THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Civil Action No. 2016-CP-40-03478
Appellate Case No. 2018-001062

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

v.

City of Columbia Board of Zoning Appeals,..Respondent.

And

City of Columbia Zoning Administrator,...Counterclaimant,

v.

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

RESPONDENT'S INITIAL BRIEF

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MAR 18 2019
SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CASES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 4

A. Procedural History 4

B. Statement of the Facts 4

STANDARD OF REVIEW 9

ARGUMENT 10

I. Based on undisputed evidence, the trial court properly enjoined Taboo from operating a sexually oriented business in violation of the Zoning Ordinance. 10

A. The trial court properly found that Taboo was operating both a "sexual device shop" and an "adult bookstore" contrary to the Zoning Ordinance. 10

B. Taboo cannot rely on new evidence or argument to show that the trial court erred in entering the Injunction Order. 13

II. No stay of proceedings barred the trial court from considering evidence of Taboo's continued violations and entering an injunction. 17

A. Because the 2017 BZA Affirmance Order does not address the City's counterclaim for injunction, that claim is a matter "not affected by the appeal" of that order. 17

B. Taboo did not properly raise the argument on the stay in the Zoning Ordinance below, which stay does not apply to court proceedings after BZA decisions. 20

C. Taboo, which has never triggered the provisional license contained in the Sexually Oriented Business Licensing Ordinance, waived its argument about provisional licenses by not arguing it at the permanent injunction hearing. 22

CONCLUSION 24

TABLE OF CASES

Page(s)

Cases

Allen v. Pinnacle Healthcare Sys., LLC,
394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011) 16

Arnal v. Fraser,
371 S.C. 512, 641 S.E.2d 419 (2007) 17, 18

Bradley v. Hullander,
266 S.C. 188, 222 S.E.2d 283 (1976) 20

City of Columbia v. Pick-A-Flick Video, Inc.,
340 S.C. 278, 531 S.E.2d 518 (2000) .... *passim*

County of Richland v. Simpkins,
348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002) 3, 10, 13

Cricket Store 17, LLC v. City of Columbia,
676 F. App'x. 162 (4th Cir. Jan. 25, 2017) 7

Cricket Store 17, LLC. v. City of Columbia,
97 F. Supp. 3d 737 (D.S.C. 2015) 7

Cricket Store 17, LLC v. City of Columbia,
996 F. Supp. 2d 422 (D.S.C. 2014) 7

Cricket Store 17 v. City of Columbia,
138 S. Ct. 116 (2017) 7

Earthscapes Unlimited, Inc. v. Ulbrich,
390 S.C. 609, 703 S.E.2d 221 (2010) 21

Ellis v. Davidson,
358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) 1, 9

Helms Realty, Inc. v. Gibson-Wall Co.,
363 S.C. 334, 611 S.E.2d 485 (2005) 21

Johnson v. Sonoco Prods. Co.,
381 S.C. 172, 672 S.E.2d 567 (2009) 21

Jones v. Lott,
387 S.C. 339, 692 S.E.2d 900 (2010) 10

Levine v. Spartanburg Reg'l Servs. Dist., Inc.,
367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005)....................1, 9

McDonald v. Palmetto Theatres,
196 S.C. 38, 11 S.E.2d 444 (1940)....................20

Sheppard v. State,
357 S.C. 646, 594 S.E.2d 462 (2004)....................21

Smith v. Fedor,
422 S.C. 118, 809 S.E.2d 612 (2017)....................2, 13

Tillman v. Oakes,
398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012)....................17, 18

Whitehead v. State,
352 S.C. 215, 574 S.E.2d 200 (2002)....................20

Wilder Corp. v. Wilke,
300 S.C. 71, 497 S.E.2d 731 (1998)....................23

Statutes and Ordinances

City of Columbia Zoning Ordinance.................... *passim*

PRELIMINARY STATEMENT

Almost nothing in Taboo's 37-page appellate brief is relevant to the issue at hand: whether the circuit court abused its discretion in granting an injunction to prevent Taboo from continuing to violate the Columbia Zoning Ordinance.

It did not, because the City showed what is necessary under governing law to get an injunction under a zoning ordinance: "(1) that it has an ordinance covering the situation," and "(2) that there is a violation of that ordinance." *City of Columbia v. Pick-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000). The circuit court's March 8, 2018 order (the "Injunction Order") explains that at the February 9, 2018 evidentiary hearing, the City offered the Zoning Administrator's testimony and seven exhibits, including the City's zoning regulations for sexually oriented businesses, photographs taken inside Taboo 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. (Inj. Order at 3.) The court stated: "Based on the photographs and testimony, the Court concludes that Taboo is a sexually oriented business, as is defined by City ordinance." (*Id.*) This conclusion included a footnote: "Although Plaintiff denies this, *it offered the Court no evidence to the contrary*." (*Id.* at n.4 (italics added).)

Thus, Taboo cannot show that the trial court's conclusion "is without evidentiary support," *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004), as required under the abuse of discretion standard governing review of a trial court's grant of an injunction. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005).

So instead, Taboo spends its brief repeating unsupported and irrelevant propositions. It repeats some over and over (and over) again, but they remain unsupported and irrelevant.

Taboo makes numerous evidentiary propositions that are unsupported. Taboo repeatedly cites affidavits and attachments thereto, which were filed before—and after—the evidentiary

hearing, but were not accepted into the record by the trial court. The trial court properly rejected, on hearsay grounds, Taboo's attempt to rely on an affidavit about Taboo's operations submitted just before the hearing. (Feb. 9, 2018 Transcript ("Tr.") at 38:17-24.)[1] The remaining affidavits that Taboo cites about its operations were submitted *after* the hearing, without leave of court and in support of Taboo's motion for reconsideration. The trial court properly refused to consider those as well. (May 14, 2018 Tr. at 6:5-24); *see also Smith v. Fedor*, 422 S.C. 118, 126-27, 809 S.E.2d 612, 616 (2017) ("A party cannot use Rule 59(e), SCRCP to present to the court an issue the party could have raised prior to judgment but did not.") (quotation omitted).

