THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate Case No.: 2018-001062
(See also: 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 INITIAL BRIEF

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STATEMENT OF THE CASE

This case is the same case filed in this Court on March 2, 2017, at Appellate Case No. 2017-000561. By Order dated July 27, 2018, this Court denied appellant's request to consolidate the two cases. Thus, most of the statement of case and statement of facts are identical to the statements in the previously appealed case.

In November, 2011, the appellant applied for a license to operate Columbia's only licensed adult business at 4716 Devine Street. Because the appellant met all applicable statutory and zoning requirements, the City issued the license on December 5, 2011. Fourteen days later, on December 19th, the City hired Scott Bergthold, a Tennessee lawyer who specializes in eliminating adult businesses, and 3 days later, on December 22nd the City held a special meeting to pass first reading of Bergthold's

licensing ordinance prepared and presented by Mr. Bergthold to regulate adult businesses. The City passed second reading at a second specially called meeting seven days later 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 Bergthold's zoning ordinance.

The Bergthold zoning ordinance contains the following language, which is the subject of the March 7, 2017, companion case now pending in this Court at 2017-000561.

> 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. page ____[ordinance]
> (The emphasis on the word "may" is boldfaced here but not in the original.)

Prior to making an application to the Board of Zoning Appeals, 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. (See March 31, 2015, District Court Opinion, page 44: "Furthermore, the ordinances provide that if any court action is initiated to appeal, challenge, restrain, or otherwise enjoin the city's enforcement of any license denial, suspension, or revocation, the City is required to issue the applicant a provisional license that allows the applicant to operate until the court issues a judgment on the matter. *Id.* § 11-610(b)")

After the remainder of the appellant's federal claims failed, the City threatened appellant with numerous criminal prosecutions. As set forth in the City's "Staff Summary" submitted to the Board of

Zoning Appeals (see companion Case No. 2017-001062): "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." On February 15, 2016, 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. The City accepted the appellant's appeal of the Zoning Administrator's decision to issue criminal citations, and this appeal became known as City 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. The application for Special Exception directs the applicant to contact the City by telephone to schedule a pre-submission meeting. This issue is discussed in the companion case at 2017-000561, but is part of the same pattern of willful excommunication discussed here. 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 known as City 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 set forth in Appellate Case 2017-000561, the Board of Zoning Appeals affirmed the Zoning Administrator's decisions on both counts, affirming the Zoning Administrator's right to use criminal prosecution, and 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, § 17-374, prohibits an adult business owner the right to appear or to be heard before the Board of Zoning Appeals.

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, the Board concluded that the appellant had no right to a stay and no right to appear before the Board and be heard because § 17-374 excludes an adult business owner from having the right to appear 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. 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, and on February 1, 2017, the Circuit Court admitted him over plaintiff's objection. 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, which 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, which is the companion case at Appellate Tracking Case Number 2017-000561.

While the companion case, 2017-000561, was pending before this Court, the City filed a motion for a permanent injunction on October 2, 2017. (R.O.A. page _____). On October 4, 2017,

appellant applied once again to the City for a general retail license. (R.O.A. page ___[White affidavit May 11, 2018, page 13]): "On October 4, 2017, I applied (again) for a new general retail business license for a new business with a new business name: Taboo. This was not my first attempt to obtain a new business license. The city refused, and continues to refuse, to accept our application submitted on March 28, 2016." After a hearing on February 9, 2018, (R.O.A. pages ___-____), the Court entered a permanent injunction on March 8, 2018, (R.O.A. page ____), and the appellant asked the Court to reconsider this decision on March 16, 2018 (R.O.A. page ____) On May 14, 2018, the parties appeared before Judge Newman on appellant's motion for reconsideration and on the City's application for Rule to Show Cause where the City raised the stakes to ask for civil and criminal contempt against the appellant's employees. (R.O.A. page ___[petition for Rule To Show Cause]) On May 16, 2018, the court denied reconsideration by Form Order (R.O.A. page ____), and the appellant filed an "amended" notice of appeal on May 29, 2018. (R.O.A. page ___) The appellant assumed incorrectly that the present case would be consolidated with the case at 2017-000561 and incorrectly labeled the notice of appeal "amended." On July 27, 2018, this Court denied appellant's motion for consolidation, and the Court assigned the present appeal a different tracking number, 2018-001062

STATEMENT OF FACTS

The procedural statement of case contains the essential statement of facts because the timeline of the City's response to appellant's original December 5, 2011, opening demonstrates the alacrity and determination the City of Columbia employed 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 find, hire, and bring in an out-of-state consultant to the City of Columbia. At a Special City Council

Meeting on December 22, 2011, the City took approximately 30 minutes to pass first reading of Mr. Bergthold's ordinance, including its "2,200 pages of legislative history." As set forth in the Statement of Case, the City then recalled Mr. Bergthold to deliver them a follow-up zoning ordinance, which the City adopted as on November 13, 2012 as Ordinance 17-374.

After the City's Board of Zoning Appeals concluded on April 12, 2016, that the Bergthold ordinance denies appellant's right to appear before them, the City then moved for a permanent injunction as a basis to seek a finding of contempt on this ground: "Because Taboo has refused to cease operating a sexually oriented business, this Court should, after an evidentiary hearing, impose a **criminal** contempt sanction, issue coercive civil contempt sanctions, and award the City its attorney's fees and expenses for having to bring and defend the motion for contempt." (R.O.A., page ___[Motion for Rule to Show Cause] (emphasis added); see also colloquy with the Court on May 14, 2014, in R.O.A. at page ____[tr. page 21]) In response to both the application for injunction and the City's May 4, 2018, application for contempt, the appellant produced uncontradicted evidence that:

1. The appellant purged all print media from the store.
2. The appellant purged all video media from the store.
3. The appellant lifted the age restriction.
4. The appellant changed the name of the business from "Taboo Adult Superstore" to "Taboo."
5. The appellant repainted the building.
6. The appellant changed the signs.
7. The appellant revised its mission statement.
8. The appellant revised its advertising in both print and digital media.
9. The appellant changed its website.

10. The appellant tried repeatedly to apply for a general retail business license.

11. The appellant tailored his operation to match similarly situated businesses operating in the City of Columbia as general retail.

