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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

RECEIVED

Case No. 2016-CP-40-03478
Appellate Case No.: 2017-000561
Opinion No. 5673

AUG 15 2019
SC Court of Appeals

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.

PETITION FOR REHEARING
PETITION FOR REHEARING *EN BANC*

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In authorized by Rules 221(a) and 240 of the *South Carolina Appellate Court Rules*, the Appellant/Petitioner moves for an Order of the Court on the ground that the Court overlooked important matters of law and fact as follows:

1. The Court’s Opinion under review creates for the first time a constitutional question.

In affirming the decision of the circuit court, this Court, for the first time under South Carolina law authorizes a municipality to exclude a class of applicants from participation before the quasi-judicial body created by the General Assembly. The General Assembly created the Board of Zoning Appeals in its Local Comprehensive Planning Act of 1997, specifically in § 6-29-800, and sets forth the powers and procedures of the Boards. Local governments possess only those powers granted to them by the State. See § 5-7-30, S. C. Code. The General Assembly specifically provides that “any person aggrieved” can appear before the Board of Zoning Appeals to request a variance or special exception. In Opinion 5673, this Court, **for the first time**, reduces the enabling statute’s grant of jurisdiction by excluding a class from applying and receiving a fair hearing, based solely on the type of business operation—contrary to the statute’s provision for “any person aggrieved.”

Appellant/Petitioner agrees with this Court’s analysis that the case **is** a question of statutory construction, and it is clear the City carefully avoided a constitutional infirmity by not proscribing a class of applicants. To get around this difficulty, the Order under review identifies two out-of-state cases in construing “may not” to mean “shall not.” These foreign jurisdictions however explicated a different municipal scheme than the one being evaluated here. They also were not be applied to the question of whether an applicant could or could not be allowed in the room. For example, in *Stringer v. Realty Unlimited Inc.*, 97 S.W.3d 448 (Ky. 2002), the Kentucky Supreme Court noted that the definitions in the ordinance under review **specifically supplied** the definition making “may”

mandatory: “In fact, KRS 446.010, which provides in subsection (20) that ‘[m]ay is permissive, contains, the preceding disclaimer ‘unless the context requires otherwise.’” The City of Columbia’s ordinance does not provide the same exception. Here, the City of Columbia did exactly the opposite, specifically defining “may” and “shall” without conditions in the definitions section of its code of ordinances. § 1-2, Code of Ordinances. More importantly, the ordinance under review in the Kentucky case involved a less fundamental question over how many lots can be subdivided out of 6.5-acre tract, unlike the fundamental question here about whether the City of Columbia can exclude an entire class of applicants from a statutory process for a fair hearing before a quasi-judicial body. The same is true of the Montana case, *In Re Denial Of Application*, 883 P.2d 833 (Mont. 1994), where the sole issue before the Court was whether an ordinance prohibiting an applicant from filing successive and identical applications after initially being turned down. Under Montana law, the applicant was free either to wait five years and re-apply, or make “substantial” changes and reapply. An ordinance prohibiting successive applications for the same relief is not equivalent to an ordinance barring a class of citizen from **ever** applying to a quasi-judicial body. Here, the City of Columbia did exactly the opposite, specifically defining “may” and “shall” for the Court. More importantly, the City of Columbia specifically avoided touching the third rail of unconstitutionality by delicately navigating around the constitutional infirmity of excluding a class of applicants based solely on their message. If this were not the case, the City of Columbia has had almost a decade to correct this ambiguity—if it is one—by amending their ordinance to make explicit the prohibition. As the colloquy before the Board of Zoning Appeals demonstrates, Professor Hubbard thought the ordinance ambiguous. The Appellant/Petitioner, on the other hand, thought the ordinance carefully drafted to avoid creating a constitutional question that the Opinion under review now creates.

Instead of correcting an alleged ambiguity, the City asks this Court to do its work for it, and

if the Court, applying the traditional rules of statutory construction as set forth in the Opinion under review, judicially re-writes the ordinance for the City, then this Opinion raises for the first time a constitutional question: Can the City of Columbia adopt a zoning ordinance that excludes a class of applicants, while the enabling statute offers its process to “any person aggrieved”?