Taboo also makes repeated allegations, and arguments drawn therefrom, about the Zoning Administrator's (Brian Cook's) post-hearing departure from the City. But none of that is supported by actual evidence in the record either. Finally, Taboo continues its years-long *ad hominem* attacks against the City's counsel. These attacks are unprofessional, unsupported by record evidence, and irrelevant to the propriety of the trial court's injunction.

Taboo's legal arguments are also makeweight. First, Rule 205, SCACR, did not bar the trial court (Newman, J.) from considering the City's counterclaim for injunction. When the lower court (Hood, J.) entered its February 6, 2017 Order Affirming Zoning Board Decisions ("2017 BZA Affirmance Order"), it dealt with two 2016 BZA decisions, not the City's late 2017 motion for injunctive relief. In fact, the order specifically stated that the City's counterclaim for injunction "is not the subject of this order." (2017 BZA Affirmance Order at 1 n.1.) Thus, the City's counterclaim was a matter "not affected by the appeal" of that order (Appeal No. 2017-

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[1] Taboo was allowed to submit one piece of evidence without a witness: an attestation affidavit submitted five days after the hearing (Feb. 14, 2018 Boyer Affidavit) about photos of, and a receipt for, merchandise observed at another store, Spencer's gifts, about a year before the injunction hearing. (Feb. 9, 2018 Tr. 69:2-6.) But the Injunction Order is correct that Taboo "offered the Court no evidence" disputing the City's voluminous evidence about *Taboo's* operations in late 2017 or January 2018.

000561), and the trial court was not divested of jurisdiction to consider the counterclaim.

Second, Taboo now argues that § 17-111(d) of the Zoning Ordinance provides for a stay of enforcement while a decision of the Zoning Administrator is on appeal to the Board of Zoning Appeals. But Taboo waived this argument by not making it before the Injunction Order issued. Moreover, that section has no relevance after the BZA makes a decision and a court case is filed.

Third, Taboo argues that § 11-740(b) of the Sexually Oriented Business Licensing Ordinance allows for a provisional license to any lawfully operating sexually oriented business upon the filing of a court action appealing any adverse decision rendered by the City under *that* ordinance. That provision is thrice irrelevant: (1) Taboo has been operating illegally for years, (2) Taboo never suffered or appealed an adverse decision under the Sexually Oriented Business Licensing Ordinance, and (3) the City's counterclaim for injunction proceeds only under the Zoning Ordinance, and it is pursuant to that ordinance that the trial court granted an injunction.

For these reasons, this Court should affirm the trial court's well-reasoned Injunction Order.

STATEMENT OF ISSUES ON APPEAL

I. **Injunction.** To enjoin a zoning violation, a city must show "(1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance." *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 905 (Ct. App. 2002). Undisputed evidence showed that Taboo was operating a "sexual device shop" and an "adult bookstore" in late 2017, and that the Zoning Ordinance prohibits such sexually oriented businesses at Taboo's location. Was the trial court within its discretion to enter an injunction?

II. **Taboo's Arguments Against Injunctive Relief.**

   A. **Rule 205, SCACR.** Rule 205 gives this Court exclusive jurisdiction over an appeal, but specifically allows the lower court to proceed with any "matters not affected by the appeal." The 2017 BZA Affirmance Order specifically excluded consideration of the City's counterclaim for an injunction, and the appeal of that order does not address injunctive relief. Did the trial court have jurisdiction to address the counterclaim for injunction?

   B. **Stay of Zoning Administrator Decision Pending Appeal to BZA.** Section 17-111(d) of the Zoning Ordinance provides for a stay of enforcement while a decision of the

zoning administrator is on appeal to the Board of Zoning Appeals. Taboo never argued § 17-111(d) until after the court entered the Injunction Order, and that provision does not give a stay during court proceedings. Did Taboo waive this argument? If not, does it lack merit?

C. **Provisional License Under Sexually Oriented Business Licensing Ordinance.** Section 11-740(b) of the Sexually Oriented Business Licensing Ordinance provides a provisional license to any lawfully operating sexually oriented business upon the filing of a court action appealing an adverse licensing decision under *that* ordinance. Taboo has been operating unlawfully for years, it never suffered an adverse licensing decision under the Sexually Oriented Business Licensing Ordinance, and this case concerns only claims under the Zoning Ordinance. Is § 11-740(b) irrelevant to an injunction under the Zoning Ordinance?

STATEMENT OF THE CASE

A. Procedural History

The present litigation began on June 8, 2016 when Taboo sought judicial review of two April 2016 decisions of the Columbia Board of Zoning Appeals. The City answered Taboo's complaint, and the City's Zoning Administrator filed a counterclaim for injunction to prevent Taboo's ongoing violations of the Columbia Zoning Ordinance.

On February 6, 2017, the trial court issued an order affirming the BZA decisions (the "2017 BZA Affirmance Order" referenced above). After a motion for reconsideration failed, Taboo appealed, and that appeal is currently pending in this Court (Appeal No. 2017-000561).

On October 2, 2017, the City moved for a permanent injunction on its counterclaim. The court held an evidentiary hearing on the motion on February 9, 2018. On March 8, 2018, the trial court issued the Injunction Order. Taboo moved for reconsideration, and the trial court heard argument on May 14, 2018. The next day, May 15, the trial court denied the motion for reconsideration. On June 7, 2018, Taboo appealed the Injunction Order.

