

STATE OF SOUTH CAROLINA )  
 ) IN THE ADMINISTRATIVE COURT  
 ) FOR THE CITY OF FOLLY BEACH  
 COUNTY OF CHARLESTON ) BUSINESS LICENSE APPEAL

Robin Schuberg as Trustee of the Robin  
 Schuberg Living Trust,

Appellant,

v.

The City of Folly Beach,

Respondent.

**FINAL ORDER**

(In Re: ISTR for 10 Red Sunset Lane)

This matter comes before me pursuant to § 110.16 of the Folly Beach Code of Ordinances (“Code”) concerning the appeal of Appellant Robin Schuberg as Trustee of the Robin Schuberg Living Trust (“Appellant” or “Schuberg”) of the decision by the License Official of the City of Folly Beach (“City”) concerning the revocation of business license LIC009806 for the operation of an Investor Short Term Rental (“ISTR”) in the dwelling unit on the property located at 10 Red Sunset Lane (“Property”), due to the license being issued three or more strikes resulting from the owner, agent, or occupant/guest of the Property being convicted of violations of the Code relating to the use of the Property as a short-term rental within a rolling twelve-month period, known as the “three strike rule.” § 117.03(D)(2)(c). (*City Ex. 9 & Ex. 10.*)<sup>1</sup>

The City’s License Official issued her decision revoking Appellant’s ISTR business license in a letter sent via United States Postal Service (“USPS”) certified mail on October 7,

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<sup>1</sup> Section 117.03 was amended on December 10, 2024, via Ordinance 030-24, but the provisions in the amendment are not applicable to the analysis since all of Appellant’s strikes were issued prior to the adoption of the amendment and a copy of the amended ordinance was not entered into evidence. Accordingly, the language in § 117.03 as adopted on February 20, 2024, which is found in *City Ex. 10*, is applicable to Strikes 2-4. The citation for Strike 1 was issued on February 5, 2024, and therefore falls under the language in § 117.03 as adopted on September 13, 2022, which was marked as *City Ex. 9*. There are no material differences between the two versions of the Code in the portions of the ordinances related to the facts in this matter, however, with the exception of the addition of some language in § 117.03(D)(1)(f), as noted in the Findings Section.

2024. (*City Ex. 1.*) Appellant served the City with notice of an appeal of the License Official's decision on November 4, 2024. (*City Ex. 2.*)

The parties appeared before me at a telephonic pre-hearing conference held on November 11, 2024, at which Appellant was represented by Maxwell J. Seferian, Esquire and the City was represented by City Attorney, Joseph C. Wilson, IV, Esquire. The parties were ordered to exchange witness names and exhibits on December 2, 2024. Upon request by Appellant's counsel, the hearing was rescheduled to January 8, 2025, and the date to exchange exhibits and identify witnesses was moved to January 6, 2025. Accordingly, the appeal hearing was held more than 30 days after receipt of the request for appeal, pursuant to § 110.16(C). (*City Ex. 11.*)

At the hearing, both parties were represented by above-named counsel. Appellant presented testimony by Schuberg. The City presented testimony by License Official Stacey Freeman ("Freeman"). Each party was given the opportunity to cross-examine the witnesses. Appellant entered into evidence *Appellant's Exhibits 1-5*, without objection by the City. The City entered into evidence *City Exhibits 1-16*, without objection by Appellant. Based on the discussion of the issues during the hearing, I asked the parties to submit legal briefs regarding the service of the notices in this matter via certified mail by January 20, 2025, and any reply briefs by January 24, 2025. Both parties timely submitted initial briefs, but only Appellant submitted a reply brief.

#### **ISSUES ON APPEAL**

Appellant raised the following ground for appeal:

1. The City, possibly inadvertently, improperly relied on a web listing which had since been revised in determining that Appellant advertised more overnight occupancy than permitted.
2. Appellant did not receive notice of his second and third alleged strikes until after he was issued a fourth strike.

