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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITIES:

REPLY ARGUMENTS

Reply to "Preliminary Statement"

I. The Respondent mischaracterizes the case and ignores the legal issue before the Court which is that the circuit court lacked jurisdiction to entertain an application for injunction because the City failed to dissolve the stay by certifying to the Board that the stay was causing "imminent peril to life or property."

The Respondent's "Preliminary Statement" is not a "preliminary statement." It is the City's first argument, and while not authorized by the *Rules of Appellate Procedure*—Rule 208(b)(2)—it crystalizes the overarching single issue that determines the outcome of this case; to wit, the City's misdirection and intentional disregard of the three automatic stays that prevent the City from asking for an injunction. The closest the City comes to addressing this fundamental threshold issue is to assert weakly that Appellant raised it too late even though it was the first thing the Appellant pointed out to the Court (R.O.A. pps. ____ and _____[tr. 5 and 9] and in its Motion for Reconsideration (R.O.A. page ____) when the circuit court overlooked it. As argued to the circuit court in open court and in Appellant's Motion for Reconsideration, and as pointed out in its initial brief, the law provides not one, but three automatic stays. This is the entire case in a single paragraph.

Instead of grappling with this controlling issue, the City misdirects the Court in an effort to avoid facing the most important legal issue raised by this appeal; to wit, the lower court lacked jurisdiction to take up the City's application for injunction in the face of statutory stays. The Respondent's first argument, advanced in the "preliminary statement," is grounded upon the unquestioned fact that the City claims a need for an injunction when the need for an injunction is created solely by the City's refusal to communicate with Appellant and preventing him from having an opportunity to address and correct alleged deficiencies that prevent him from obtaining his general retail license. This is exactly like the motorist who is ticketed for traveling too fast for conditions without identification of the conditions.

In the City's first legal argument, although couched as a "preliminary statement," the parties do reach common ground in Respondent's assertion that the City of Columbia has ordinances that govern Appellant's operation, and the City agrees that it must enforce its ordinances in a fair and impartial manner. As the record demonstrates, and as briefly discussed here but detailed in Appellant's brief at pages 22 - 28, and at R.O.A. page ____[tr. page 50], even though the Appellant made all the necessary changes to take his operation **outside** of the City's adult use ordinance, §17-734 and zoning ordinance, §17-711, Mr. Cook does not care. R.O.A. pages ____[tr. page2 45-54] Only because the City refuses to communicate with Appellant to explain what deficiencies remain, the Appellant must grope in the dark as to why the City will not provide him a general retail license. As a review of the City's ordinance reveals, a general retail business can stock so-called adult material without being classified as an adult business, a point conceded by the Zoning Administrator on cross-examination. R.O.A. page ___[tr. page 29, line 1] And as this record reveals, detailed in appellant's initial brief at page _____, not one time since this hemorrhaging of judicial resources began, has the City identified by letter, phone call, e-mail, fax, or any other means of communication, what it requires of the appellant to issue his general retail license. R.O.A.____ [tr. page 28, line 11]: Q. You've never met with me in your office? A. Correct. Mr. Cook goes on to explain that the reason for his refusal to communicate is "because we have been in court for the last seven years." R.O.A. page ___[48, line 3]. See also Brian Cook's testimony at R.O.A page ____[tr. Page 45, lines 14-19]. (Page limitations prevent extensive quotations from the testimony.).

When the federal court ruled against the appellant's constitutional challenges, the appellant conformed to the ordinance and modified his operation to conform to the same ordinances that allow any number of similarly situated business to operate unmolested by the City. Simultaneously, he applied to the City of Columbia's Board of Zoning Appeals for a special exception as allowed by § 6-

29-800. The same Zoning Administrator determined that the City's Board of Appeals could not hear Appellant's application due solely to the nature of the business. That refusal is the subject of the companion case at 2017-000561. Because the City refuses to communicate with Appellant (see R.O.A. pages ___-____[tr. pages 47-48], it forces him to involve the Court to protect its rights, and once the Appellant invokes his rights of judicial review, the City refuses to communicate because of the Appellant filing a necessary court action. There is no dispute that three stays apply, but the City fails to mention the statutory mechanism to dissolve the stay, a mechanism the City ignored, thus depriving the circuit court of jurisdiction to grant an injunction:

(C) An appeal stays **all legal proceedings inf furtherance of the action appealed from, unless the officer [Brian Cook] from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life and property**. In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is take and on due cause shown. (emphasis added)

See also *South Carolina National Bank v. Devine Blosssom*, 321 S.C. 110, 467 S.E.2d 767 (1996): "This automatic stay continues in effect for the duration of the appeal. . . . The lower court retains jurisdiction over matters not stayed by the appeal. (Emphasis added) See also S. C. Code Ann. § 18-9-220 (1985)." Thus, without conforming to the statutory mechanism for dissolving the stay set forth in the City's and the State's ordinances, the lower court lacked jurisdiction to enter an injunction. The City failed to certify the imminent peril to live an d property as required by statute in order for the automatic stay to be lifted. The City never produced any evidence to the Board that Appellant's business produced any cause to defeat the automatic stay, and in fact, testified to the opposite at page ____ of the R.O.A. [tr. page 48]. The City stepped over and ignored its own requirement , and instead did an end run around the law and filed a motion for injunction, which the circuit court did not have jurisdiction to entertain. The existence of the municipal and state stays alone should lay to rest the issue

of an injunction. This record shows that the Appellant cited all three statutory stays to the circuit court at the beginning of the motion hearing, but the circuit court failed to address them in either the Order on the merits or in the Order denying reconsideration even though the Motion for Reconsiderations specifically called this oversight to the circuit court. See page 7 of the motion for reconsideration at R.O.A. page ____:

In granting a permanent injunction, the Court never acknowledges or addresses the terms of the City's ordinances. For example, the ordinance governing the procedure before the City's Board of Zoning Appeals provides for an automatic stay of enforcement pending appeal. The Court never addresses this fact. City Ordinance 17-111(d) (same as § 6-29-800(B)) says:

> 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)

Respondent relies instead on a weak argument in II B, that Appellant did not raise the jurisdictional question timely even though the record shows Appellant raised the application of all three stays at the first opportunity. See R.O.A. page ___, [tr. page 5]:

> Mr. Goldstein: I'm placing an objection on the record in order that it won't be argued later that I waived it for a later time, which I'm required to do. . . . The objection is that the Court lacks jurisdiction to hear this matter on the ground that the case is already on appeal. And the second part of that motion is that the case that is on appeal also includes a challenge to Mr. Bergthold's participation in this case. He has been admitted *pro hac vice* over my objection, that that issue was also on appeal.
> R.O.A. page ___, lines 7-18

At the injunction hearing on February 9, 2018, on cross-examination, even the Zoning Administrator admitted—at least he did not refute—that the City's zoning and licensing ordinances also provide stays. See Record on Appeal page ____[tr. page 62]:

Q. Y'all's ordinance, the ordinance that you're here testifying about that Mr. Bergthold put into evidence, it provides for an automatic stay provisional license while a case is on appeal, doesn't it?

A. The zoning ordinance.

Q. Yeah

A. Specifically for appeal to the Board of Zoning Appeals. Not under State law for appeal to another court. So that gets out of my range of purview specifically.

Q. It provides for a provisional license during the course of the appeal?

Mr. Bergthold: Asked and answered.

The Court: Overruled

Q. It calls for—it provides for provisional license.

A. The zoning ordinance?

Q. Yeah.

I don't believe it does, and if it does, I don't know what section that would fall under.

As the record shows, Brian Cook's testimony was disingenuous at best, a fact cemented by the undisputed facts that Appellant applied multiple times for his general retail license after adjusting his operation to conform to the City's requirements for general retail (R.O.A. page _____[tr. pages 42-54], and Mr. Cook conceded that the Appellant had done that and needed only to come see him.

What is just as important as what is in this record is what is **not** in this record. What is not in this record is any evidence that the City ever communicated with Appellant, or his counsel, to explain what deficiencies remain to prevent the appellant from operating as a general retail store like any number of similarly situated businesses in Columbia. What is **not** in this record is evidence of the City's moving to dissolve the stay based on "imminent peril to life or property," which is the necessary legal test to dissolve the stay. The City's deplorable treatment of Appellant got so bad that it reduced Appellant to begging for an audience with a pathetic fill-in-the-blank ballot that the City also ignored. See Appellant's February 28, 2018, letter, R.O.A. page ___[tr. Exhibit P-1], to counsel renewing Appellant's request for a meeting with the City under any terms agreeable to the City:

After Brian Cook gave his testimony before this Court on February the 9th, his sworn testimony, I met with him right outside this doorway in the anteroom and I asked him, what could we do to end this litigation, who can we come see to allow our operation to operate as a general retail. Now what I handed up for Plaintiff's Exhibit 1 for today's hearing which has already been filed which is my letter to Pete Balthazor. . . . So in an effort to move this dispute to a voluntary resolution, let me ask you, and

I've enclosed a ballot and a return envelope for your convenience and reply. Is the City going to allow my client to meet with City officials and find out what deficiencies, if any, remain to getting a general retail license?"

R.O.A. pages ___-___ [tr. Pages 11-13, February 28, 2018 correspondence, R.O.A. page ___] (See also May 14, 2018, transcript at R.O.A. page [tr. page 12])

The City has never responded to Appellant's "ballot."

The trial court understood that the City is acting in bad faith—as the City's numerous, frivolous objections to Appellant identifying the applicable law to the Court at the beginning of the motion hearing, and to nearly every question put to the City's witness even though it was a non-jury motion hearing. As the Court stated on the record, she thought the issue of injunction was settled by the Appellant's efforts to comply. In her view, it was a matter to be addressed when the City moves for enforcement. See R.O.A. page ___[May 14, 2018, tr. page 16] However, judicial deference abdicates the core of judicial ontology: A) Courts must not act where there is no jurisdiction and B) Courts must protect the rights of the minority from the tyranny of the majority, when exercised through misapplied governmental police powers. See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803): "The province of the court, solely, is to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." A government official has a higher duty to a citizen than a citizen to an official. No fair-minded reader can read the Zoning Administrator's testimony and conclude that he treats this applicant fairly—he admitted he was retaliating "because we've been in court for seven years." The Zoning Administrator's lack of truthfulness, combined with the City's deliberate mistreatment of Appellant, are facts pertinent to a reviewing court, especially where the City ignored its obligation to produce evidence of "imminent peril to life or property," which is the test to dissolve the stay. In this case, because the Appellant had the temerity to challenge the City's ordinance, the City retaliated by ceding its ministerial responsibility to an out-of-state law consultant who has no intention of allowing the Appellant to operate in conformity