12. The appellant contacted the City numerous times in person, by e-mail, by telephone to determine what other changes, if any, the City was requiring in order to grant him his general retail license. (R.O.A. page _____, [October ___ 2017 application for general retail license; May 11, 2018, affidavit of Jeff White, pages., especially pages 20-27; See appellant's February 28, 2017, "Ballot" to the City, asking for the manner in which the City would agree to communicate with appellant at page ___R.O.A. [Exhibit 1 to May 14, 2018 transcript and Exhibit A to March 14, 2018, Motion for Reconsideration. See also May 11, 2018, affidavit of Larry Boyer: "On March 9, 2018, I applied for a business license. As of this time I have not received any answer or reply to that application." R.O.A. page ____)

Most importantly, and this is the central undisputed fact that controls both the decision on injunction and on contempt, the appellant tried repeatedly to communicate with the City to discover what deficiencies remained to prevent him from obtaining a general retail business license. However, despite the appellant's numerous efforts to communicate and conform, and the City refused—and still refuses—to communicate. All City administrative decisions are controlled by Scott Bergthold, who refuses to authorize the City to communicate with appellant. The clearest example of the appellant's desperation to communicate and the City's recalcitrance is found in the Record on Appeal in appellant's February 9, 2018, check-the-box ballot which the City ignored. (R.O.A. page ___[ballot]) The record shows that the City ignored appellant's check-the-box request for consultation when the City's reply required nothing more than to fill in the blanks of a pre-printed ballot and return in in the

envelope provided. (R.O.A. page ____[ballot]) The record demonstrates further that the **only** time the City's Zoning Administrator communicated with appellant or his counsel was in open court when cross-examined on February 9, 2018, and even then, the Zoning Administrator looked to Mr. Bergthold to supply the answers for him:

Q. If they're [Taboo] operating illegally. What if they're operating—why do you keep looking at Mr. Bergthold? You know, let's have a conversation . . .

MR. BERGTHOLD: Objection. Now he's badgering the witness.

THE COURT: I'm sure he's looking at him because there are repeated objections. He's waiting for him to be rescued. Witnesses do that.

R.O.A. page ___, lines 6-13 [tr. P. 45, lines 6-13]1

The Zoning Administrator mislead both the appellant and the Court by not being forthcoming about his current position with the City and not being forthcoming about what the City's licensing ordinance allows. As for the ordinance itself, the trial judge never considered, let alone analyzed, that the appellant is within his rights to operate a general retail store that carries a small percentage of adult material, just like Spencer's at Columbiana Mall or any of a number of similarly situated competitors. As for Mr. Cook's sworn promise to make himself available to resolve this dispute, the appellant had no reason to doubt his truthfulness about making himself available to the appellant to resolve the licensing issue, but when appellant attempted to schedule a meeting with Mr. Cook as he promised under oath he would do, appellant discovered Mr. Cook is no longer employed by the City of Columbia. On the day he gave his testimony, he neglected to mention that a month earlier he had

1 Mr. Bergthold's participation in this case is unsettled. In the companion case at 2017-000561, appellant objected to the Court admitting Mr. Bergthold *pro hac vice*. The circuit court overruled appellant's objection and admitted him, which decision is raised as error in the companion case. Moreover, the appellant has now learned that Mr. Cook's testimony was untruthful. On January 10, 2018, he signed a contract with the Town of Blythewood to become its Administrator with a start date no later than March 24th.

signed a contract with the City of Blythewood to become its City Administrator.

The undisputed facts of this case demonstrate:

- The companion appeal provides an automatic stay by operation of Rule 205.
- The underlying licensing ordinance provides an automatic stay by operation of Ordinance 17-374.
- The underlying Board of Zoning Appeals ordinance provides an automatic stay by operation of Ordinances 11-610 and 17-711(d).
- The record demonstrates appellant has made numerous efforts to transition to general retail, which the City ignores and refuses to communicate with appellant thus manufacturing a controversy where none exists.

Just as a pointillist can create a vivid image from small dots of color, the facts of this case paint a vivid portrait of a municipal government that has abandoned its municipal responsibilities and delegated them to a crusader who has no intention of communicating constructively on behalf of the City. (Mr. Bergthold's *pro hac vice* admission is challenged in the companion appeal.) None of this litigation is necessary if the City simply does its job and treats the appellant like any other citizen in conformity with its own Code of Ordinances.

STANDARD OF REVIEW

This appeal is an appeal from a grant of injunction, but the legal issue involves the application of an automatic stay provided by the *Rules of Appellate Procedure* and the underlying City Ordinances §§ 11-610(b) and 17-711(d). As a result this case raises mixed questions of fact and law similar to the mixed questions in *Commissioners of Public Works v. City of Laurens*, 423 S.C. 461, 815 S.E.2d 21 (Ct. App. 2018), which analyzed the standard of review in such mixed cases this way:

The parties disagree on the proper standard of review for this case. "Declaratory judgment actions are neither legal nor equitable and therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin* , 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought." *Lollis v. Dutton* , 421 S.C. 467, 478, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting *Fesmire v. Digh* , 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009)). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville Cty.* , 380 S.C. 528, 534, 670 S.E.2d 663, 666-67 (Ct. App. 2009). "If the character of the action appears with sufficient clearness in the body of the complaint, it must control, unaffected by the prayer for relief or the intention or characterization of the pleader." *Bramlett v. Young* , 229 S.C. 519, 531, 93 S.E.2d 873, 879 (1956) (quoting *Speizman v. Guill* , 202 S.C. 498, 514-15, 25 S.E.2d 731, 739 (1943)). "While the prayer constitutes no part of the plaintiff's cause of action, 'it is an element that may properly be considered in determining the legal or equitable character of an action, and[ ] whe[n] the complaint states facts which would support either a legal or an equitable action, the relief demanded will ordinarily determine its character.' " *Id.* (citation omitted) (quoting *1 C.J.S.* Actions § 54 at 1155). Fountain Inn asserts the proper standard of review to apply is that for the review of a request for an injunction. "The power of the court to grant an injunction is in equity." [815 S.E.2d 25] *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). An injunction is a drastic and "extraordinary equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party" when no adequate remedy exists at law. *Hampton v. Haley* , 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). "In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism* , 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Straight v. Goss* , 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren* , 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001). However, LCPW contends the standard of review is that interpreting a statute and thus is at law. "Statutory interpretation is a question of law . . . ." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013). Additionally, "[t]he determination of legislative intent is a matter of law." *Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005). "This [c]ourt reviews all questions of law *de novo*." *Lollis* , 421 S.C. at 477, 807 S.E.2d at 728 (quoting Fesmire , 385 S.C. at 302, 683 S.E.2d at 807). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc* ., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). "The [c]ourt will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.* at 600, 675 S.E.2d at 415. Because the resolution of this matter turns on the interpretation of section 5-7-60, the appropriate standard of review for this case is that for the interpretation of a statute, which is an action at law. *Comm'rs of Pub. Works of Laurens v. City of Fountain Inn*, 423 S.C. 461, 815 S.E.2d 21 (S.C. App., 2018)

Thus, this Court evaluates the case *de novo*.

Argument I

Did the circuit court err in failing to apply the automatic stays provided by the Rules of Appellate Procedure, the City's Licensing Ordinance, and the City's Zoning Ordinance?

A.