3. But for the City's aforementioned acts and omissions, Appellant would not have tallied three strikes within a rolling twelve-month period and his ISTR would not have been subject to revocation.
4. The City undermined the purpose of § 117.03 of the Code by failing to provide Appellant with proper notice of the alleged offenses and failing to give him an opportunity to cure the alleged offenses prior to issuing another strike for the same issue.

### **JURISDICTION AND SCOPE**

“Subject matter jurisdiction is ‘the power to hear and determine cases of the general class to which the proceedings in question belong.’” Gantt v. Selph, 423 S.C. 333, 337, 814 S.E.2d 523, 525 (2018) (quoting Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). In general, “[t]he jurisdiction of a court is determined by the sovereign creating it,’ so reference must be made to local law, such as the constitution and the laws of the state.” Seels v. Smalls, 437 S.C. 167, 172, 877 S.E.2d 351, 353 (2022) (quoting Peterson v. Peterson, 333 S.C. 538, 547-48, 510 S.E.2d 426, 431 (Ct. App. 1998) (citation omitted). Where a forum is created by legislative action, its jurisdiction is limited to that “expressly or by necessary implication conferred by statute.” Katzburg v. Katzburg, 410 S.C. 184, 188, 764 S.E.2d 3, 5 (Ct. App. 2014)(quoting State v. Graham, 340 S.C. 352, 354, 532 S.E.2d 262, 263 (2000)).

In this business license appeal, my authority as Hearing Officer and designee of City Council comes from § 110.16 of the Code, which states in relevant part: “Except with respect to appeals of assessments under § 110.11 hereof, which are governed by S.C. Code Ann. § 6-1-410, any person aggrieved by a determination, denial, or suspension and proposed revocation of a business license by the License Official may appeal the decision to the Council or its designee [the Hearing Officer] by written request stating the reasons for appeal . . . .” § 110.16(B). (*City Ex. 11.*) The Code further provides that following the hearing, the Hearing Officer “shall render a

written decision based on findings of fact and conclusions on application of the standards herein.” § 110.16(C)(2). (*City Ex. 11.*) The Hearing Officer’s decision serves as “the final decision of the municipality.” (*Id.*)

Consistent with the law regarding administrative bodies in general<sup>2</sup> and based on the clear language in § 110.16, as the Hearing Officer, I have the authority to determine whether or not the License Official’s decision was proper based on the “standards herein,” which in this instance are the applicable Code provisions in Chapters 10, 110, and 117 and supporting legal authorities and doctrine. In other words, the administrative appeal process authorized is the oversight of the License Official’s actions.

Nothing in § 110.16 confers authority on the Hearing Officer to rule on facial challenges to the validity or constitutionality of Chapter 117 in its entirety or the process by which it was enacted – those would be the decisions and actions of City Council (rather than those of the License Official) in either the manner in which Council adopted the ordinance or the language they incorporated therein. Such matters are not expressly or impliedly decisions of the License Official to deny, suspend, or revoke a license or the actions taken by her (or her staff) in that process. Therefore, such determinations are beyond my jurisdiction and the scope of the authority granted to the Hearing Officer in the Code and are more appropriately brought before

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<sup>2</sup> “An administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute. The agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.” 2 Am.Jur.2d *Adm. Law* § 188, p. 21. “The authority and powers of reviewing boards and officers must be strictly confined to the limits marked out by the statutory or constitutional provisions from which their existence is derived; and acts in excess of their jurisdiction are void.” 84 C.J.S. *Taxation* § 519, p. 995. Administrative officers cannot issue orders which “materially alter or add to the law.” Lee v. Michigan Millers Mut. Ins. Co., 250 S.C. 462, 467, 158 S.E.2d 744, 766 (1968). Rather an administrative agency must follow the law as written until its constitutionality is judicially determined and has no authority to pass on the constitutionality of a statute. Beaufort Cnty. Bd. of Educ. v. Lighthouse Charter Sch. Comm., 335 S.C. 230, 241, 516 S.E.2d 655, 660–61 (1999) (recognizing that neither the state nor county boards of education may rule on the constitutionality of provisions of the Charter Schools Act); South Carolina Tax Comm’n v. S.C. Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983)(holding that neither the Tax Commission nor the Tax Board of Review had authority to rule on whether a portion of the tax code violated the South Carolina Constitution).

the Charleston County Circuit Court in a declaratory judgment proceeding pursuant to S.C. Code Ann. § 15-53-30. *See, Travelscape, LLC v. S.C. Dept of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011)(finding facial challenges to a statute or regulation “are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court” rather than before an administrative officer).