with the City's ordinances. If this were not the case, then Respondent could easily point to evidence in the record of the City's responses to Appellant's numerous attempts to communicate that became so numerous and desperate that Appellant resorted to a February 28th fill-in-the-blank ballot that the City also ignored. Just like there is no evidence of the City's replies, there is no evidence of the City following its own ordinance—and state law—and thus the City must misdirect to irrelevant topics because it cannot meet the "imminent peril to life or property" test. This is the absence of evidence, and in seeking the extraordinary remedy of injunction, the burden is on the City, not the Appellant. This entire litigation is easily avoided if the City simply communicates with the Appellant to identify deficiencies that must be corrected in order to operate as a general retail business. There are plenty of other similar businesses in Columbia that do. Even though it is so simple to avoid this controversy, the Respondent relies instead on Brian Cook's subjective opinions, a witness so coached, he continuously looked to counsel to give him the desired answer (R.O.A. page ___[tr. Page ___]. The paucity of evidence combined with the City's excommunication of the Appellant hardly rises to the level of "imminent harm."

Because of the existence of the stays, which the City never addresses, other than to say Appellant raised it too late, the record demonstrates the circuit court lacked jurisdiction to entertain the injunction and never addressed the application of the stays in any meaningful fashion. The circuit court's Order is under review precisely because it is grounded on nothing in the record other than the Zoning Administrator's unsupported opinions and his steady resolve to shut out the Appellant. Not once does the City cite to the record in its "preliminary statement" because not only the record does not support the trial court's acceptance of the Zoning Administrator's subjective conclusions, but also, more importantly, the circuit court ignored the controlling stay provisions. Even if there were jurisdiction, the decision is still controlled by error for lack of evidence of the necessary harm to sustain an injunction,

and the circuit court ignored the undisputed evidence of the Zoning Administrator's intentional refusal to communicate with appellant in order to obtain his general retail license: "Q. So are—can we make an appointment to come see you to sit down and talk to you to figure out 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. (R.O.A. page ___[tr. 53, lines 14-19] Of course, as the May 14th transcript reveals, that too proved to be just another misrepresentation when Appellant tried to do exactly what Mr. Cook testified was his course because Brian Cook had already accepted employment at another municipality, and the City carries on its mistreatment of the Appellant by continuing the program of retaliation. The only way Appellant will be allowed to communicate with the City is when a Court requires the City to do so, which will probably require yet another lawsuit for a writ of mandamus. The issue before this Court, which the Respondent ignores, is whether the trial court did or did not have jurisdiction, and if it did, whether its conclusions regarding injunction are or are not supported by the record. Appellant agrees with Respondent that the lower court accepted the Zoning Administrator's testimony, but that statement begs the question under review, and this Court can take its own view of the preponderance of evidence, which shows Mr. Cook was demonstrably not truthful. *Miller v. Borg Warner Acceptance Corp.*, 279 S.C. 90, 302 S.E.2d 340 (1983). (Actions for injunctive relief are equitable.). *Stevenson v. Stevenson*, 276 S.C. 475, 280 S.E.2d 541 (1981). (Appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence.). All of this evidence demonstrates the City is manufacturing the controversy by refusing to communicate with appellant.

Reply to Statement of Facts

The Respondent's brief contains a material misprint on page 5 of its initial brief, which Appellant assumes it will correct in its final brief. It says, "Taboo features a variety of sexual merchandise, including sexually explicit DVDs and devices." Obviously, the City makes a mistake

because it is indisputable that, in keeping with its efforts to obtain a general retail license, the appellant purged all the sexually explicit material and sells no DVDs. There is not one single DVD offered for sale at Taboo, because if there were, then Mr. Cook would have identified that as a reason for withholding the license. Moreover, if Mr. Cook were treating Appellant fairly, he would have explained to him what deficiencies prevented the City from issuing a general retail license. Instead, he testified he had not been inside the store since October 5, 2017. (R.O.A. page ___ [tr. page 16, line 20]) As discussed on page 12, Brian Cook did concede that he did not care what Appellant did to conform. (See R.O.A. page __[tr. Page 50]. Probably, the City meant to use the past tense "featured" instead of the present tense, "features." And if the city is relying on the Order under review to justify reliance on the present tense, then that is one more example of legal error requiring reversal.

The misprint on page 7 is more troublesome. There, the City misquotes its ordinance even though: 1). Scott Bergthold wrote the ordinance, and 2) the case involving "may" vs. "shall" in that ordinance is the same ordinance Mr. Bergthold fully briefed to this Court in the companion case before this Court at No. 2017-00561. The City says the Zoning Administrator refused to process appellant's application to apply for a special exception—which is true—because the ordinance says, "that no variance or special exception **shall** be granted for a sexually oriented business." (Brief at page 7). That is a troublesome assertion not only because it is inaccurate—the ordinance says **"may"** not **"shall"**—but also because if anyone should know what the ordinance says, it should be its author. Such a misrepresentation is emblematic of the entire case.