B. Statement of the Facts

In late 2011, Taboo opened at 4716 Devine Street in the City of Columbia. (Inj. Order at 1-

3.) Taboo features a variety of sexual merchandise, including sexually explicit DVDs and devices. (*Id.* at 3-4.)

On December 29, 2011, the City of Columbia adopted a Sexually Oriented Business Licensing Ordinance. (*Id.* at 2.) On November 13, 2012, the City adopted updated regulations governing sexually oriented businesses in its Zoning Ordinance. (*Id.*)

Zoning Ordinance § 17-374(b) prohibits a sexually oriented business from operating outside of an M-1 or M-2 district. (March 8, 2018 Injunction Hearing ("Inj. Hrg.") Ex. D-1 at 6.) Similarly, § 17-374(c) prohibits a sexually oriented business from operating within 900 feet of, *inter alia*, "[a] boundary of a residential district" or "[a] lot devoted to residential use." (*Id.*)

Section 17-372 of the Zoning Ordinance defines a "sexual device shop," one type of sexually oriented business, 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.
>
> *Sexual device* means any three dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

(Inj. Hrg. Ex. D-1 at 5.)

"*Regularly* means the consistent and repeated doing of an act on an ongoing basis." (*Id.* at 4.)

Another type of sexually oriented business is an "adult bookstore," defined in relevant part:

> Adult bookstore or adult video store means a commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals or other

printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides, or other visual representations which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas." A "principal business activity" exists where the commercial establishment meets any one or more of the following criteria:

(1) At least 30 percent of the establishment's displayed merchandise consists of said items; or

...

(5) The establishment maintains at least 30 percent of its floor space for the display, sale, and/or rental of said items (aisles and walkways used to access said items shall be included in "floor space" maintained for the display, sale, or rental of said items); or

...

(8) The 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.

(Inj. Hrg. Ex. D-1 at 3.[2])

Taboo did not satisfy the Zoning Ordinance's location requirements, but was allowed to amortize its investment and move to a conforming location by January 1, 2014. (Inj. Hrg. Ex. D-1 at 7, Zoning Ordinance § 17-374(i).) Taboo applied to extend the amortization period, but the application was denied by an independent hearing officer, who found that Taboo failed to show that it had not reasonably recouped its investment, and that Taboo's accounting paperwork "showed significant inaccuracies, rending the statements of little or no evidentiary value."

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[2] Specified anatomical areas means and includes:
(1) Less than completely and opaquely covered: human genitals, pubic region; buttock; and female breast below a point immediately above the top of the areola; and
(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.
Specified sexual activity means and includes any of the following:
(1) Intercourse, oral copulation, masturbation or sodomy; or
(2) Excretory functions as a part of or in connection with any of the activities described in (1) above.
(Inj. Hrg. Ex. D-1 at 5.)

Cricket Store 17, LLC v. City of Columbia, 996 F. Supp. 2d 422, 426 (D.S.C. 2014).

Instead of relocating, Taboo sued in federal court. In detailed orders, the district court upheld the City's ordinances against constitutional attacks on preliminary injunction, *see id.*, on summary judgment, *see Cricket Store 17, LLC. v. City of Columbia*, 97 F. Supp. 3d 737 (D.S.C. 2015), and on reconsideration of summary judgment. *See* 2016 WL 81807 (D.S.C. Jan. 7, 2016). The Fourth Circuit affirmed. *Cricket Store 17, LLC v. City of Columbia*, 676 F. App'x. 162 (4th Cir. Jan. 25, 2017). The Supreme Court of the United States denied Taboo's petition for certiorari on October 2, 2017. *Cricket Store 17 v. City of Columbia*, 138 S. Ct. 116 (2017).

Nevertheless, Taboo continued violating the Zoning Ordinance. On January 28, 2016, the Zoning Administrator provided a letter to Taboo stating that Taboo was operating a sexual device shop on that date. (Inj. Order at 2.) On February 26, 2016, the Administrator also declined to process Taboo's application for a special exception to the Zoning Ordinance because § 17-374(a) states that no variance or special exception shall be granted for a sexually oriented business. (*Id.*; *see also* Ex. D-1 at 6.) Taboo appealed these two decisions of the Administrator decisions to the BZA, which held a hearing and thereafter affirmed the Administrator's decisions. (Inj. Order at 2.)

On June 15, 2016 Taboo appealed the BZA decisions to the circuit court. The City answered and filed a counterclaim for injunctive relief under the Zoning Ordinance. (Inj. Order at 2.)

On February 6, 2017, the circuit court affirmed the BZA's decisions; "however, the City's counterclaim was specifically excluded from that Order, and no decision was rendered regarding injunctive relief." (Inj. Order at 2.) The 2017 BZA Affirmance Order is currently on appeal in No. 2017-000561.

Eight months later, on October 2, 2017—the same day that the Supreme Court of the United States denied review in the federal case—the City moved forward on its counterclaim for injunctive relief. On February 9, 2018, the circuit court held an evidentiary hearing.

At that hearing, the City's Zoning Administrator testified about three visits he made to Taboo on September 29, October 5, and December 21, 2017. The City also entered into evidence several sets of photographs of Taboo's interior that were taken during the Zoning Administrator's visits, as well as pictures of Taboo's store and website, showing that it sold hundreds of sexual devices and sexually explicit DVDs. (Inj. Hrg. Exs. D-2 through D-6.)

Taboo *did not present any witnesses and entered no exhibits* at the hearing. Taboo attempted to enter photographs and a receipt from a different store, Spencer's Gifts, by cross-examining the Zoning Administrator about them. The City objected on foundation and relevance. (Feb. 9, 2018 Tr. 64:16-65:1; *see also id.* at 31:9-17, 33:8-25; 52:4-12, 65:14-66:9.) The trial court refused to admit the items at the hearing, but eventually allowed Taboo to submit them via an attestation affidavit after the hearing to remedy a lack of foundation. (*Id.* at 65:6-11, 67:1-9.)