The answer is, of course, “no.” The reason the answer is “no” is because the *Local Government Comprehensive Planning Enabling Act* sets the the Board’s jurisdiction and its procedures, and the City cannot jettison the requirements of the State in § 6-29-800, *et. al.* The rules of statutory construction require that this Court not apply such rules in a manner that creates a constitutional doubt. *Curtis v. State*, 345 S.C. 557, 569-570, 549 S.E.2d 591, 597 (2001) (“A possible constitutional construction must prevail over an unconstitutional interpretation.”) And, if this Court is going to apply the rules of statutory construction to rewrite the ordinance to exclude Appellant, not only is the Court creating a constitutional question that did not exist until now, but also the Court must transfer the case to the Supreme Court under the *Rules of Appellate Procedure*, Rule 242 when “substantial constitutional issues are directly involved.” As set forth in the briefs filed with this Court, the Appellant never contended the case raised a constitutional question because the Appellant asserted and asserts now that the City’s ordinance is specifically drafted to avoid raising a constitutional question.

For the foregoing reasons, the Court should vacate its Opinion and either direct the parties to brief whether a constitutional issue is raised, and if so, how the Court should address it, or, in the alternative, certify the question to the Supreme Court under Rule 242.

2. The Local Government Comprehensive Planning Act does not grant to local governments more authority than is granted by the General Assembly.

In the Opinion under review, this Court concludes that § 6-29-800(A)(3) expands local

governments' power to amend the Act to prevent the Board from **hearing** the Appellant's application. The Court overlooks the main purpose of this appeal, because the Appellant is not before this Court on a denial on the merits; the Appellant is before this Court because the Board will not let the Appellant be heard! This is a huge distinction. It would have been a simple matter for the Board to allow the Appellant to be heard on the merits, deny his application, and then, and only then, would the effect of § 6-29-800(A)(3) be in play, but that is **not** what happened. The Board never reached the merits of Appellant's application, which, as pages 38-42 of the Record on Appeal demonstrate, the Appellant meets. As Judge Huff pointed out at oral argument: there is no record of whether the Appellant meets the necessary criteria or not because the City blocked the Appellant from making a record. Trial courts do not, for example, grant summary judgment because they think the non-moving party might lose at trial, and likewise, this Court should not assume the Appellant will not meet the requirements for a special exception.

3. The Opinion under review overrules Supreme Court precedent, which it cannot do.

The Opinion under review cites the 1977 Supreme Court opinion, *Bostic v. City of West Columbia*, 268 S.C. 386, 234 S.E.2d 224 (1977) for the same principle of law set forth in argument number 1 above; to wit, that local governments cannot rewrite state law. This Court erroneously concludes that the General Assembly provides an escape from the application of *Bostic* by concluding that the current version of § 6-29-800 is materially different from the 1962 version of the same statute, § 47-1009, S. C. Code, 1962. However, the 1962 version it is not materially different, and the Board of Zoning Appeals is not a municipal potted plant whose powers are circumscribed by municipal ordinance. Rather, its powers are defined by the statutory criteria identified in the Local Government Comprehensive Planning Enabling Act, and as set forth above, neither the parties nor this Court know

how the Appellant will fare on the merits because the Zoning Administrator vetoed his application and prevented him from a fair hearing or even just being heard. Neither the state statutory scheme nor the municipal counterpart grant such veto power to the Zoning Administrator. Thus, this Court's Opinion under review is a direct and palpable rejection of the statement of law enunciated in *Bostic*, and this Court is bound by the Supreme Court's precedent. The Court of Appeals lacks the authority to rule against prior published precedent precedent from the Supreme Court and is bound by those decisions. S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. 2012) (Court of Appeals lacks the authority to rule against prior published precedent from the Supreme Court of South Carolina). The purpose of the Local Comprehensive Planning Enabling Act is to establish the statutory procedure for "any person aggrieved" to be heard whether it is an appeal from a administrative decision, an application for variance, or an application for special exception. This Court is required to interpret the code in a manner that fulfils the policy of the law. *S. C. Coastal Council v. S. C. State Ethics Commission*, 306 S.C. 41, 410 S.E.2d 245 (1991) ("In interpreting a law, a court must look to its language and its meaning in conjunction with the purpose of the whole statute and the **policy of the law.**" Emphasis added.)Likewise an interpretation or application of statutory construction cannot serve as justification for overruling the universal statement of law that municipalities lack the authority to circumscribe state law.