The *S. C. Rules of Appellate Procedure*, Rule 205

As set forth in the Statement of Case, the City moved for an injunction even though the parties are already before the Court of Appeals on an appeal. See Case at Appellate Case No. 2017-000561. The appellant pointed out to the trial court at the earliest possible time (R.O.A. page ___, lines 7-18 [tr. Page 5] that the case was on appeal and that the *Rules of Appellate Procedure* stayed further action on the case. See Rule 205: "Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal. . . Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." The appellant informed the trial court at the first opportunity and on his motion for reconsideration that the Appellate Court Rules prohibited the City from moving forward on an injunction because it is indisputable that the the subject matter and the parties are the same in the pending companion case. (R.O.A. pages __-___ and ____-____[tr. page 5, memorandum and motion for reconsideration]) The circuit court never addressed the issue in its March 8, 2018, Order (R.O.A. page ___), and when the appellant pointed out this deficiency by motion for reconsideration, the circuit court failed to address appellant's legal issues by issuing a Form Order (R.O.A. page ____) without addressing any of appellant's legal positions or legal authorities. Appellant was, of course, stuck with the Form 4 Order because litigants are not permitted to file successive motions for reconsideration. As a result, this Court is left to grope in the dark as to why the trial court found no merit in appellant's legal arguments and/or legal authorities regarding the stay because the trial court did not provide an explanation of its reasoning. See *South Carolina Rules of Civil*

Procedure, Rules 52 and 58, which require a circuit court to "find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58." In the March 8th Order granting an injunction, the circuit court found only that: (1) the City has an ordinance governing adult uses, and (2) the City's evidence was sufficient to show that the City was suffering an irreparable harm. The trial court ignored appellant's assertions that the case was already before the Court of Appeals, and when appellant pointed out this oversight in its Motion for Reconsideration, the trial court ignored appellant a second time and deprived this Court any opportunity to analyze the reasons for the decision.

Because the trial court never shared its reasoning with the parties, we are required to guess as to how the trial court arrived at its decision that Rule 205 is not applicable to this case. In South Carolina jurisprudence, there are only two cases that analyze the rule in roughly analogous facts. (Most of the cases discussing the rule involve the question of whether Family Courts can go forward with a hearing on attorney's fees while the case is on appeal.) In the seminal case on the Rule, the Supreme Court took up the question of whether an appeal to the Supreme Court operated as stay to prevent workers' compensation benefits to an injured employee. Under Workers' Compensation law at the time, an appeal to the Supreme Court only stayed the payment of benefits for 30 days. In applying Supreme Court Rule 18 to the facts (the same rule we have today as 205), the Supreme Court held:

Moreover, we think that Rule 18 of this Court definitely indicates that after an appeal has been perfected and docketed as required by Rule 1, the jurisdiction of the Circuit Court ceases; and that would apply **even if an undecided motion to enforce a judgment upon which argument has been made was still pending in the Circuit Court.**

McDonald, et. al. v. Palmetto Theaters, et. al., 196 S.C. 38, 11 S.E.2d 444 (1940) (emphasis added)

Likewise in *Bradley et. al. v. Hullander, et. al.,* 266 SC. 188, 222 S.E.2d 283 (1976), the Supreme Court reached the same decision when a trial judge overruled a demurrer and set the case for trial from which the defendants appealed. In following the holding of *McDonald, supra*, the Supreme Court said:

> A ruling upon the third question will simplify treatment of the first two. The appeal from the ruling of the order of February 8 1975, stayed all further proceedings in the circuit court pertaining to this ruling. After the notice of intention to appeal from the order of February 8 was served, the circuit court lost jurisdiction as to this order and the motions, which the Buyers attempted to pursue, should not have been heard without the permission of the Supreme Court.

It is clear from the Rule and the case law that a lower court retains jurisdiction to proceed on matters not encompassed by the appeal, but there is no dispute that the subject matter and the parties in this injunction case are same as in the case on appeal. The trial court never addresses this, and the failure to address it leaves both the Court and the parties hampered by the trial court's failure to provide its reasoning as to how it arrived at its conclusion that none of the statutory stays apply. We do not know if the trial court found that the motion for contempt is unrelated to the issue on appeal—a dubious proposition since a reversal of the Board of Zoning Appeals' decision to disallow the appellant to be heard vacates every application for relief made by the City. Likewise, we do not know if the circuit court found that Rule 205 is not applicable for some other reason. The failure to explain its reasoning deprives this Court of the opportunity to review it for error, but either way, the Supreme Court makes clear that actions taken under such circumstances are void:

> This Court held in the case of *Epps v. Bryan* 219 S.C. 307, 65 S.E.2d 112 (1951) that an order issued by the circuit court, after an appeal had been taken from a previous order, was void. By a like token, we hold that any proceedings, relative to the order of February 8, 1975, after the notice of intention to appeal dated February 17, 1975, were void. *Costas v. Florence Printing Co.*, 237 S.C. 655, 118 S.E.2d 696 (1961); *Rylee v. Marett*, 121 S. C. 366, 113 S.E. 483 (1922)

Bradley at page 286

It is impossible to take note of the legal issues in the companion case and fail to see that the issues here are identical. A reversal in the companion case is determinative of the issues raised in this case, and no lawyer acting in good faith would argue otherwise.

B.
The City's Zoning Ordinance Provides an Automatic Stay

The legal analysis here is identical to the issue raised in the companion case. In the companion case, the Board of Zoning Appeals refused to allow the appellant to appear and be heard on the merits of his application because the Bergthold ordinance putatively bars an adult business owner an opportunity to be heard. For over a year, even though his request for Special Exception is pending, the appellant transitioned from an adult business to a general retail business like its competitors such as Spencer's. However, the record demonstrates, the City delegated its municipal duties to its law consultant, and having done so, the City has cut off all communication with the appellant or his counsel. R.O.A. pages ___ and ____ [Jeff White affidavit, February 9, 2018 ballot, Larry Boyer affidavit, page 3: "On March 9, 2018, I applied for a business license. As of his time I have not received any answer or reply to that application."] Mr. Bergthold is now acting as the City's *de facto* Zoning Administrator, and acting in this dual capacity as *de facto* administrator and out-of-state law consultant raises troubling ethical questions—especially where he now seeks the imposition of criminal penalties when the ordinance he drafted provides for civil penalties. See Ordinance § 11-745: "Each infraction shall be punishable by a civil fine of $50.00." The function of a government official is to treat each applicant no better or no worse than any other applicant, but in making administrative decisions for the City, Mr. Bergthold's duties are in direct conflict with his well-documented crusade

against adult messages, against equal rights for homosexuals, and campaigns against gender equality. Mr. Bergthold's continuous interference in Taboo's efforts to conform to the ordinance and be left alone is identical issue resolved by the federal courts when a Rowan County Clerk of Court refused to obey the Supreme Court's decision requiring equal treatment for same sex couples. By shutting down communication and imposing shifting criteria, the City sets a bar Taboo can never cross. However the conflict between the City's refusal to communicate plays out, the City's zoning ordinance provides for an automatic stay following an appeal to the Board of Zoning Appeals that applies to everyone except the appellant, according to the author of the ordinance, Mr. Bergthold. As a Regent University trained lawyer, whose motto is: "Christian Leadership to Change the World," Mr. Bergthold's commitment to stamp out adult messages makes him ill-suited to act as both author and enforcer of his ordinance, and the Regent University motto is in direct conflict with the motto of the U. S. Supreme Court: "Equal Justice Under The Law." One motto advocates discrimination; the other forbids it. Thus, it is hardly surprising this litigation continues because with Mr. Bergthold in charge of the City's administrative decision making, there can be only one outcome.