Based on the undisputed evidence of Taboo's operation, the trial court entered a permanent injunction on March 8, 2018. The trial court held that the City satisfied the two-part test for a permanent injunction under *City of Columbia v. Pic-A-Flick*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000). The trial court held "(1) that [the City] has an ordinance covering the situation" because the City's Zoning Ordinance prohibits sexual device shops and adult bookstores from operating "outside of an M-1 or M-2 zoning district" or "within 900 feet of residential districts or residential uses." (Inj. Order at 6.)

The trial court also held that "(2) there is a violation of that ordinance" because undisputed evidence showed that Taboo was operating both a sexual device shop and adult bookstore in

violation of the district and buffer distance requirements. (*Id.* at 3-4, 6.) Specifically, the court found that Taboo was operating an adult bookstore because "it appeared that at least forty percent of Taboo's floor space was dedicated to sexually explicit DVDs," which exceeds the thirty-percent threshold in the "adult bookstore" definition in § 17-372. (*Id.* at 3-5.)

Taboo also qualified as a "sexual device shop" because it regularly featured sexual devices, with "entire walls and racks displaying sexual devices, lighted display cases highlighting sexual devices, and signage promoting sexual devices during each of [the Zoning Administrator's] visits to Taboo." (*Id.* at 4.) Additionally, "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." (*Id.*) Similarly, "[o]n 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.'" (*Id.*)

Taboo is not located in an M-1 or M-2 district. It is located within 900 feet of a residential district and of a residential use. (Inj. Order at 6; *see also* Feb. 9, 2018 Tr. 12:19-23, 13:10-14.)

On March 16, 2018, Taboo filed a motion to reconsider the Injunction Order. Taboo also later filed affidavits from persons who did not testify at the injunction hearing. Taboo also attempted to raise new legal arguments, including that Zoning Ordinance § 17-111(d) imposed a stay of enforcement. The trial court heard oral argument on the motion on May 14, 2018, and denied the motion the following day. On May 29, 2018, Taboo appealed the Injunction Order.

STANDARD OF REVIEW

"The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion." *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005). "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d

817, 825 (Ct. App. 2004).

"A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

ARGUMENT

I. Based on undisputed evidence, the trial court properly enjoined Taboo from operating a sexually oriented business in violation of the Zoning Ordinance.

A. The trial court properly found that Taboo was operating both a "sexual device shop" and an "adult bookstore" contrary to the Zoning Ordinance.

Taboo has been forbidden from operating a sexually oriented business at its present location since January 1, 2014. (Inj. Hrg. Ex. D-1 at 7, Zoning Ordinance § 17-374(i).) Because Taboo continued to do so, and administrative action did not produce compliance, the City moved for an injunction on October 2, 2017. At the February 9, 2018 evidentiary hearing, the City offered unrefuted evidence that on specific dates in September, October, and December 2017, Taboo continued to operate a sexually oriented business. Thus, the trial court did not abuse its discretion in entering the injunction, and the Injunction Order should be affirmed.

In a normal case, to obtain an injunction, a party must show irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. "The South Carolina Supreme Court, however, has '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). "In

order for a city to get an injunction for a zoning violation," it need only 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); *see also* S.C. Code Ann. § 6-29-950 (authorizing municipalities to "institute injunction ... or other appropriate action or proceeding" to abate land-use violations).

Here, the trial court properly enjoined Taboo. The City has "an ordinance covering the situation" because "[b]oth 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." (Inj. Order at 6; Ex. D-1 at 6, Code § 17-374(b), (c).) The Zoning Ordinance prohibits a sexually oriented business at Taboo's location: "Taboo admits that 4716 Devine Street [its location] is not located in an M-1 or M-2 district." (Inj. Order at 6.)

And second, "there is a violation of that ordinance." The record more than amply supports the trial court's conclusion that Taboo operates a sexually oriented business in violation of the Zoning Ordinance. On September 29, 2017, October 5, 2017, and December 21, 2017, the Zoning Administrator visited Taboo and took pictures.

On September 29, the Administrator observed that 40 percent of the floor space was dedicated to sexually explicit DVDS, causing Taboo to qualify as an adult bookstore. (Feb. 9, 2018 Tr. 14:21-15:1.) On each of the three visits, he took pictures of sexually explicit DVDs. (Inj. Hrg. Exs. D-2, D-3, D-4.) Thus, the trial court correctly found that Taboo qualified as an adult bookstore under § 17-372(5) based on observations that more than thirty percent "of Taboo's floor space was dedicated to sexually explicit DVDs." (*Id.* at 3-4; *see* Feb. 9, 2018 Tr. 14:21-15:1).

Taboo also qualified as a sexual device shop. On all three of the Administrator's exhibits, it had entire walls and racks displaying sexual devices, lighted display cases highlighting sexual devices, and signage promoting sexual devices. (Feb. 9, 2018 Tr. 15:2-10, 18:22-19:7; Ex. D-2, 9/29/2017 Photographs; Ex. D-3, 10/5/2017 Photographs; Ex. D-4, 12/21/2017 Photographs.)

The sexual devices at Taboo consist of objects designed for stimulation of the male or female human genitals and anus, including dildos, vibrators, cock rings, anal beads, butt plugs, artificial vaginas, masturbation tubes, orgasm bunnies, prostate stimulators, G spot stimulators, penis pumps, and orgasm balls. (*Id.*) Taboo also stocks sexual devices designed for sadomasochistic use or abuse of oneself or others, including cuffs, restraints, nipple clamps, collar leashes, mouth gags, hogtie kits, bondage sets, and paddles. (*Id.*) Sexual devices are featured throughout Taboo—filling glass display cases at the counter, and covering walls and racks around the store. When the Administrator visited Taboo on September 29, 2017, he saw signage that limited admittance to the store to persons 18 years old and older. (Feb. 9, 2018 Tr. 17:1-13.) Taboo continued to impose an age requirement to enter the store on updated signage in early 2018, (*id.* 58:23-59:3), which is advisable given the sexually explicit nature of its wares.

