

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Elizabeth Souder,

Petitioner/Appellant,

v.

THE CITY OF COLUMBIA and THE
CITY OF COLUMBIA BOARD OF
ZONING APPEALS,

Defendants/Respondents.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2025-CP-40-07466

**PETITIONER/APPELLANT'S
REPLY TO THE CITY'S
OPPOSITION BRIEF**

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INTRODUCTION

Libby's Opening Brief explained why the City's decision to shut down her backyard swim lessons violates the South Carolina Constitution in three different ways. First, the ban violates Libby's right to equal protection. Second, the ban exceeds the City's limited police power. And third, the ban violates Libby's substantive due process rights. In the alternative, Libby also demonstrated that she is entitled to prevail on her equitable estoppel claim.

The City's opposition to Libby's Equal Protection claim fails because, contrary to the City's argument, Libby's business is, in fact, similarly situated to residential daycares. The City's opposition to Libby's two other constitutional claims fails because it does not fully address the relevant legal tests, and the City offers no response to the merits of Libby's estoppel claim. Each claim provides an independent basis for the requested relief, and the City's arguments to the contrary do not prevent this Court from awarding Libby her requested relief. Finally, Libby does not challenge the City's authority to enact reasonable regulations that serve the public good; she challenges only the City's decision to shut her down—after seven years of running her business responsibly and with the City's express approval—solely because her lessons take place outdoors.

ARGUMENT

I. Libby's Business Is Similarly Situated to Residential Daycares.

The challenged ban violates Libby's equal protection rights because it is irrational to permit a more intensive use—residential daycares—to operate outdoors

while simultaneously banning Libby's less intensive backyard swim lessons. Libby's Opening Br. at 12–15. The City responds by arguing that the two uses are not similarly situated because they differ in some respects. *See* City's Br. at 13–15. But the relevant constitutional question is *not* whether the two uses are alike in every respect, but whether the two uses are alike with respect to the governmental *purpose* underlying the challenged disparate treatment. *See* Libby's Opening Br. at 13. Libby's business and residential daycares are alike in the relevant ways.

Under South Carolina's Equal Protection Clause, whether persons are similarly situated is evaluated in relation to the "legislative purpose" of the challenged ordinance. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451–52, 790 S.E.2d 763, 771 (2016) (plurality); *see also Bodman v. State*, 403 S.C. 60, 70, 742 S.E.2d 363, 368 (2013) (explaining that the Court's "*entire* equal protection inquiry revolves around [the] interplay between the specific classification created *and the purported basis* for it" (emphasis added)).

Here, the purpose of the challenged ordinance is to prevent the "home occupation activity [from] being seen or heard off-site" and to "reduce [any] potentially adverse impacts on surrounding lands." BZA 029–30. Thus, if the goal is to prevent commercial activities from being seen or heard offsite, it is inherently irrational to ban a lower-intensity use while permitting a higher-intensity use to operate in that same area. As Libby previously demonstrated, residential daycares are a more intensive use than her backyard swim lessons in every *relevant respect*. Libby's Opening Br. at 14–15. Daycares have more children outside, more often, and for

potentially longer periods. *Id.* Thus, as it relates to the challenged ban’s purpose of ensuring that home occupations are not seen or heard offsite, there is no “plausible reason as to why” residential daycares are permitted to operate outdoors, while Libby’s lower-intensity use is forbidden. *Joseph*, 417 S.C. at 452. Accordingly, the ordinance is irrational and therefore unconstitutional under South Carolina’s Equal Protection Clause. *See id.* at 451–52 (holding statute that treated physical therapists differently from other healthcare professionals unconstitutional because that disparate treatment lacked a “rational relationship to the legislative purpose of the statute”); Libby’s Opening Br. at 12–16.