This church/state conflict became clear in the colloquy with Zoning Administrator, Cook, quoted at the beginning of the brief on page 11. There, not only did he withhold from the Court that he would not be employed with the City and could not meet with the appellant as he promised to do, but also his testimony demonstrated that even in Court, the City delegates all its decisions regarding Taboo to an out-of-state lawyer whose professional career is dedicated to the elimination of adult messages. Thus, the City's refusal to communicate with the appellant flows from Mr. Bergthold's conduct, which raises troubling questions of barratry. South Carolina has a barratry statute, § 16-17-10, which makes maintaining an action for the purpose of obtaining employment for himself a crime. Add to the mix the

potential for criminal prosecution and petitions for criminal contempt, and we have a dangerous recipe for oppression. Unshackled from the social equilibrium and restraint inherent in Bar membership combined with a supply of taxpayer money, the checks and balances governing ethical exercise of the enormous power of the State is obliterated. In addition to Zoning Administrator Cook looking to the City's out-of-state consultant to supply answers, the abuse of delegated governmental power is further highlighted in Sidra Nelson's November 21, 2017, letter to Taboo. (R.O.A. page ___) There, responding to appellant's effort to secure his business license, she informs appellant that he cannot appeal her decision to deny the license because even though he mailed it within the ten day appeal period, she received it outside the ten-day appeal period. See Record on Appeal at page ____[Ex. 4 to appellant's Memorandum of Law]. Appellant had to bring a separate F.O.I.A. lawsuit to compel Ms. Nelson to admit what is obvious: she did not write the letter to Taboo. Government discrimination against unpopular applicants is nothing new—in the early 70's I was denied a driver's license because I had long hair. I overcame the discrimination by driving to another DMV office, where my application met less resistance. The appellant here cannot drive to another Zoning Administrator's office and submit his application to a less biased official. The **only** protection afforded the appellant is the unbiased application of the City's ordinances, and the trial court did not apply the ordinances as they are written. When the City's Board of Zoning Appeals refused to allow the appellant to be heard on the merits, Mr. Bergthold was there, having flown in from Tennessee to assist the Zoning Administrator in presenting his case. (This is the case currently under review at case at 2017-000561). Even though that case is pending, and even though the City's ordinance, § 17-711(d) provides an automatic stay, Mr. Bergthold instituted the present action for injunction, now seeking civil and **criminal** penalties,2 even

2 An out-of-state law consultant seeking **criminal** penalties for a violation of an ordinance that he drafted—and which provides for civil penalties—raises troubling ethical considerations.

though the City's ordinances governing appeals from the Board of Zoning Appeals grant to the appellant an automatic stay. See § 17-115, Appeals from decisions of board in the City of Columbia ordinances, which says:

> Any person who may have a substantial interest in any decision of a board of zoning appeals, or any officer or bureau of the city having authority, may appeal from any decision of a board to the circuit court in and for the county by filing with the clerk of such court a petition in writing setting forth plainly, fully and distinctly wherein such decision is contrary to law. Such appeal shall be filed within 30 days after the decision of a board is mailed.
> (Ord. No. 2012-096, 10-16-12)

This municipal code section is in accord with the *South Carolina Comprehensive Local Planning Act of 1994*, specifically §17-111(d) which provides the automatic stay:

> (d)
> *Stay of proceedings pending appeal.* An appeal stays all proceedings in furtherance of the action appealed from, unless the zoning administrator certifies to the applicable board of zoning appeals, after notice of appeal is filed with him, that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property. In that case, proceedings shall not be stayed otherwise than by a restraining order, which may be granted by the board or by a court of record on application, on notice to the zoning administrator from whom the appeal is taken and on due cause shown.
>
> (Ord. No. 2012-096, 10-16-12)

Notwithstanding the automatic stay provided by the Zoning Code, Mr. Bergthold sailed ahead with his application for injunction, seeking civil and criminal contempt, despite the fact that the City's ordinances, and the state code, provide an automatic , despite the fact that the licensing and zoning ordinances contain self-enforcement provisions, §§ 11-745 and 17-90, and despite the fact that the record shows Mr. Bergthold is directing City staff not to communicate with the appellant thus creating the controversy for which he asks the Court to punish appellant. See appellant's February 28, 2018 ballot at page ____ R.O.A. and affidavits of Jeff White and Larry Boyer at pages ___ and ____. When the appellant called this automatic stay provision to the

attention of the circuit court, the trial court ignored it. The trial court did not mention the ordinance in its Order granting injunction, and when appellant called this to the trial court's attention, the trial court denied reconsideration by a form Order with no explanation. Thus, the decision is controlled by an error of law and should be vacated by the operation of the City's zoning ordinance.

C.
The City's Licensing Ordinance Provides an Automatic Stay

As analyzed in the preceding section, this litigation unreasonably burdens the court and wastes valuable and limited judicial resources because the appellant wants nothing more than to conform his operation to operate as lawful general retail just as his competitors do, and the only thing preventing him is Mr. Bergthold's terminating appellant's access to local government. The record demonstrates the City has ceded its administrative authority to Mr. Bergthold, and he is not constrained to act impartially in discharging the duties of governmental decision-making. Government must feed all its citizens from the same spoon—even if they are not popular. Rather, the decision to cut appellant off from access to City Hall is motivated by the twin pillars of religious activism and a financial imperative to burnish the pre-packaged ordinance marketed nationwide. See Judith Lynn Hanna, *Naked Truth: Strip Clubs, Democracy, and a Christian Right* (University of Texas Press, 2012). As a result, the City follows instructions to refuse to communicate with the appellant. This, in turn, forces the appellant to turn to the courts as the only alternative because, unlike the driver's license example above, he cannot drive to the next nearest City Hall and find someone who will talk to him This entire litigation is a waste of valuable legal resources, for all that is required is for the City to apply its ordinance as written to the appellant, and if there are deficiencies he must correct, then the City must identify them in order

that he can take corrective action. If the City were acting in good faith, it requires less energy and expense to advise appellant what additional changes are required, if any, in order to operate free from the City's interference. The profligate consumption of limited judicial resources is especially galling here because the City's adult licensing ordinance, § 11-740, is Mr. Bergthold's creation, and even it provides the legal equivalent of an automatic stay by issuing a "provisional license":

(b)
If any court action challenging a licensing decision is initiated, the city shall prepare and transmit to the court a transcript of the hearing within 30 days after receiving written notice of the filing of the court action. The city shall consent to expedited briefing and/or disposition of the action, shall comply with any expedited schedule set by the court, and shall facilitate prompt judicial review of the proceedings. The following shall apply to any sexually oriented business that is lawfully operating as a sexually oriented business, or any sexually oriented business employee that is lawfully employed as a sexually oriented business employee, on the date on which the completed business or employee application, as applicable, is filed with the administrator: **Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the city's enforcement of any denial, suspension, or revocation of a temporary license or annual license, the administrator shall immediately issue the respondent a provisional license.** The provisional license shall allow the respondent to continue operation of the sexually oriented business or to continue employment as a sexually oriented business employee and will expire upon the court's entry of a judgment on the respondent's appeal or other action to restrain or otherwise enjoin the city's enforcement.
(Ord. No. 2011-105, 12-29-11) (emphasis added)