On Facebook, Taboo describes itself as an adult novelty and smoke shop by the name "Taboo Adult Superstore." (Feb. 9, 2018 Tr. 24:19-25:4.) On Yelp, Taboo describes itself as an "adult superstore." (*Id.* 25:5-15.) Additionally, Taboo's websites "tabooadultstore.com" and "taboosc.com" both promote the Taboo store at 4716 Devine Street and the kinds of sexual devices—such as realistic dildos, butt plugs, masturbators, vibrators, cock rings, etc.—on display and offered at that location. (Inj. Hrg. Ex. D-5, Ex. D-6.) Thus, the trial court properly enjoined Taboo from operating a sexual device shop.

Taboo did not present any witness at the permanent injunction hearing. (Feb. 9, 2018 Tr.

63:25.) Instead, Taboo's counsel staked out the store's position: "But my defense to the application for injunction is a legal defense, not -- not a factual defense." (*Id.* at 64:13-14.) But the only evidence Taboo offered at the injunction hearing was about items offered at a *different* store, Spencer's Gifts. Taboo did not dispute the testimony and photographs showing that Taboo operated an adult bookstore and a sexual device shop.

Because the evidence actually before the trial court supports the court's conclusions about Taboo's operation of a sexually oriented business, it was clearly violating the location standards in Zoning Ordinance § 17-374. This Court should therefore affirm the Injunction Order.

B. Taboo cannot rely on new evidence or argument to show that the trial court erred in entering the Injunction Order.

Because Taboo offered no evidence at the evidentiary hearing to dispute the City's proof that it violated the Zoning Ordinance, Taboo's primary tactic now is to rely on alleged evidence that was not presented at the hearing, and to deflect and shift blame by accusing the City and its counsel of bad faith. These unsupported arguments are both irrelevant and without merit.

Taboo's only legal argument is to cite injunction cases that are irrelevant to the case at bar. Taboo simply refuses to acknowledge that, under *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000) and *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 905 (Ct. App. 2002), a government may obtain an injunction by showing that the opposite party is violating a zoning ordinance. It is those cases that govern.

Taboo also attempts to rely on new evidence via multiple affidavits electronically filed on May 11, 2018, three days before oral argument on Taboo's motion for reconsideration. But "[a] party cannot use Rule 59(e), SCRCP to present to the court an issue the party could have raised prior to judgment but did not." *Smith v. Fedor*, 422 S.C. 118, 126-27, 809 S.E.2d 612, 616 (2017) (quotation omitted). Thus, it is improper to cite the affidavits on appeal.

Just as the hearsay affidavit was not considered by the trial court during the evidentiary hearing, (Feb. 9, 2018 Tr. at 38:17-24), none of the post-hearing evidence of Taboo's alleged compliance was considered by the trial court. (May 14, 2018 Tr. at 6:5-24.) Taboo does not challenge either of these evidentiary rulings. Thus, Taboo has no legal basis to rely on evidence outside the record of the injunction hearing to challenge the Injunction Order. Taboo decided to rely on legal arguments, not factual ones (Feb. 9, 2018 Tr. at 64:13-14), and must live with that strategic decision.

Taboo also repeatedly alleges that the City refused to communicate with Taboo about obtaining a general business license and that the City was commandeered by the City's legal counsel. But there is no actual record support for Taboo's allegations. Indeed, the record supports the opposite.

As an initial matter, however, these arguments are irrelevant to the issue on appeal. Taboo's attempt to get a general business license—to operate a *non*-sexually oriented business—does not undermine the Injunction Order at all. That order prohibits only the operation of a sexually oriented business at Taboo's location, in violation of the Zoning Ordinance. Taboo could easily drop its sexually oriented merchandise (sexually explicit DVDs and sexual devices) and obtain a general business license. The Injunction Order is no bar to that course of action, which is the course that Taboo was required to take under the Zoning Ordinance by January 1, 2014. Instead, it sued the City in federal court and lost at every level, including the U.S. Supreme Court.

Taboo's arguments are also unsupported. Taboo asserted that it was no longer a sexually oriented business, and applied for a general business license on October 4, 2017. (Feb. 9, 2018 Tr. 37:6-9.) The City promptly acted on that license: the following day, October 5, 2017, the Zoning Administrator visited Taboo to confirm whether Taboo qualified for a general business

license. It plainly did not. Taboo was still operating as a sexually oriented business, with sexually explicit DVDs on numerous shelves and with whole racks and lighted cases featuring all kinds of sexual devices. (Feb. 9, 2018 Tr. 16:17-17:19, 18:22-19:7, 26:12-24; Ex. D-3 photographs.) Thereafter, the City denied Taboo's general business license application, citing the reasons as required by ordinance. (Feb. 9, 2018 Tr. 37:10-12.) The City also communicated with Taboo concerning the untimely filing of its administrative appeal from that denial. (Feb. 9, 2018 Tr. 37:13-16.)

The record evidence reflects that 2017 was not the first occasion that Taboo falsely alleged that it was no longer operating as a sexually oriented business—Taboo had made the same false claim a year and a half prior, in February 2016. (Inj. Hrg. Ex. D-7 at 1.)

In short, the trial court's conclusion in the Injunction Order—that Taboo "offered the Court no evidence" (Inj. Order at 3 n.4) to refute the proof of Taboo's operation as a sexually oriented business in late 2017—is uncontroverted.