On page 9 of its brief, the City identifies the embarrassing reality of why so much judicial effort is absorbed by this case: The City cites the trial court's finding that "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 §§ 17-732." (R.O.A. page ___[order page ___]).

This inaccurate conclusion is troubling for two reasons. First, it is unsupported by the record and second, it illustrates the City's lack of good faith in dealing with Appellant. Leaving aside the obvious fact that the record demonstrates Brian Cook had no idea what percentage of Appellant's inventory was "adult," he testified **he did not care**:

> Q. But you have no evidence of the amount of inventory that is classified as adult, correct? Inventory with photographs, is yes.
> Q. All right. I know, but you don't know what percentage of sales that comprises.
> A. Sales? No sir.
> Q. Do you even care?
> A. No, I really don't.
>
> R.O.A. page ___[tr. Page 50]

More importantly, if Mr. Cook had kept the appointment he promised under oath, he would know that the evidence in this case **is undisputed** that the appellant, in order to qualify for a general retail license, voluntarily purged all DVD's, only selling inventory that the ordinance exempts as items sold "for the prevention of sexually transmitted diseases or to prevent pregnancy," which the ordinance specifically exempts. However, since no one from the City will acknowledge the Appellant, he is frozen in time, and this is how the City manufactures a controversy that does not exist. Thus, the issue in the case became:

Why did the City not seek to dissolve the automatic stay by showing "imminent peril to life or property"?

Why is the City relying on evidence from the former operation as justification for an injunction against the Appellant's revised operation?

Why does the City refuse to communicate with the Appellant to allow him an opportunity to cure any deficiencies in order to end this limitless litigation?

All three questions are important but unanswered because: A) the trial court ignored them even though the record and logic lead to one answer, and B) the Zoning Administrator testified he does not care. The reason the Zoning Administrator does not care is important because it proves he has ceded his ministerial authority to an out-of-state law consultant. This damages justice, but it

becomes a double windfall because it both destroys any incentive to act in good faith, and the City pays him hundreds of thousands of dollars to wage a religious crusade against Appellant. The City of Atlanta recently severed its relationship with the same out-of-state law consultant after his campaign to deny equal rights to homosexuals and transgendered persons came to light. As a result, this conduct—especially the refusal to communicate—raises the specter of barratry, which is prohibited under South Carolina law. § 16-17-10, S. C. Code, ann. And, as *de facto* City official, he brings a religious justification for treating the Appellant unfairly because as the Liberty Law School Mission statement explains: "Liberty University School of Law exists to equip future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures." Thousands of years of human history demonstrate religion is a poor substitute for law, and when South Carolina addressed the intersection of religion and law, it banished religion to its proper sphere of influence. *Silverman v. Campbell, et. al.*, 326 S.C. 208, 486 S.E.2d 1 (1997). As Blaise Pascal observed: "Men never do evil so completely or cheerfully as when they do it from religious conviction."

Regarding the Appellant's location, the City is correct: Taboo is not located in a M-1 or M-2 district, but as the City acknowledges itself on pages 5 and 6, as long as appellant operates within the terms of the City's ordinance, it is entitled to operate as a general retail just as other similarly situated businesses do. Had Brian Cook given appellant five minutes of his time, as he promised the Court he would do, to identify what he considered deficiencies; all of this litigation is avoided. This record demonstrates that the City will never afford Appellant an opportunity to operate a general retail business until a court requires them to treat Appellant like everyone else. The Zoning Administrator took the stand and testified under oath he would make himself available, knowing full well he had no intention

of doing so as he already accepted employment with another municipality as of the date he gave his testimony.

Reply to Argument I A. Taboo is operating as a general retail store in accordance with the City's ordinance.

The City's Argument I A is premised on a material misrepresentation. First, Taboo has **not** been legally forbidden from operating a sexually oriented business at its present location (Respondent's Brief at page 10) because there are three stays in effect, an undisputable statement of law which the circuit court failed to apply. This omission is discussed fully in Appellant's initial brief, Argument I, at pages ___-____. Thus, we need not burden the Court with a second discussion of this point because—and this is the second, most important point of the entire appeal—having lost the constitutional challenge to the ordinance, the Appellant accepted its loss and made the necessary changes to operate as a general retail store as allowed by the ordinance. To do this, as this record demonstrates, even though the Appellant has purged every DVD, reduced inventory to 30%, dropped the 18 and older age restriction, and now sells only those items packaged as "primarily intended for protection against sexually transmitted diseases or for preventing pregnancy." § 17-372, quoted on page 5 of Respondent's brief, the Zoning Administrator does not care. The reason the parties are before the Court and consuming profligate amounts of limited judicial resources over a manufactured legal issue is because Appellant's fight is really not with the City of Columbia but with the religiously aggrieved Mr. Bergthold. This zealotry justifies the biggest misrepresentation in Respondent's brief and summarizes the entire case. On page 10, the City writes: "Because Taboo continued to do so, **and administrative action did not produce compliance**, the City moved for an injunction on October 2, 2017." (Respondent's brief at page 10, emphasis added). The record is silent as to this putative "administrative action," because, as this record demonstrates—and this is the entire appeal in a single sentence: The