As this record demonstrates, the City has never issued a provisional license even though it pointed to this section of the ordinance to induce the district court judge to turn away the appellant's prior restraint claim. When the Zoning Administrator was before the Court on February 9, 2018, under oath, he claimed first to be the "expert" on the ordinance (R.O.A. page ___[tr. Page 30, line 6], but when questioned about the application of the provisional license, he claimed not to know about it: "I don't believe it does, and if it does, I don't know what section it would fall under." R.O.A. page ___tr. Page 62, lines 20-21] This disingenuousness permeates the case from start to finish. Not to put too fine a point on it, but the City told the district court one

thing and did the opposite. As set forth in Section 1B above, to show good faith after his constitutional challenges failed, the appellant voluntarily transitioned to general retail as allowed by the Bergthold ordinance:

Q. All right. And you're not trying to mislead this Court. They're [Taboo] entitled to have up to 30 percent of adult inventory and not be classified as an adult business; isn't that true?

MR. BERGTHOLD: Objection. Vague.

THE COURT: Overruled.

A. Correct.

R.O.A. page ___[tr. pages 28, line 20—page 29, line 1]

That brief colloquy captures the entire case. The duties of the Zoning Administrator include "interpreting the terms and provisions of the zoning code." City of Columbia Ordinance § 17-82(i). He is **required** to assist the appellant, but as this record—and the record in the companion case—demonstrates, the **only** time he communicates with appellant or his counsel is from the witness stand. When counsel asked him a simple, straightforward question interpreting what the zoning ordinance says, the author of the ordinance, Bergthold, interferes to object that the question is "vague." As appellant detailed in his affidavit (R.O.A. page ___), he made substantial changes to his operation to bring it in conformity with the general retail operations allowed by the City's ordinances. However, as set forth throughout this brief and as the record demonstrates, the City refuses to communicate with the appellant, leaving him to grope in the dark as to what are his alleged deficiencies. As discussed more fully in the next section, the sole evidence for an injunction is the Zoning Administrator's subjective impressions, which does not come close to the evidence required to support the "drastic remedy" of an injunction. Because of the operation of

the numerous stays and because of the lack of evidence supporting an injunction, the appellant asks this Court to reverse the trial court's grant of an injunction and require the City to provide to appellant a list of objective criteria he must meet in order to operate his business. When the appellant called to the trial court's attention all the effects of the various stays and the City's demonstrable bad faith in refusing to communicate with appellant, the trial court responded by ignoring the existence of the stays, never addressing how the City met its burden to satisfy the requirements for the "drastic remedy" of an injunction. Thus, as set forth in the preceding section the trial court's decision is controlled by an error of law.

Argument II

The trial court erred in granting an injunction when the undisputed evidence demonstrates that the City refuses to communicate with the appellant or provide any objective criteria to allow him to operate unmolested by the City.

As discussed in the previous sections, the City shut down all communication with the appellant and refuses to provide appellant with a list of deficiencies or objective criteria by which he can operate without interference from the City. All the City does is tell the appellant he does not meet its ordinances without providing particulars. When the appellant was afforded his only opportunity to speak with the Zoning Administrator to date—on February 9, 2018, when he took the stand—the Zoning Administrator admitted that his opinions were subjective, R.O.A. page ____[tr. Page 41, line 25—42, line 23]:

Q. Well, you [Zoning Administrator] contend we're still in violation.

A. Yes, I do.

Q. But you have no evidence as to what percent of the inventory is or is not constituted by what you define as adult material.

MR. BERGTHOLD: Objection. Vague. There's no definition of adult material.

THE COURT: Overruled.

A. It says specifically sexual devices. There's – you know, the store is filled with sexual devices.

Q. Okay. It's filled with sexual devices. That's your subjective opinion, right?

A. It is my opinion, yes.

Q. It's your opinion. You didn't do an inventory count, right?

A. I took photographs.

Q. You took photographs. You could have asked the applicant to give you an inventory of what he had in the store, correct?

A. Yes.

Q. You could have met with the applicant and said, "You're okay as long as you reduce your inventory down to 'X', but you didn't do that either, did you?

A. No.

The Supreme Court said in *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000) that guesswork will not support an application for an injunction. At this same court appearance, the Zoning Administrator openly deferred to Mr. Bergthold to such an extent that he would not even look at appellant's counsel when asked a question. R.O.A. page ____[tr. Page 45] quoted above on page 11. The most fundamental duty of government is to make sure that citizens are apprised of the objective legal criteria so they can conform their behavior to avoid unnecessary entanglement with government, and the City's ordinance regulating "sexual devices" contains numerous exceptions, including exempting those not "regularly" sold, or those sold to prevent pregnancy or sexually

transmitted diseases, and exempts businesses that do not restrict admission to adults. See affidavit of Jeff White at R.O.A. pages ____(pages 5-6). In an effort to meet the high evidentiary standard for an injunction, the City offered nothing more than Mr. Cook's photos and opinions, a witness so unreliable, he misled the Court about his status with the City. The right to operate a business in South Carolina without excessive government entanglement is so fundamental in our State that the framers of our state Constitution codified the right in Article I, § 22. As a result, the government cannot proscribe conduct without specifically and objectively defining the parameters of lawful conduct. In short, government tells us what we cannot do, not what we can do. And when proscribing conduct, the government is required to speak clearly and objectively, a bedrock legal principle since the Supreme Court laid the issue to rest in the seminal case of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965). That case gave birth to the settled legal principles today including, but not limited to, the Constitutional infirmity of unbridled discretion, prompt judicial review, the need for objective criteria when proscribing conduct, *etc.* Fortunately, we do not have to address these weighty Constitutional issues here because the issue before the Court is so basic. Can the City eliminate the appellant by simply ignoring him, relegating him to second-class citizen unworthy of communication and unworthy of the statutory protections provided to every other business owner? This record shows a shocking display of governmental abdication of impartial administration of its laws. Here, the record shows that the City's refusal to communicate with the appellant became so entrenched, that the appellant was reduced to begging the City for an opportunity to communicate by sending a February 28, 2018, ballot (R.O.A. page ___) that required the City only to check a box and return it in a self-addressed, stamped envelope. The City refused to do even that, and then lied to the Court and lied to the appellant when the Zoning Administrator promised under oath to make himself available for consultation. (R.O.A. page ___[tr.

Page 53, line 4- page 54, line 3]:

A. Initially to take a business plan or business license application. Generally speaking in a scenario, we all can look at it and take a written business plan from a business and then look at it overall.

But specifically to answer your question, the final determination, if it's one that's on the edge or not, would be made by the Zoning Administrator.