Taboo also asserts that the Zoning Administrator agreed during the hearing to meet with Taboo in the future, but that he knew he would soon leave to work for another city. (Aplt. Br. 27-28) But there is zero evidence in the record concerning Cook's departure from the City. At footnote 1 on page 11 of Taboo's brief, Taboo asserts—without a citation to record evidence—that it "has now learned" that Mr. Cook "signed a contract with the Town of Blythewood to become its Administrator with a start date no later than March 24th." Thus, even the alleged post-hearing evidence (which is not in the record) would show only that Mr. Cook was due to leave the City by the end of the following month.

That does not support Taboo's assertions of foul play. And it certainly does not support any claimed defect in the Injunction Order.

Taboo also complains that the City sought no sales or inventory data, but that data was not necessary. The trial court correctly found that Taboo was an adult bookstore based on how much floor space the sexually explicit DVDs occupied. (Inj. Order at 3-5.) The trial court also correctly found that Taboo operated a sexual device shop because it regularly featured sexual devices.[3] It based these findings on the Zoning Administrator's first-hand observations, descriptions, and photographs from within the store. Taboo, the store operator, provided no rebuttal.

From the opening page and throughout its brief, Taboo levels baseless *ad hominin* attacks against the City's legal counsel. As explained at the oral argument on Taboo's motion for reconsideration, Taboo's attacks on counsel have been ongoing since the beginning of the federal litigation.[4] Smears concerning a fellow attorney's background, legal practice, motives, and advice to a client are beneath the dignity of the legal profession and this Court. Moreover, they are wholly outside the record, and completely irrelevant to the propriety of the Injunction Order.

Taboo also fails to provide any legal framework for its unsupported legal and factual claims. For this reason alone, Taboo's argument fails. *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 276, 715 S.E.2d 362, 367 (Ct. App. 2011) (holding that appellants abandoned argument because it cited "no law for this assertion").

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[3] Taboo makes hay about the City's objection to a question posed to the Zoning Administrator about a business operating with less than a certain amount of "adult material." (Aplt. Br. 25.) But the objection was sound: the term "adult material" does not appear in the Zoning Ordinance, and the question sought to lump sexually explicit media items with sexual devices. Section 17-372 of the Zoning Ordinance, however, clearly distinguishes between the two. Sexually explicit media items are covered under the "adult bookstore" definition, which has a trigger of 30% of floor space, above which a store will be considered an "adult bookstore." (Inj. Hrg. Ex. D-1 at 3.) The "sexual device shop" definition, however, does not contain a numerical or percentage threshold for sexual device inventory. (Inj. Hrg. Ex. D-1 at 5.)

[4] May 14, 2018 Tr. at 19:7-12, 19:23-20:3 (quoting email from Mr. Goldstein to Mr. Bergthold on November 5, 2014, at 12:08 p.m.) ("[Y]are not a lawyer representing your client.... [W]hen you attack adult businesses in the manner you do, you differ in degree, not kind. From the same kind of name calling prejudice that caused my grandmother's family to disappear in the smoke stacks of Auschwitz.")

The trial court properly relied on the unrefuted evidence entered into the record at the hearing to find that Taboo was unlawfully operating as both a sexual device shop and an adult bookstore. Based on these findings, the circuit court properly enjoined Taboo from continuing to violate the City's Zoning Ordinance.

II. No stay of proceedings barred the trial court from considering evidence of Taboo's continued violations and entering an injunction.

A. Because the 2017 BZA Affirmance Order does not address the City's counterclaim for injunction, that claim is a matter "not affected by the appeal" of that order.

Taboo argues that, because the trial court's 2017 BZA Affirmance Order was on appeal, the trial court lacked jurisdiction per Rule 205, SCACR, to consider the City's counterclaim for a permanent injunction. Taboo also complains that the trial court did not address this argument. Taboo is wrong on both points.

Rule 205 gives the appellate court exclusive jurisdiction over an appeal after a notice of appeal is served. But it also states that "[n]othing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with **matters not affected by the appeal**." (emphasis added). As explained in *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012), "the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a)." *See also* SCACR, Rule 241(a) (stating that lower court "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal").

When Rule 205 is cited to undo a lower court's decision, any issue litigated in the lower court should be analyzed to determine whether it is a matter affected by an ongoing appeal. *See Arnal v. Fraser*, 371 S.C. 512, 520, 641 S.E.2d 419, 423 (2007) (analyzing issues under Rule 205 and explaining that lower court could act on matters not affected by the appeal); *see also*

Tillman, 398 S.C. 245 (holding that lower court had power to adjudicate custody portion of order even though visitation rights part of same order was currently on appeal). More fundamentally, where the order on appeal "specifically declined to address" a matter, it was "not dealt with in the final order, [so] this matter was not affected by the appeal." *Arnal*, 371 S.C. at 520, 641 S.E.2d at 423.

These legal principles establish that the trial court properly exercised jurisdiction to decide the City's counterclaim for a permanent injunction.

Just as in *Arnal*, the first order that was appealed in this case "specifically declined" to deal with the City's counterclaim: "The Board's July 2016 answer included a counterclaim by the City of Columbia Zoning Administrator seeking injunctive relief against Taboo, but that counterclaim is not the subject of this order." (2017 BZA Affirmance Order at 1 n.1.)

Because the City's counterclaim for injunction was not the subject of the 2017 BZA Affirmance Order, that claim is a matter not affected by Taboo's previous appeal, and the trial court had jurisdiction to consider it. Taboo's Rule 205 argument is without merit.

Taboo's claim (Aplt. Br. 14-16) that the trial court did not address this argument also lacks merit. The trial court, in the Injunction Order, specifically rejected Taboo's Rule 205 argument:

> 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."