City refused, and continues to refuse, to communicate with Appellant or his counsel which included falsely testifying before the circuit court that the City's door was open to Appellant to discuss what additional changes in Appellant's operation, if any, are required to end this litigation. This record contains copious evidence of Appellant's efforts to reach City officials to determine why it was refusing to issue a general retail business license, but the City's "administrative" decisions are delegated to an out-of-state law consultant who has no interest in providing an "administrative action" to determine the issues. If there were an opportunity for an "administrative action," then the Appellant would be afforded minimal due process instead of having the door to city hall slammed in his face. See South Carolina Constitution, Article I, § 22. The reason the City does not cite to the record in support of its legal assertion is telling because the record establishes:

- The City's zoning ordinances as well as the *South Carolina Rules of Appellate Procedure* provide automatic stays (R.O.A. pages.
- The Zoning Administrator relied on his subjective opinion for his conclusions (R.O.A. page__)
- The appellant made substantial changes to its operation to bring itself within the rules for general retail. (R.O.A. pages _____)
- The City's ordinances exempt appellant's operation from classification as an adult business, a fact neither recognized nor discussed by the Orders under review. (R.O.A. pages ____)
- The Zoning Administrator never responded to appellant's numerous efforts to communicate with the City to identify and cure any remaining deficiencies. (R.O.A. pages _____)
- On the day he testified, the Zoning Administrator had signed a contract to become City Administrator of the Town of Blythewood.

What is **not** in this record is any evidence of an "administrative action." These undisputed facts, including the absence of evidence of any "administrative action," explode the City's legal argument that it can get by with showing the lesser standard of "harm" to justify an injunction because the record demonstrates that the "harm" is self-created by the City's refusal to communicate with appellant to guide him into what is necessary to come into compliance with a general retail operation. Because of the lack of an "administrative action," both the Appellant and this Court are left to grope in the dark as to which deficiency is preventing him from obtaining his general retail license. For these reasons, the

Order under review is controlled by palpable errors of law because the record in this case demonstrates the City's bad faith and the City's manufacture of a claim for injunction based on nothing more than its refusal to communicate with Appellant.

A. Even if the Appellant were not trying to obtain a general retail license by conforming to what is allowed under the City's Ordinance, the automatic stay provisions of the City's own ordinance and the automatic stay provisions of the *South Carolina Rules of Appellate Procedure* prevent the City from enjoining the Appellant's operation.

The City contends, and the lower court accepted, that the Zoning Administrator—if he were the Zoning Administrator—concluded that 40% of appellant's inventory was "adult," ignoring the fact that the record demonstrates this was nothing more than his subjective opinion. See R.O.A. page ___[tr. Page 42]. If the City had provided Appellant the putative "administrative action" it touts. The parties could have addressed any deficiencies and stop overburdening the courts of his state with a manufactured controversy. Likewise, both the putative Zoning Administrator and the circuit court ignored the fact that the City's ordinance exempts "sexual devices" that are not "regularly featured" and/or are "sold for the prevention of disease or pregnancy." § 17-734____(.). But assuming, *arguendo*, the City is correct—its own ordinances and the *Rules of Appellate Procedure* preserve the status quo. More importantly, as discussed above, if the appellant has, for example, a 10% inventory deficiency or if the Appellant sells a device that Mr. Cook did not believe is being sold for the prevention of disease or pregnancy that prevents the City from issuing a general retail license, then the City has the obligation to identify a deficiency so appellant can correct it to come into compliance. The fact that it did not proves two things: (1) that Appellant is being set up to fail, and (2) the so-called "administrative action" relied on by the City never occurred. Otherwise, the City's actions are like a police officer issuing a speeding ticket for an undisclosed speed limit it refuses to identify. As the Supreme Court said in *Skilling v. United States*, 561 U.S. 358 (2010): To

satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, *357 (1983).* This universal proposition of law applies with greater force to an injunction case in which the appellant is being denied a general retail license, and Appellant hopes the bitter irony of its situation is not lost on this Court. By refusing to communicate with Appellant, the City ensures Appellant will fail and thereby stands the law of injunction—and especially the law of contempt—on its head by refusing to identify what ordinance the Appellant is violating and how so that he can take corrective action and avoid being in court for the rest of his life. This record demonstrates that the only evidence for the City's refusal to issue the license is that: 1) the putative Zoning Administrator had a subjective opinion combined with 2) the same Zoning Administrator refusing to disclose his concerns with Appellant, thereby relegating him to double secret probation being punished for secret infractions. It is so simple for the Zoning Administrator to identify for the appellant what he must do to come into compliance, *i.e.* grant him the mythical "administrative action," instead of leaving the Appellant to grope in the dark. As stated throughout the Appellant's initial brief and above, the Appellant repainted the building, dropped the 18 and over age restriction, purged the DVD's and limited inventory to only those items intended for the prevention of disease and pregnancy. (R.O.A. page ____) Why we continue to fight with the City is an unexplained mystery.