Additionally, the City speculates (at 14) that Libby’s swim lessons would produce more traffic than residential daycares, but that argument fails for three reasons. First, requiring a business to operate indoors rather than outdoors has no bearing on the level of traffic associated with that business. Second, the evidence below demonstrates that Libby’s business does not cause disruptive traffic. *See* BZA 050 (neighbors stating that they “have noticed no disruption to traffic or the peaceful character of our street or neighborhood”); BZA 052, 058, 060 (similar). Third, the City already has a regulation in place that addresses traffic, and Libby does not challenge that regulation. *See* Libby’s Opening Br. Ex. 1 at UDO § 17-4.3(d)(6)(i) (prohibiting home occupations from producing “significantly greater volumes or frequencies of . . . vehicular traffic, or pedestrian traffic than normally expected in a residential neighborhood”).

Finally, the City mentions (at 17) that if Libby were allowed to resume her swim lessons, the City could implement safety standards and regulations. But Libby is not asking to be exempt from regulations. Quite the contrary, she seeks to be rationally regulated rather than categorically banned. If allowed to resume her swim lessons, Libby would be subject to the City's existing regulations governing home occupations, which already address issues such as noise and traffic. *See* Ex. 1 at UDO § 17-4.3(d)(6). And if the City identifies additional public health or safety concerns that warrant regulation, nothing prevents it from adopting reasonable, generally applicable requirements to address them. Ultimately, however, whether the City could adopt additional safety regulations is beside the point. The question before this Court is whether banning Libby's swim lessons while permitting residential daycares is a rational way to advance the City's interest in preventing "potentially adverse impacts [from home occupations] on surrounding lands." BZA 029. It is not, *see* Libby's Opening Br. at 12–15, which means that Libby is entitled to prevail on her Equal Protection claim.

II. The Ban Exceeds the City's Limited Police Power and Is Thus Unconstitutional under *James*.

The ban is also unconstitutional as applied to Libby because it exceeds the City's limited police power. *See* Libby's Opening Br. at 16–20. In *James v. City of Greenville*, the Supreme Court held that the government may not suppress or remove an "already established" lawful business from a residential district without first making "a factual showing that the continuance of such business would be detrimental to the public health, safety, morals or general welfare." 227 S.C. 565,

584–85, 88 S.E.2d 661, 671 (1955) (Legge, J., concurring) (controlling opinion, joined by four of five justices). That rule governs this claim. The City, however, does not discuss *James*, address the rule it establishes, or identify any factual finding that allowing Libby to operate would harm the public health, safety, or general welfare.

Instead, the City treats Libby's claim as though it depended on a formal nuisance designation. City's Br. at 25–26 (citing *Painter v. Town of Forest Acres*). But *Painter* held no such thing. Rather than establishing such a requirement, *Painter* instead reaffirmed the constitutional principle espoused in *James*: the government may not impose a restriction that will “seriously impair” a lawful business by simply labeling that business a nuisance or otherwise declaring it harmful to the public welfare. 231 S.C. 56, 58, 60–61, 97 S.E.2d 71, 72–73 (1957). Thus, when the *Painter* Court held unconstitutional an ordinance that required all businesses to close at midnight, it did so by explaining that “[a] municipal corporation cannot make a business a nuisance by merely declaring it to be such.” *Id.* at 60. The challenger there was not the subject of a formal nuisance designation, and the case did not otherwise involve nuisance law. *See id.* at 57–61. The quoted language instead reflects a constitutional principle. There—just as here—the city made no factual showing that the affected businesses harmed the public welfare, and the Court therefore held the restriction unconstitutional. *Painter*, 231 S.C. at 58, 60–61. Thus, *Painter* did not create a different rule with a new requirement; it simply applied the principle recognized in *James* to a different factual context, as the Supreme Court has done several times before. *See Libby's Opening Br.* at 17–19 (collecting cases).

Because the City never addresses the governing rule announced in *James*, its response provides no basis for denying relief on this claim.