4. The Appellant did not abandon its challenges to being excluded from the pre-submission process, including mediation, or the admission of the City's out-of-state law consultant to this case.

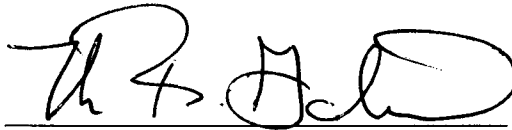
While Appellant did not spend a lot of time on these issues at oral argument, the Appellant apportioned his arguments as allowed by the time limitations imposed by the Court. All three issues are briefed fully. The Appellant concedes that the case law is not well developed, especially

on the *pro hac vice* issue as the phenomenon traveling law consultants, like lawyer advertising, is a new one. No one disputes that lawyer advertising has been a disaster for reputation of lawyers. So too is the existence of specialized religious law consultants who use the court system to infiltrate with a religious interpretation of law. It is also true the record is not well developed, but that is beyond Appellant's control because the trial court gave Appellant no opportunity to develop the record. The circuit court gave these issues short shrift, and afforded the Appellant no meaningful opportunity to challenge Mr. Bergthold's admission. This important issue has been catching up in other forums, *Annex Books v. City of Indianapolis*, 740 F.3d 1136 (7th Cir. 2014), and recently, the City of Atlanta terminated its relationship with the out of state law consultant for the same reasons advocated by the Appellant here; to wit, that he misuses the courts to advance a religious based policy of discrimination. As for being denied an opportunity to participate in the prehearing submission process made available to everyone else and the mediation program available to everyone else, the Appellant's arguments are premised upon the same demand for equal treatment set forth in his original argument that prevented the Appellant/Petitioner from being heard on the merits. The prejudice that prevented the Appellant from being heard on the merits is the same prejudice that prevented the Appellant from participating in the process that could narrow the issues and prevent this entire litigation, but by continuing to refuse to communicate with Appellant—a refusal that carries through to this very day—the City fuels this litigation and unnecessarily burdens the Court. It is a tough course to plot between the Scylla of repetitive arguments on the one hand and the Charybdis of not enough argument on the other. Looking at the record as a whole, it is clear that the refusal to allow the Appellant to participate in the pre submission process is the same error that prevented him from being heard on the merits. In short, the City is being rewarded for bad behavior.

Conclusion

For the reasons set forth above, the Appellant respectfully submits that the Court overlooked these important considerations and should grant the Appellant a petition for rehearing. In the alternative, if the Court is going to stand by its decision to amend the City's ordinance to exclude the Appellant as a participant before the Board, then the Court should transmit the case to the Supreme Court under Rule 242 because the Opinion under review creates a constitutional question of due process/equal protection where there was none. Finally, if the Court is going to overrule the Supreme Court precedent in *Bostic*, then the Court should likewise transfer the case under Rule 242, or, in the alternative, grant rehearing *en banc* to determine if the Opinion under Review does or does not overrule South Carolina controlling precedent.

Respectfully submitted



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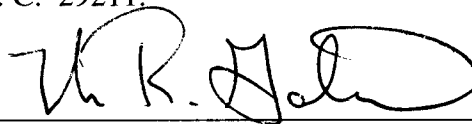
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PROOF OF SERVICE

I certify that I have served the Appellant's/Petitioner's Petition for Rehearing/Petition for Rehearing *En Banc* upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 14, 2019, addressed to his attorney of record, Peter Balthazor, Riley, Pope, & Laney, L.L.C., P. O. Box 11412, Columbia, S. C. 29211.

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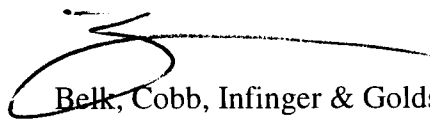
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Re: Cricket Store vs. City of Columbia, 2016-CP-40-03478
Appellate Tracking Number: 2017-000561
Opinion No.: 5673

Dear Ms. Kitchings,

I enclose the appellant/petitioner's Petition for Rehearing/Rehearing En Banc along with a certificate of service and our firm's check to cover the filing fee. Would you be so kind as to file this with the Court and return a clocked copy in the envelope provided? 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/

encl.: Petition for rehearing, check No. 18854, return envelope

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