The analysis regarding sexual devices is exactly the same and does not need to be repeated. The City's ordinance exempts items sold "for the prevention of sexually transmitted diseases and the prevention of pregnancy," § 17-734, so the appellant limited his inventory to these items, dropped the 18 and over age restriction, and took other steps to conform to general retail. The Order under review gives these undisputed facts no weight or analysis, and this error requires reversal. The

Zoning Administrator never explains how the items being sold fail to prevent sexually transmitted diseases or prevent pregnancy, but it is the City's burden to do so when seeking an injunction. Likewise, the over 18 age restriction is gone, and the link to Facebook is gone, although it makes no difference because a general retail operation has the right to sell adult novelty items and smoke items, neither of which are prohibited by ordinance. Once again, the Court is required to take up this case for the sole reason that the City creates the dispute by refusing to communicate with the Appellant.

Finally, the City criticizes Appellant for not producing witnesses at the permanent injunction hearing. The Court can take judicial knowledge of the fact that the Richland County Clerk of Court listed that matter before the Court as a motion hearing, and the transcript of record reflects that it was a motion hearing. The City called it a motion hearing. (R.O.A. page ___[tr. Page 7]. Thus, it is disingenuous for the City to suggest appellant's counsel was somehow deficient in failing to bring witnesses to a motion hearing, which might be the procedure in Tennessee. Most importantly, cross examination of the City's putative Zoning Administrator revealed: 1) his opinions were drawn on his subjective impressions, 2) his testimony confirmed Appellant's complaint that the City refuses to communicate with him to identify and cure deficiencies that would make this litigation unnecessary, and 3) he was woefully uninformed about what the City's ordinance allows general retail stores to do. The cross examination of Mr. Cook demonstrates that the City's evidence against appellant consists of what the City manufactures by freezing the Appellant out of communication. The City's true motives are illustrated by the record of the hearing where the City's 26 spurious objections to questions over a span of 26 pages (R.O.A. pages ___- ____[tr. Pages 28-54]) reveals the City's bad faith. The cumulative effect of this record leads to only one conclusion—that the City has manufactured this controversy

Reply to Argument I B. Appellant is not relying on evidence disallowed by the trial court.

This issue is fully addressed in the previous reply. As set forth above, the Clerk's office set the matter before Judge Newman as a **motion** hearing, and Appellant attended to defend the motion. The trial court allowed Appellant's evidence, and the City did not appeal those evidentiary decisions, so it is waste of time to brief a legal issue not before the Court. Moreover, the appellant did not object to Mr. Cook testifying, for as the record demonstrates, and as discussed above, it was Appellant's **only opportunity** to speak with him since this case began! See R.O.A. pages ____[tr. Page 27]. As set forth above, Mr. Cook testified he was available 8:30 to 5:00, but omitting to answer truthfully that he was no longer employed by the City of Columbia. Moreover, Mr. Cook's lack of truthfulness is laid bare when measured against Appellant's February 28th prayer for some kind of meeting under any conditions suitable to the City. (R.O.A. page ___, [ballot]. As for the City's complaint about "new evidence," the admission of evidence was within the discretion of the trial court and is the law of the case now. Moreover any so-called dilemma of putative "new evidence" is a dilemma created entirely by the City. Even though the Zoning Administrator testified under oath that he would make himself available to discuss and solve deficiencies (R.O.A. page ___[tr. page ____]), he did not, and Appellant's efforts to adhere to his advice on solving the business license issue revealed that on the day he gave his testimony, he had already signed a contract to become the City Administrator of Blythewood. The most important point is the simplest: that Appellant's numerous efforts to come into compliance are doomed to fail because the City has delegated its administrative duties to an out-of-state law consultant who is financially rewarded for waging a religious campaign against Appellant. If the City would simply talk to Appellant and tell him what additional steps, if any, are required to secure his general retail license, this litigation evaporates. However, for reasons that can never be discovered, the City has delegated these municipal decisions to an out-of-state law consultant.

Reply to Argument II A. There are three automatic stays in effect that prevent the City from moving forward on injunction.

As pointed out above, it is beyond dispute that the two cases now pending in this Court between the same parties and the same subject matter. Cases 2017-00561 and 2018-001062 are nearly identical, and there is bitter irony in the City's assertion on page 7 of its brief that the Appellant failed to adhere to "administrative procedures" when the companion appeal demonstrates the City barred Appellant from participating in the Board of Appeals' "administrative procedures." (Boards of Appeals are not administrative bodies; they are quasi-judicial Boards created by the General Assembly.). The earlier case, 2017-000561, is an appeal from the Board of Zoning Appeals' refusal to allow the appellant to appear because the Bergthold ordinance says that a variance or special exception "may not" (not "shall not" as misquoted by Respondent on page 7 of its brief here) be granted. (Even though he did not apply and was not admitted *pro hac vice* for the Board of Zoning Appeals, Mr. Bergthold was present and assisted the Zoning Administrator in the presentation of his case.) On the one hand, arguments over the stays provided by two City ordinances (licensing §____ and zoning §17-111), the state statute, and the *Rules of Appellate Procedure* (Rule 232) would be moot as this entire case would be moot if only the City would communicate with the Appellant since he has modified his operation to conform to the ordinance. The only thing standing in his way—and consuming outrageous litigations time and effort—is the City's recalcitrance and refusal to communicate. On the other hand, the stays are important because they prevent the City from achieving an extra judicial remedy which is: simultaneously shutting out the Appellant from access to the City's administrative process while it unleashes an out-of-state law consultant to destroy Appellant by unremitting litigation. The City's legal position is circular: the Appellant is out of compliance only because the City will not identify what deficiencies, if any, remain to bring him in compliance; therefore, an injunction is in order. The reason the City employed

the injunction route—and this is the legal error requiring reversal—is because it purposely avoided asking for a dissolution of the automatic stay which requires the City to show "imminent peril to life and property." § 6-29-800 and § 17-111. In short, the City availed itself of the injunction route to escape its responsibilities under the law, and the circuit court erred in not requiring the City to conform to the requirements of the law to dissolve the automatic stay.

