW

I. City Ordinances

The City of Columbia imposes location requirements on sexually oriented businesses. In particular, Zoning Ordinance § 17-374(b) prohibits a person from operating a sexually oriented business outside of an M-1 or M-2 district. Likewise, it is unlawful to operate a sexually oriented business within 900 feet of a residential district or a residential use.

One type of sexually oriented business is a “sexual device shop,” which § 17-372 defines as follows:

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 premises or a portion of its premises to adults only.

COLUMBIA, S.C., CODE OF ORDINANCES § 17-372. "Regularly means the consistent and repeated doing of an act on an ongoing basis." *Id.* The ordinance also defines "adult bookstore" as a sexually oriented business if it is a commercial establishment which meets certain criteria, such as having at least thirty percent of its displayed merchandise as sexual devices or certain books and movies, using at least thirty percent of its floor space for display or sale of those items, or where "[t]he establishment regularly features said items and regularly advertises itself or holds itself out, by using 'adult,' 'adults-only,' 'XXX,' 'sex,' 'erotic,' 'novelties,' or substantially similar language, as an establishment that caters to adult sexual interests." *Id.*

Based on the evidence before the Court, it is clear that Plaintiff's operation of Taboo – a sexual device shop, adult bookstore, and sexually oriented business – violates § 17-374(b) of the City's sexually oriented business zoning ordinance.

II. Injunction

It is equally clear that the City is entitled to a permanent injunction against Taboo in this case.

The Supreme Court of South Carolina has held that "[i]n order for a city to get an injunction for a zoning violation they must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000) (citation omitted). In most cases, "[t]o obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). However, our courts have "articulated a lesser standard where the injunction sought is specifically authorized by statute and the party seeking the injunction is a governmental entity." *County of*

Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 905 (Ct. App. 2002). Additionally, while the United States Supreme Court "has allowed local governments to regulate sexually oriented businesses ... as a response to their negative impact on the community," the Supreme Court of South Carolina has determined that "[m]unicipalities do not have to show negative secondary effects in order to enforce adult zoning provisions." *Pic-A-Flick*, 340 S.C. at 283-84, 531 S.E.2d at 521 (citations omitted).

In this case, the City has "an ordinance covering the situation." See COLUMBIA, S.C., CODE OF ORDINANCES §§ 17-371 TO -374. Both sexual device shops and adult bookstores (like Taboo) are types of sexually oriented businesses regulated by ordinance. Sexually oriented businesses are not allowed outside of an M-1 or M-2 zoning district, nor may they operate within 900 feet of residential districts or residential uses. Moreover, the City is authorized to seek injunctive relief for violations of its ordinances. See S.C. CODE ANN. § 6-29-950(A) (authorizing injunction for illegal land uses); see also COLUMBIA, S.C., CODE OF ORDINANCES § 17-89 (authorizing injunction for land uses violating City ordinance).

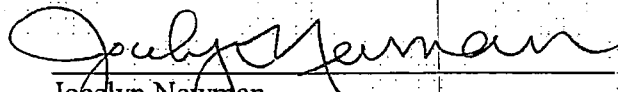
Second, Taboo is clearly violating Code § 17-374(b). Taboo admits that 4716 Devine Street is not located in an M-1 or M-2 district. It is also located within 900 feet of a residential district and of a residential use. Nevertheless, Taboo has continued to operate a sexually oriented business at that site in violation of the law.

Based on the foregoing, the Court concludes that a permanent injunction is necessary to prohibit Plaintiff from further violating applicable law.

IT IS THEREFORE ORDERED that Defendant's Motion for Permanent Injunction is GRANTED.

IT IS FURTHER ORDERED that Cricket Store 17, LLC d/b/a Taboo, its officers, agents, servants, employees, and those persons in active concert or participation with them are hereby ENJOINED, RESTRAINED and BARRED from operating a "sexual device shop," "adult bookstore" or other "sexually oriented business" at 4716 Devine Street in the City of Columbia, State of South Carolina.

AND IT IS SO ORDERED.



Jocelyn Newman
Presiding Judge

March 8, 2018
Columbia, South Carolina.