Q. And that's you.

A. It is.

Q. Okay. So are—can we make an appointment to come see you to sit down and talk to you to figure ourt what we can and cannot do?

A. Certainly.

Q. And how would we do that?

A. We can set it up today if you would like.

Q. Okay. Well, before you leave, are you agreeable to given us a date and time to come to your office and discuss that?

A. We're specifically talking about how to establish a business that meets the zoning ordinance and not anything related to any open court cases, absolutely.

Q. Sure, Absolutely. That's what we'd like to do. Thank you for that.

A. Yes, sir.

That meeting never happened despite several efforts to follow up, and we now know that on the day the Zoning Administrator gave his sworn testimony, he failed to disclose he already signed a contract with the Town of Blythewood on January 10, 2018, to become its City Administrator. At the

May 14th motion for reconsideration hearing, appellant identified the City's violation of Cook's promise delivered under oath. See R.O.A. page ____[tr. pages 11-14]) Thus, he misled both the Court and the appellant by suppressing the fact that on January 10, 2018, a month before he gave the above testimony, Brian Cook executed a contract of employment with Blythewood and would not be available to meet with the appellant! So, when the appellant attempted to do exactly what the Zoning Administrator directed him to do, he was, once again, thwarted by the City's bad faith. If this Court grants oral argument on this case, the question that will lay heavily on the case is whether counsel did or did not know of the Zoning Administrator's altered employment with the City, and if so, whether that amounts to misleading the Court and opposing counsel.

In short, the City has set up the appellant to fail. By adopting the simple expedient of refusing to communicate with appellant, the City has demoted him to a second-class status, kept in the dark about what he must do and who he must see to get his license. The trial court was unconcerned with the City's conduct and did not address it in the Orders under review, thereby requiring a remand to require the City at least to afford the appellant a meaningful opportunity to participate in the process afforded to every other citizen and which the Zoning Administrator promised to deliver under oath. To do otherwise is to reward the City for its misconduct.

Argument III

Did the Court of Common Pleas err in granting an injunction when the City failed to provide sufficient evidence that the appellant violated the City's ordinance or that it was suffering irreparable harm without a statutory remedy available?

The City's manufacture of a controversy and the lack of evidence supporting the grant of a drastic remedy by way of injunction is the most important and the most the most palpable error of law in the Order under review. The record in this case demonstrates without contradiction that after the

appellant failed to prevail on his constitutional challenges, he began the process of converting his operation to conform to the City's ordinances. He did this because he was acting in good faith. In fact, under the City's ordinances governing both adult uses and zoning appeals, the appellant is entitled to continue an adult business unabated, but he chose instead to be a gracious loser and conform to the rules authorizing a general retail operation. These rules include, among other things, the right to carry up to 30% adult material under a general retail license and the right to sell items "designed for the prevention of pregnancy and sexually transmitted disease." See Ordinance §§ 17-711 and 17-374. As set forth in his February 9, 2018, and May 11, 2018, affidavits (R.O.A. pages ___ and ____), appellant, among other things outlined above on page ___, changed the name of his business, applied for a general retail license in the name of the new business (which the City refused to acknowledge—see R.O.A. page ___[Sidra Nelson letter]), softened the exterior, dropped the age restriction, and purged all print material. In short, he began conducting his business exactly like similarly situated general businesses in Columbia such as Spencer's at the Columbiana Mall. (See R.O.A. page ____[White May 11, 2018, affidavit, pages 3-10]) In response to this, the City put up demonstrably false evidence. First, the Zoning Administrator promised to set up a meeting with appellant to instruct him what additional changes he required. (R.O.A. page ___[tr. page 53, line 19]. Not only did the Zoning Administrator lie about his pledge, but also when appellant attempted to follow up, he discovered the Zoning Administrator is not employed by the City of Columbia. As set forth above, when appellant's counsel attempted to ask him straightforward, uncomplicated questions, instead of answering, he looked to Scott Bergthold to supply the answers. (R.O.A. page ___[tr. page 45] quoted above on page 10) When asked if he had either conducted an inventory count of appellant's business or asked the appellant to furnish one, he essentially said he did not care. (R.O.A. page ___[tr. page 28, line 30-29, line 1]:

Q. All right. And you're not trying to mislead this Court. They're [Taboo] entitled to have up to 30 percent of adult inventory and not be classified as an adult business; isn't that true?

MR. BERGTHOLD: Objection. Vague.

THE COURT: Overruled.

A. Correct.

. . .

Q. Okay. But you have no evidence of the amount of inventory that is classified as adult, correct?

A. Inventory with photographs, is yes.

Q. All right. I know, but you don't' know what percentage of sales that comprises. You haven't made an effort to ascertain that.

A. Sales? No sir.

Q. Do you even care?

A. No, I really don't.

R.O.A. page ___[tr. page 50, lines 1-9]

As the government official charged with the duty of "interpreting the terms and provisions of the zoning code," §17-82(i), instead of conducting an inventory, or asking the appellant to provide one, or communicating with the appellant in any manner, or applying the ordinances as written, or acting in the slightest degree in good faith to cooperate with appellant to make the transition, this record makes clear the City has cut off appellant from communication and refused to interpret the ordinance for the appellant. The Ordinance that the Zoning Administrator did not care about provides that a business owner can have up to "30 percent of the establishment's displayed merchandise" without being

classified as adult. The appellant has zero. As for "sexual devices," a business owner can sell such provided they are packaged to be "primarily intended for protection against sexually transmitted diseases or for preventing pregnancy," which is why such items can be found at Spencer's, Target, Walgreens, and CVS. Likewise, a business is not a "sexual device shop" so long as it is 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." § 17-372. See February 6, 2018, affidavit of Jeff White at R.O.A. page ____. The Zoning Administrator did not care about any of this; he took some photos, he slammed his door shut; he lied to the Court and to the appellant about his availability to interpret the ordinance—case closed. The City's Zoning Administrator admitted that the City is not acting in good faith to retaliate against appellant because "we've been in court the last seven years." (R.O.A. page ___[tr. page 48, line 3]): "Q. So if we're dealing in good faith, can we come to your office and sit down with you and discuss all this and figure out what we can and cannot have? A. Certainly. Q. That hasn't happened before, has it? A. It has not because we've been in court for the last seven years." By abdicating his statutory duty under the City's ordinance and delegating that core governmental function to someone with a religiously fueled demonstrated animus for anything remotely touching on the subject of human sexuality, the City has abdicated its responsibility to, as Judge Walter Bristow liked to say: "feed all its citizens from the same spoon." Mr. Bergthold's reputation in this area is so well known as to become a subject of academic analysis:

> Frequently, governments accept volunteers or employ various for-profit and/or not-for-profit CR-Activists [Christian Right] to draft and defend sexually oriented business regulations. These are often borrowed verbatim from CR-Activist standard recommendations. I frequently see Scott Bergthold, the omnipresent CR-Activist attorney, in court with his clients, from Pasadena, California, to Daytona Beach, Florida, and points in between. After graduating from Pensacola Christian College in 1994, Bergthold received his law degree from the Robertson-founded Regent University Law School, graduated third out of 102 students. At law school, he became involved with the American Center for Law and Justice (ACLJ), also part of Robertson's empire. The CLJ, with a more than $13

million budget, helped vet President George W. Bush's Supreme Court nominees, Bergthold ran the Community Defense Counsel, which is tied to the Alliance Defense Fund. According to his website, his practice is "the nation's only law firm focused exclusively on the drafting and defense of municipal adult business regulations." He has served local governments as a consultant, drafting ordinances and updating outdated regulations, and as a "double-dipping" litigator and appellate counsel, defending zoning, regulations, or licensing restrictions in state or federal court. Bergthold going from city to county nationwide to sell anti-exotic dance ordinances has been likened to an old-time snake oils salesman riding the circuit. Knoxville City Council member Joe Bailey remarked, "To me, it seems like he's just a franchisee and goes around from city to city and sells these laws and municipalities pass them, and then we hire him to represent the city at $200.00 per hour."