The other point the City raises that requires a reply is the Respondent's contention that the trial court "addressed" the legal issues of the stay. Appellant concedes that the trial court **mentioned** the existence of the three stays, but the Order under review is silent as to any analysis or explanation how or why the trial court reached a decision that the stays are not applicable. Appellate courts frequently deny litigants relief for arguing in a conclusory manner and failing to address thoroughly legal issues, and the same analysis applies to decisions being reviewed. See *S. C. Rules of Civil Procedure, Rule 52.* By failing to provide an explanation, the Appellant and this Court must grope in the dark as to why the circuit court found none of the stays applicable. It is beyond dispute that the trial court treated the stay issue in a conclusory fashion, neglecting to say how or why the two cases on appeal are not identical or how or why each of stays does not apply. While the trial court's grant of injunction may not "depend" (Respondent's brief at page 19) on the decision reached by the City's Board of Zoning Appeals, the Appellant's right to be heard on an administrative process afforded to every other business in South Carolina most certainly does, especially here where the City falsely argues that Appellant was afforded an administrative process. The Appellant contends the right to apply for a special exception is a right afforded by statute to "any person aggrieved," § 6-29-800, S. C. Code, ann., and while the appeal from the Board's decision to bar Appellant from participating is pending, the City cannot move for an injunction without going through the statutory procedure that allows a Zoning Administrator to dissolve the automatic stay if, and only if, he or she can demonstrate "imminent peril to life and property":

(B) Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the boar, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action was taken.

(C) An appeal stays **all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property.** In that case, proceedings may not be stayed other than by a restraining order which may be granted by the board or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown. (emphasis added)

As the Appellant informed the circuit court, the state automatic stay provision of § 6-29-800 is identical to the automatic stay provision of the Columbia City Code, § 17-111,and reliance or either or both demonstrates that the circuit court erred when it allowed the City to move forward on an injunction when three levels of procedural rules prohibit it, and where the City never availed itself of the statutory procedure to dissolve it. Thus, as Appellant said at the beginning of this Reply Brief, the City's entire argument is premised on misdirection because, at the end of the day, the only reason the Appellant is allegedly out of compliance is because the City has manufactured the entire controversy by the simple expedient of not communicating.

Reply to Argument II B. The appellant raised the application of the stay at the earliest opportunity.

The City's argument of waiver is demonstrably frivolous. The record in this case demonstrates that the Appellant clearly articulated the application of all three stays to the circuit court at the call of the case. At page 4 of the Record on Appeal [tr. Page 4], the Appellant stated:

MR. GOLDSTEIN: Your Honor, my name is Tommy Goldstein. I represent Cricket Store, and I have two preliminary objections to place on the record.

MR. BERGTHOLD: Your Honor, if we could, I –
MR. GOLDSTEIN: I—
MR. BERGTHOLD: --this is our motion and I'm – I think he can make any arguments in response to the motion, but we have the burden and I think we typically would go first. So I think—I think—
MR. GOLDSTEIN: I—
MR. BERGTHOLD: leapfrogging us is not—is not—
THE COURT: Okay. Are [there] objections as to—
MR. GOLDSTEIN: I—I'm placing an objection on the record in order that it won't be argued later that I waived it for a later time, which I'm required to do.
THE COURT: Okay. Yes, sir.
MR. GOLDSTEIN: The objection is that the Court lacks jurisdiction to hear this matter on the ground that the case is already on appeal. And the second part of that motion is that the case that is on appeal also includes a challenge to M. Berghtold's participation in this case. He has been admitted *pro hac vice* over my objection, but that issue was also on appeal. Those are my two objections.

The City never argues that any of the stays do not apply or that it followed the procedure provided by statute to dissolve the stay; rather, the City employs the feeblest straw that Appellant did not enunciate properly, arguing the only way the Appellant could raise an objection to jurisdiction was through a 12(b) motion and that the Appellant is arguing outside the record because it is citing a City Ordinance! As to the first argument, the *South Carolina Rules of Civil Procedure*, Rule 7(b) authorizes motions, which may be made "during a hearing or trial in open court with a court reporter present."

The City's second argument is equally spurious. The Appellant made clear that it had "three automatic stays in this case" (R.O.A. page ___[tr. page 9]) In addressing the Court, a party is not required to use an ordinance's number to satisfy an objection. The record is crystal clear that Appellant was relying on all three levels:

MR. GOLDSTEIN: There are three automatic stays in force in this case. One from the Court of Appeals Rules of Procedure, one from the Sexually Oriented Business Licensing and one from the appeal from the Board of Zoning Appeals.
R.O.A. page ____[tr. page 9]

The City's arguments on these points are frivolous.

Reply to Argument II C.
The City's Argument II C is the same argument raised in II B.