III. The Ban Is Not Reasonably Related to Any Legitimate Government Interest.

As Libby explained in her Opening Brief (at 20–26), the ban violates her due process rights because it is not reasonably related to any legitimate governmental interest. This is because (1) Libby’s business is harmless and (2) the City’s other, unchallenged regulations already address any legitimate concerns the City identifies. The City’s response fails because it defends the Zoning Administrator’s interpretation of the ordinance rather than the constitutionality of the challenged ban. *See* City’s Br. at 20–22. Libby is not challenging the process by which the Zoning Administrator issued his formal interpretation; she is challenging the constitutionality of the ordinance itself.

Rather than responding to these claim-specific arguments, the City instead discusses its legitimate interest in adopting neighborhood regulations. City’s Br. at 22–24. But Libby does not challenge the City’s authority to enact reasonable regulations. She challenges only this specific ban, as applied to her backyard swim lessons. Here, the ban fails constitutional scrutiny because (1) it does not further any legitimate interest in the context of its application to Libby, and even assuming it did, (2) it is not reasonably related to that interest. *See* Libby’s Opening Br. at 20–26.

Finally, the City makes a passing reference (at 19–20) to the fact that while the ban prevents Libby from using her own property to offer swim lessons, she could conceivably offer her lessons at some other pool, like “a pool at a country club[.]” City’s

Br. at 20. But as Libby’s counsel explained to the Board below, relocating to a different pool would impose prohibitively high rental costs and eliminate the quiet, one-on-one environment necessary for many of Libby’s special-needs students. *See* BZA 094, 099; Libby’s Opening Br. Ex. 3 (BZA Hearing Transcript) at 13:10–18. Moreover, the challenged regulation unquestionably restricts Libby’s right to use her private property. The government cannot defend its deprivation of Libby’s private property rights by simply pointing out that it hasn’t also deprived her of the ability to ask other people for permission to use their property. Instead, to be valid, the restriction must “bear[] a reasonable relationship to [a] legitimate interest of government.” *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004) (setting forth the test for substantive due process challenges). Libby has already explained why the challenged restriction fails that test, *see* Libby’s Opening Br. at 20–26, and the City’s arguments to the contrary provide no basis for denying Libby her requested relief.

IV. In the Alternative, this Court Should Grant Libby’s Unrebutted Estoppel Claim, Which Is Properly Before this Court.

In the alternative, Libby is entitled to prevail on her estoppel claim for the reasons set forth in her Opening Brief (at 26–30). The City does not contest the merits of Libby’s claim but instead asserts—without citation or argument—that this claim is not properly before this Court because it was not ruled on by the zoning board below. *See* City’s Br. at 26. But this Court already rejected that argument when it denied the BZA’s motion to dismiss at the April 2 hearing and held that Libby could bring all her claims in this zoning appeal. Furthermore, the City’s argument is

foreclosed by binding precedent. *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116–17, 719 S.E.2d 282, 284 (Ct. App. 2011) (expressly rejecting the City’s argument and holding that an appellant does not need to even attend the board hearing or otherwise “communicate his concerns to the Board prior to filing his petition with the circuit court”); *see also Merchant v. City of Columbia Zoning Adm’r*, No. 2010-CP-32-01368, 2012 WL 10129860, at *5–6 (S.C. Ct. Com. Pl. Apr. 4, 2012) (adjudicating an estoppel claim in a zoning appeal filed against the BZA and Columbia); *Allen Univ. v. City of Columbia Design/Dev. Rev. Comm’n*, No. 2023-CP-40-01426, at 8 (S.C. Ct. Com. Pl. Sep. 27, 2024) (this Court rejecting the same jurisdictional and issue preservation argument).

CONCLUSION

As applied to Libby, the challenged ban violates the South Carolina Constitution in three independently sufficient ways. Additionally, Libby has demonstrated that she is entitled to prevail on her estoppel claim. This Court should grant Libby’s zoning appeal so that she may resume her private swim lessons.

Respectfully submitted,

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July 27, 2026

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2026 a true and correct copy of the foregoing **PETITIONER/APPELLANT'S REPLY TO THE CITY'S OPPOSITION BRIEF** was served via electronic filing upon the following counsel of record:

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