Judith Lynne Hanna, *Naked Truth: Strip Clubs, Democracy, and A Christian Right*, (University of Texas Press, 2012) pages 34-35[fn3]

This record is clear: because the City has a specific goal in mind, it feels justified in reducing the appellant to second class status. By cutting off all communication with the appellant, it sets an impossible bar for appellant, the same way Voter Registration Clerks did for years to suppress minority voter registration—there was always another requirement the applicant had not met or another form that was not completed. The record demonstrates that the Order under review is controlled by error because it takes no account of the undisputed facts of the City's conduct or that the City of Columbia refuses to apply its own ordinances, refuses to adhere to the rules of appellate procedure, and seeks the "drastic remedy" of injunction with no showing of either irreparable harm or lack of a legal remedy for what it contends is a zoning violation, especially where the ordinance contains a self-enforcing provision. The City concedes it sought an injunction without evidence of nuisance in the case:

Q. Now, let's talk about your motion for an injunction. Tell the Court how many people have been arrested at Taboo.

MR. BERGTHOLD: Objection. Foundation.

THE COURT: If he knows.

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3 Local publications addressed the same topic: See *Grandstrand Daily*, Aug.10, 2013, "Making Adult Entertainment Go Away—Not!" Also "A Brookhaven Resident Provides a Perspective," *The Brookhaven Post*, January 25, 2014

A. Physically custodially arrested?

Q. Yeah.

A. I have no knowledge of any.

Q. Nobody's ever been attacked there, right, as far as you know?

A. I don't' [have] any of the police statistics specifically for that location.

Q. Okay. Nobody's ever been robbed there as far as you know.

A. I can't tell you. I don't know.

Q. Nobody—you never heard of anybody being sexually assaulted there?

A. I don't know.

R.O.A. page __, [tr. page 48 ___, lines 5-21]

In short, this record contains no evidence supporting the grant of a permanent injunction, which cannot be granted by way of a motion in the first place. The error below is that in granting the permanent injunction, the trial court did not recognize, apply, or even discuss the evidentiary standard required for an injunction. The leading case on injunction is *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004):

The Developer asserts that the Master erred in granting the preliminary injunction because Scratch Golf did not present sufficient evidence to establish that injunctive relief was appropriate. We agree. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff. Flanagan, S.C. Civil Procedure, 507 (2d ed.1996). For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Although Scratch Golf may be able to satisfy elements 1 and 2, it cannot satisfy element 3 because there was an alternative [361 S.C. 122] remedy at law available for Scratch Golf: the statutory remedy of attachment. Therefore, an injunction was not the appropriate remedy.

Should there be any question about the appropriateness of applying *Scratch Golf Co.* to this case because the issue there was a preliminary injunction, the rule is the same for a permanent injunction, and, in fact even more stringent because it requires the finding of nuisance, and this record demonstrates that the City failed to produce any evidence of a nuisance at Taboo:

"The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected." [645 S.E.2d 259] *LeFurgy*, 313 S.C. at 558, 443 S.E.2d at 578. "In cases where an injunction is sought to abate an alleged private nuisance, the court must deal with the conflicting interests of the landowners by balancing the benefits of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant or deny an injunction as seem most consistent with justice and equity under the circumstances of the case." *Id.* In its order, the trial court recognized the serious nature of an injunction and acknowledged the need to balance the parties' conflicting interests and pointed to evidence of Coleman's "confrontational and threatening behavior." We agree with the trial court and find the preponderance of the evidence shows that Coleman's conduct on his shooting range constitutes a private nuisance and should be enjoined.
Shaw v. Coleman, 373 S.C. 485, 645 S.E.2d 252 (S.C. App., 2007)

This record also shows that the Zoning Administrator agreed that the only reason the City sought an injunction was to cure a zoning violation, an alleged defect which exists solely because the Zoning Administrator refused to discharge his statutory duty. (R.O.A. pages ___-___[tr. Page 49]:

Q. Do you know why we're here today?

A. Yes.

Q. In your words, tell us why we're here today.

A. To get an injunction.

Q. Thank you. And tell me exactly why you need this injunction.

A. Need this injunction in order to further bring Taboo—who's operating and has been operating for seven years in violation of the City of Columba ordinance.

In light of the undisputed modifications to the operation of the business, there is no evidence in

support a permanent injunction at a motion hearing on a zoning violation, especially here where the only evidence presented against Taboo is the Zoning Administrator's subjective opinion, which he manufactured by barring the appellant from communication. Even Sidra Nelson **refused** to recognize that appellant's application for a general retail license was for a new business. Despite having the application in front of her, she insisted on calling appellant's application for "An Adult Superstore," when the whole purpose of the application was to demonstrate to the City that the appellant sought to transition to general retail. See R.O.A. pages ___[Sidra Nelson October 24, 2017, letter and Goldstein October 31st response: "Taboo (not Taboo Adult Superstore, which no longer exists) applied for a general retail license, an allowed use at its location." Ex. 2 & 3]. Despite this profound abdication of responsibility, here is how the trial court dealt with all of these issues:

> 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. . . . Although Plaintiff denies this, it offered the Court no evidence to the contrary.
>
> (Order under review at page 3, R.O.A. page ____)

This wholly unsupported conclusion is not corroborated by the record. First, there is no evidence in this case to support either a temporary or a permanent injunction other than the Zoning Administrator's admittedly subjective impressions based on insufficient facts and by his turning a blind eye his duties under the City's own ordinances. Second, the Zoning Administrator misled the Court and the appellant about his availability to discuss alleged deficiencies. Third, the ordinance itself contains the mechanism to exact compliance, and it is a gross miscarriage of justice to allow the City to manufacture a controversy and blame it on the appellant while withholding his remedy. As Sidra Nelson's November 21, 2017, letter shows (R.O.A. page ___), the City is launching a coordinated attack on appellant from all sides with all decision-making authority unlawfully delegated to a law

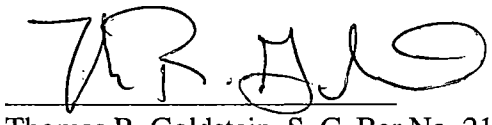
office in Chattanooga, Tennessee. Finally, South Carolina has a well-developed body of law on the evidence necessary to secure the "drastic remedy" of injunction, and there is not a *scintilla* of evidence in this record to support a conclusion that Taboo is a nuisance. In essence, the Order under review concludes that Taboo failed to prove it is NOT a nuisance, and therefore, an injunction shall issue. No citizen is ever required to prove a negative, which cannot be done. (Bertrand Russell once famously declared that a teapot orbited the Sun between Earth and Mars, and no one could prove it did not.) The appellant has a right to operate as a general retail store provided it conforms to the ordinance upheld by the Fourth Circuit Court of Appeals. Appellant has done this, and the City only claims otherwise by adopting the expedient of refusing to communicate. The Order below should be reversed with instructions to the City to provide objective criteria or objective statement of deficiencies and afford the appellant the opportunity to operate unmolested as any other business.