The City's argument in II C is identical to II B, and as may be seen by the foregoing reply argument, this issue is fully addressed in the preceding sections and does not require repetition. The City does add one additional argument not raised in IIB, and that is that automatic stays cannot possibly be the intent of the ordinance, statute, or rule because if that were the case, "any basic zoning decision could not take effect or be enforced for multiple years of litigation. . ." (Respondent's Brief at page 22. But that is exactly the case, and that is why both the state statute and the municipal ordinance provide a procedural method for dissolution of the automatic stay. See § 6-29-800(C) quoted above on page 20. Automatic stays are called **automatic** stays for a reason and provisional licenses are called provisional for a reason. The law does not require the Appellant to ask for a stay; the law requires the City to petition to dissolve it if it can show "imminent peril to life or property." The City knew it could not, so it tried to do an end run around its statutory obligation, and the circuit court erred in entertaining an application for injunction when the City failed to follow its own procedure. As argued throughout the Appellant's Initial Brief and here, the issue of the provisional license is a red herring because as Appellant has explained at every exhausting opportunity, the Appellant modified his operation to take it out of the sexually oriented business ordinance, and the only reason this litigation exists is because the City manufactures this conflict to retaliate against the Appellant. This record is bursting with unrefuted evidence that the only reason Appellant does not possess a valid general retail business license is because the City has slammed shut the doors of government to appellant. Whether it is Brian Cook's untruthful testimony, the City's ignoring Appellant's repeated requests for communication, or the City's willful failure to avail itself of its own procedure, the record paints a clear picture of discrimination. The circuit court recognized this and thought that the issue would be resolved at an enforcement hearing to come later, but this judicial kicking the can ignores the Appellant's right to be treated civilly and equally. Instead, we have a record that demonstrates that the grounds for injunction in this case are

manufactured by the City by shutting the Appellant out of the process to participate in municipal functions.

Conclusion

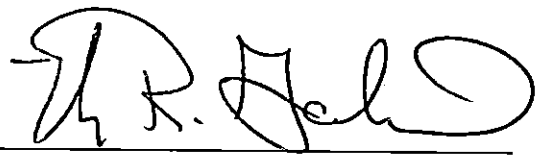
This record makes obvious what happened in this case. This case burns up disproportionate judicial resources because the City manufactures every controversy. It prevailed on the constitutional challenge to its ordinance, but it cannot be a gracious winner. In 15 minutes a City official could meet with the Appellant and inform him what additional changes, if any, he must take to obtain a general retail license just like the other similarly situated businesses in Columbia. It is obvious that the City is retaliating against him. Even the cagey way the City went about sandbagging the Appellant at a **motion** hearing and then criticizing him for not being ready for **trial** speaks loudly about the City's intent and lack of good faith, especially when the Zoning Administrator promised **under oath** to meet with the Appellant to solve this and then refused. The circuit court's order is governed by clear, material errors of law in failing to apply any of the applicable automatic stays and in failing to require the City to provide a means for Appellant to comply. Most importantly, the City ignored its own procedure for dissolving the stay and decided, instead, ongoing another route in order to do an end run around the automatic stays. The City even misleads this Court about a non-existent "administrative procedure," while the companion case is simultaneously pending in this Court—brought about because the City denied the Appellant an opportunity to participate in a quasi-judicial forum. The record in this case does not come close to meeting the standard for an injunction, and the Order under review should be reversed.

Afterward: A comment on Footnote 4

On page 16 of its brief, the City quotes a single line out of a May 14, 2014, e-mail from Appellant's counsel to the City's out-of-state law consultant. Respondent seeks to exploit a shock value

of quoting the word, *Auschwitz*, out of context, omitting to place the remark in context: "... but what I am saying I that your name-calling attacks on any adult business are premised upon your religious convictions, not on the law. Every time your quote *Renton* or *Alameda*, you always leave out the part of the opinion that says regulations must be 'reasonable'." He also omitted the multiple invitations solve the legal issues, rejecting every overture to solve the problem rather than generate litigation: "I really would like to have lunch with you. There's no denying your brilliance and the dedication to your craft. The problem is: you'd never agree to have lunch with me!" When opposing counsel quoted a single sentence out of context, he refused to provide a copy for opposing counsel, and to this day refuses to provide one. The only copy the City provided became Plaintiff's Exhibit 2 and left with the Court. R.O.A. page ___[tr. Page 22]) In order to combat both the unprofessional strategy of inserting settlement communications into the record and the effort to mislead the Court through an inaccurate summary of it, Appellant included the entire correspondence as part of the record so the Court can determine it in the proper context. The entire e-mail is found in the record on appeal at page ____, and this Court can judge for itself whether the reference was or was not appropriate.

Respectfully submitted,



August 13, 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
(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.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief (Designation of Contents of Record on Appeal being addressed in a separate filing) upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2019, addressed to his attorney of record, Peter Balthazor, Riley, Pope, & Laney, L.L.C., P. O. Box 11412, Columbia, S. C. 29211.

August 14, 2019

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August 14, 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

Dear Ms. Kitchings,

I enclose the appellant's reply brief. I am also filing by separate motion an application to hold filing the Record on Appeal in abeyance for the reasons set forth in that motion. 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.: Reply Brief, return envelope

cc:
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Mr. Peter M. Balthazor (e-mail and regular mail)
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AUG 19 2019
SC Court of Appeals

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