(Inj. Order at 3 n.2.)[5]

Even if the clear statement in footnote 1 of the 2017 BZA Affirmance Order were lacking, analysis under Rule 205 demonstrates that the permanent injunction appealed here is a matter not

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[5] Taboo also erroneously asserts that the trial court "ignored" the Rule 205 argument "a second time" when Taboo moved for reconsideration. (Aplt. Br. 15.) The court discussed and rejected that specific argument during the May 14, 2018 hearing on the reconsideration motion. (May 14, 2018 Hearing Tr. 20:17-21:6.)

affected by Taboo's appeal of the 2017 BZA Affirmance Order. The case below started when Taboo challenged two decisions reached in 2016 by the City's Board of Zoning Appeals: (1) a decision affirming the Administrator's January 28, 2016 determination that Taboo was operating a sexual device shop and (2) a decision refusing to accept Taboo's application for a special exception from the Zoning Ordinance per § 17-374(a). (Inj. Order at 3-4.) The City answered those challenges to the 2016 BZA decisions.

The City's Zoning Administrator also counterclaimed for prospective relief, to obtain a permanent injunction to prevent future zoning violations by Taboo. In 2017, the trial court considered and rejected Taboo's challenges to the BZA decisions. Because the BZA decisions had been reached in 2016, those decisions were based on information from 2016 and earlier.

On October 2, 2017—seven months after Taboo appealed the 2017 BZA Affirmance Order—the City moved for a permanent injunction on its counterclaim. The City's counterclaim and the resulting permanent injunction did not depend on the BZA decisions. Rather, at the hearing, the City offered evidence that in September, October, and December 2017, Taboo was operating a sexually oriented business at an unlawful location. On the basis of this activity occurring at Taboo more than a year after the BZA decisions, the trial court granted the permanent injunction that Taboo appeals here. As this procedural history demonstrates, the City's counterclaim is independent of Taboo's challenges to the BZA decisions.

Even if Taboo succeeded in its appeal from the 2017 BZA Affirmance Order concerning the 2016 BZA decisions, that result would not affect the trial court's 2018 Injunction Order on the City's counterclaim. Under Rule 205, that order is a matter not affected by the earlier appeal.

Undaunted, Taboo asserts that "[a] reversal in the companion case is determinative of the issues raised in this case," but does not explain why that would be true. (Aplt. Br. 17.) Nor could

it be true. The 2017 BZA Affirmance Order concerns whether the Board of Zoning Appeals correctly upheld decisions of the Zoning Administrator relative to Taboo in 2016. By contrast, the City's counterclaim for an injunction involves whether the City showed the trial court in 2018 that Taboo was violating the City's Zoning Ordinance in late 2017. *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000). As the trial court explained, "the appeal of Judge Hood's [2017] Order is on a separate tangential issue to the operation of this business in violation of the statute. Therefore, this Court believes that those automatic stays do not apply." (May 14, 2018 Tr. 20:25-21:4.)

Taboo ignores that Rule 205 limits a lower court's jurisdiction only when subsequent proceedings involve an issue affected by a current appeal, and the cases Taboo cites demonstrate this. *See McDonald v. Palmetto Theatres*, 196 S.C. 38, 11 S.E.2d 444 (1940) (holding that trial court could not enforce money judgment while it was on appeal); *Bradley v. Hullander*, 266 S.C. 188, 222 S.E.2d 283 (1976) (holding that appeal of 1975 ruling "stayed all further proceedings in the circuit court pertaining to this ruling").

Because the trial court properly applied Rule 205, SCACR in concluding that it could resolve the City's counterclaim, Taboo's challenge to the Injunction Order on this ground fails.

B. Taboo did not properly raise the argument on the stay in the Zoning Ordinance below, which stay does not apply to court proceedings after BZA decisions.

Taboo also argues that the trial court could not grant an injunction because doing so would violate the automatic stay in the City's Zoning Ordinance. But this argument is waived, and any stay has long since expired.

Rule 12(b), SCRCP requires a party to assert "[e]very defense, in law or fact, to a cause of action ... in the responsive pleading thereto if one is required." "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C.

215, 220, 574 S.E.2d 200, 202 (2002); *see* Rule 8(c), SCRCP (requiring a party to "set forth affirmatively the defenses: accord and satisfaction, arbitration and award, ... and any other matter constituting avoidance or affirmative defense"). A statutory prohibition that precludes relief is an affirmative defense that must be pled. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) (holding that statutory prohibition preventing enforcement of contract was waived where it was not affirmatively pled). Additionally, "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

Similarly, the appellant bears the burden of providing a sufficient record. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). Thus, the appellant is responsible for any deficiencies in the record, and appellate courts "will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. *See, e.g.*, *Helms Realty*, 363 S.C. 334, 611 S.E.2d 485 (refusing to consider whether jury charge was improper because jury charge was not in record); *Sheppard v. State*, 357 S.C. 646, 657 n.3, 594 S.E.2d 462, 469 n.3 (2004) (refusing to consider State's failure to produce a witness's prior statements because statements were not included in record).

Here, Taboo never affirmatively pled that it was entitled to a stay under the Zoning Ordinance, in its complaint or its reply to the City's counterclaim. It did not argue for a stay under the Zoning Ordinance until its motion for reconsideration. Just as the defendant in *Earthscapes* did not argue for a statutory prohibition until after the trial, *id.* at 616, so too did Taboo belatedly raise its argument under the Zoning Ordinance after the Court entered the dispositive Injunction Order. Taboo has thus waived any ability to assert this defense.

In fact, Taboo never even presented § 17-111 to the trial court, so its argument is also

improper because it relies on evidence outside of the record on appeal. SCACR 210(h).