CONCLUSION

The trial court erred in granting an injunction for any or all of the reasons set forth above. Not only do the Rules of Appellate Procedure and the City's own licensing and zoning ordinances provide for an automatic stay and a provisional license, but also the appellant demonstrated its conformity to the licensing ordinance and its entitlement to operate as a general retail operation. The Zoning Administrator had no evidence to offer beyond his subjective opinions, and the City's' obvious efforts to freeze the appellant out of participation with the City do not justify the grant of an injunction. Nowhere has the City demonstrated a *scintilla* of evidence of either irreparable harm or the lack of an adequate remedy at law. In short, after appellant made extensive changes to his operation to conform to the ordinance, it is the City who is the acting outside the law because it has targeted the appellant for destruction and will not fulfill its statutory duties under the law. The appellant prays that the Order

under review be reversed, both because there are stays that prevent the City from taking such action against the appellant, and more importantly, because the City has manufactured a controversy by adopting a course of conduct designed to exclude the appellant from participation in the orderly administration of its municipal ordinances. The appellant prays further for an Order requiring the City to "interpret the terms and provisions of the zoning ordinance" as required by law and provide the appellant with objective criteria that will allow him to secure his general business license.

Respectfully submitted,



January 16, 2019

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-03478
Appellate Case No.: 2018-001062
(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.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Contents of Record on Appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 16, 2019, addressed to his attorney of record, Peter Balthazor, Riley, Pope, & Laney, L.L.C., P. O. Box 11412, Columbia, S. C. 29211.

January 16, 2019

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January 16, 2019

Hon. Jenny A. Kitchings,
Clerk of Court
South Carolina Court of Appeals,
ATTN.: Jessica, case manager
P. O. Box 11629
Columbia, S. C. 29211

Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478
Appellate Tracking Number: 2018-001062
(See also: Appellate Tracking Number: 2017-000561)

Dear Ms. Kitchings,

I enclose the appellant's initial brief, designation of contents of record on appeal along with a proof of service. Would you be so kind as to file this with the Court? I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,

Belk, Cobb, Infinger & Goldstein, P.A.
Thomas R. Goldstein

TRG/

cc:
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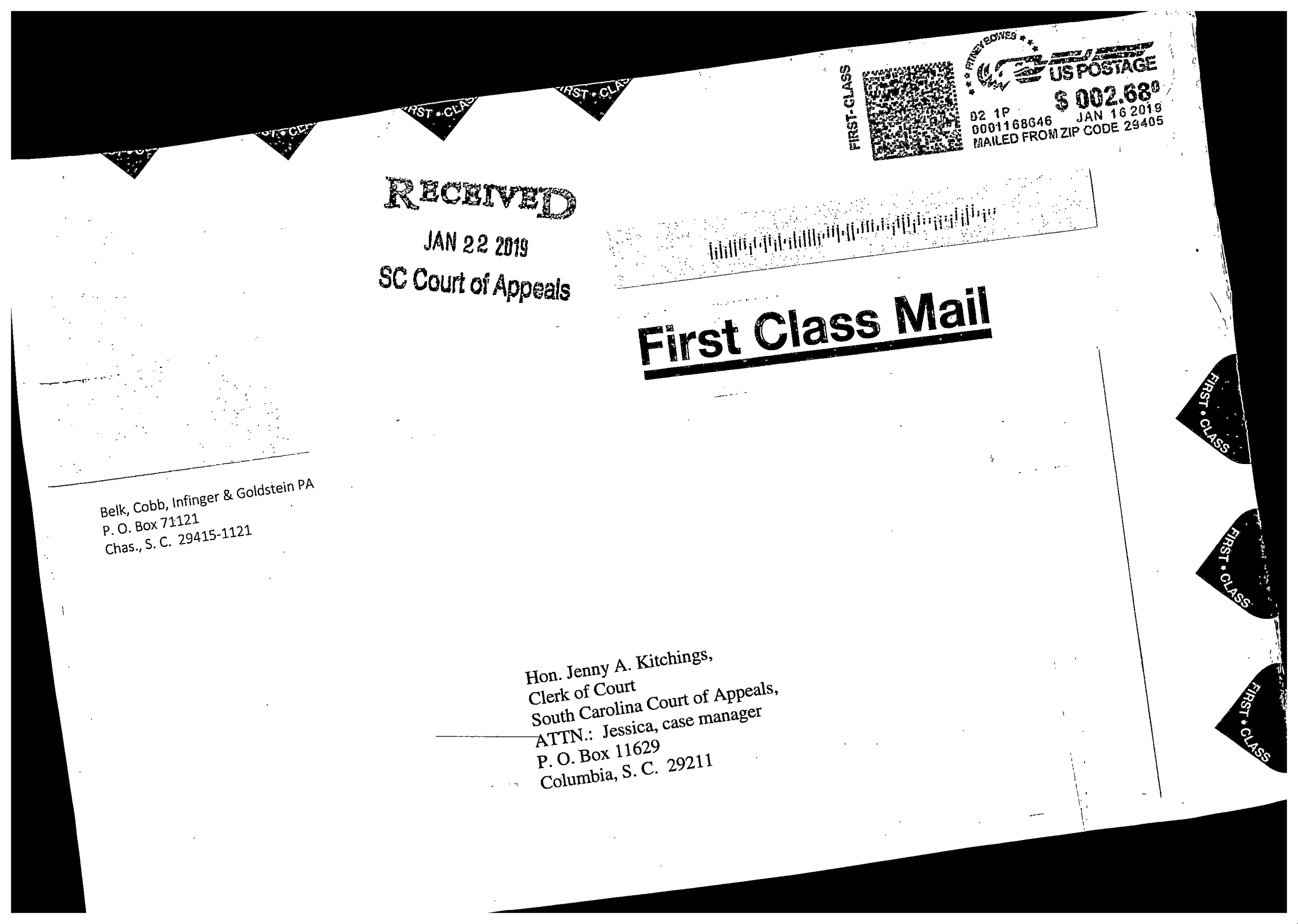
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