But even if the Court considers this argument, it fails because any stay has long since expired. Zoning Ordinance § 17-111 lays out the organization and procedure for a party to appeal from a decision of the zoning administrator to the board of zoning appeals. Section 17-111(d) affords a stay of the zoning administrator's decision while the matter is before the board of zoning appeals. (Feb. 9, 2018 Tr. 62:4-11.) Taboo received such a stay when it appealed the zoning administrator's decisions to the board of zoning appeals in 2016, and that stay expired when the BZA issued its decisions, leading to this lawsuit. And when Taboo challenged the BZA's decisions, the City counterclaimed for an injunction to enjoin Taboo's unlawful sexually oriented business use, as authorized by Zoning Ordinance § 17-89.

Yet Taboo argues that an automatic stay would continue until the expiration of the entire case, not only during the board of zoning appeals proceedings, but also during challenges to the BZA decision in the trial court and in higher courts during any appeals from the trial court's decision. By Taboo's logic, any basic zoning decision could not take effect or be enforced for multiple years of litigation, at least until the Supreme Court denies certiorari or decides the appeal. In just this case, the 2016 BZA decisions concerning Taboo are slated for a possible oral argument in this Court in May 2019.

Taboo has not presented, either below or here, any authority for its expansive reading of Zoning Ordinance § 17-111(d). Because the zoning appeals stay for Taboo concluded wen the BZA decided Taboo's appeals in 2016, the trial court properly granted the injunction.

C. Taboo, which has never triggered the provisional license contained in the Sexually Oriented Business Licensing Ordinance, waived its argument about provisional licenses by not arguing it at the permanent injunction hearing.

Taboo similarly argues that the circuit court's Injunction Order contravenes § 11-740(b) of the City's Sexually Oriented Business Licensing Ordinance. The argument falls flat for several

reasons. Taboo did not argue this issue in the trial court against the permanent injunction proceeding, and the only record evidence concerning a "provisional license" confirms that it is not a zoning concept. Rather, § 11-740(b) applies only when a lawfully operating sexually oriented business suffers an adverse licensing decision under the Sexually Oriented Business Licensing Ordinance. Taboo has not been lawfully operating, it has not suffered an adverse licensing decision, and this case is about the Zoning Ordinance, not the licensing ordinance. For all these reasons, Taboo's argument reveals no defect in the permanent injunction.

As an initial matter, Taboo has quoted only non-record sources to discuss the provisional license set forth in Section 11-740(b). Taboo has not cited any portion of the record where this section was presented to the trial court in its defense against the permanent injunction. Because this argument was not raised or ruled upon in the permanent injunction, Taboo did not preserve it for consideration on appeal. *Wilder Corp. v. Wilke*, 300 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

During the permanent injunction hearing, the only mention of a "provisional license" occurred during cross-examination of the City's zoning administrator. When asked whether the zoning ordinance (Ex. D-1) provides for a provisional license, the zoning administrator replied in the negative. (Feb. 9, 2018 Tr. 62:4-21.) This oblique reference to a provisional license, during cross-examination, is not adequate to preserve the argument Taboo is now making on appeal.

Even if Taboo's argument were preserved, it does not apply to help Taboo here. Under the City's Sexually Oriented Business Licensing Ordinance, if a licensed and lawfully operating sexually oriented business has its license *under that ordinance* suspended or revoked, or if it is denied a license *under that ordinance* at renewal, the business may obtain a "provisional license"

so that it may continue operating until it receives a trial court judgment on its challenge to that decision. The section applies to licensing situations; it does not interfere with zoning matters.

The provisional license is triggered only when a sexually oriented business has suffered, and is challenging in court, an adverse licensing decision issued under the Sexually Oriented Business Licensing Ordinance. Taboo is not in that posture. Finally, the provisional license is only available to lawfully operating sexually oriented business licensees. As found by numerous decision-makers, Taboo has been operating unlawfully over many years. Because Taboo's unlawfulness and this zoning enforcement case do not trigger Sexually Oriented Business Licensing Ordinance § 11-740(b), Taboo's argument does not undermine the Injunction Order.

CONCLUSION

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Civil Action No. 2016-CP-40-03478
Appellate Case No. 2018-001062

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

v.

City of Columbia Board of Zoning Appeals,...Respondent.

And

City of Columbia Zoning Administrator,..Counterclaimant,

v.

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

PROOF OF SERVICE OF RESPONDENT'S INITIAL BRIEF
AND DESIGNATION OF MATTER

I certify that on March 18, 2019, I have served all counsel in this action with a copy of the foregoing by mailing a copy of the same via United States Mail, postage prepaid, to the following addresses:

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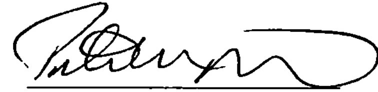
Dated: March 18, 2019



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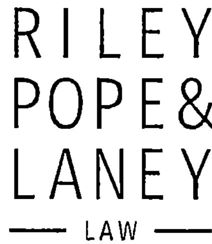

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March 18, 2019

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Cricket Store 17, LLC d/b/a Taboo v. City of Columbia Board of Zoning Appeals AND City of Columbia Zoning Administrator v. Cricket Store 17, LLC d/b/a Taboo
Civil Action No.: 2016-CP-40-03478
Appellate Case No.: 2018-001062
Our File No.: 5253.00114

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent's Initial Brief and Designation of Matter, with proof of service attached in connection with the above-referenced matter. Please file same and return the filed copy with my runner.

Thank you for your kind assistance in this matter.

Sincerely,

Kimberly R. Bickford
Paralegal

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SC Court of Appeals

/krb

Enclosures

Cc: Thomas R. Goldstein, Esquire
Trevor P. Eddy, Esquire

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&Laney, LLC | ATTORNEYS AND COUNSELORS AT LAW

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FEB 13 2019

SC Court of Appeals

TO:

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