However, to the extent presented with a challenge asserting that the way in which the License Official applied the ordinance to a particular party violated state law or the party’s constitutional rights, this tribunal has jurisdiction over the as-applied challenge. *See Id.* at 109, 705 S.E.2d at 39; *Dorman v. Dep’t of Health & Env’tl. Control*, 350 S.C. 159, 565 S.E.2d 119, 126 (Ct. App. 2002); *Ward v. State*, 343 S.C. 14, 538 S.E.2d 245 (2000). *See also, S.C. Elec. & Gas Co. v. Randall*, 331 F. Supp. 3d 485, 495 (D.S.C. 2018) (relying on *Travelscape* and *Dorman* to find an administrative tribunal “can only rule on whether a law violates constitutional rights as applied, not whether a law is constitutional on its face.”). Upon review of the issues as stated in the Notice of Appeal and as argued by the parties at the hearing and in their briefs in the light most favorable to Appellant, I find that Appellant has properly raised as-applied due process challenges based on the manner in which the notices required by the Code were delivered to him. Accordingly, I find that I have jurisdiction to address Appellant’s due process claims set forth in Issue 4.

#### STANDARD OF REVIEW

In addition to the jurisdictional matters discussed above, I have generally applied the following legal standards in evaluating the evidence and arguments herein. Business licenses are not property rights, but rather are permits issued by a governmental entity. *Army Navy Bingo, Garr. No. 2196 v. Plowden*, 281 S.C. 226, 314 S.E.2d 339 (1984). A business license fee is a tax

on the privilege of doing business within a county or municipality. Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 648, 760 S.E.2d 103, 103 (2014); City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 675 (1967). “It is a well-established principle of law that tax statutes cannot be extended by implication beyond the clear import of the language used, and in case of doubt, such doubt must be resolved against the government, and in favor of the taxpayer.” Hadden v. S.C. Tax Comm’n, 183 S.C. 38, 190 S.E. 249, 251 (1937); Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946).

Licensing officials who are given administrative duties under an ordinance are vested with discretionary powers in administering the law. Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504, 509–10 (1943); *see also*, Landing Dev. Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985); Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958). “The construction of a[n ordinance] by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” Brown v. S.C. Dep’t of Health & Env’t Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)).

In regard to the analysis of the applicable Code provisions, a municipal business license ordinance should be interpreted based on the general rules of statutory construction. Olds v. City of Goose Creek, 424 S.C. 240, 246, 818 S.E.2d 5, 9 (2018). Similarly, § 10.02 of the City’s Code instructs “[u]nless otherwise provided herein, or by law or implication required, the same rules of construction, definition and application shall govern the interpretation of this code as those governing the interpretation of state law.” Under § 10.07, “[t]he provisions of this code, so far as

they are consistent with any prior ordinances, shall be construed as continuations of the prior provisions and not as new enactments.”

“The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the [enacting body].” Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). “When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used.” City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001) (citing Charleston Cnty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995)).

In addition, “the [ordinance] must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Similarly, the ordinance should be read “in a manner consonant and in harmony with its purpose.” CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010)).

The terms in the ordinance should be given their “plain and ordinary meaning without resort to subtle or forced construction to limit or expand the [ordinance’s] operation.” Sloan, 371 S.C. at 499, 640 S.E.2d at 459. Where the words in an ordinance are unambiguous, the court should apply their literal meaning. Id. at 498, 640 S.E.2d at 459. Under § 10.06 of the Code, “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”

## FINDINGS

Having carefully considered the evidence and those arguments properly before the tribunal, taking into account the credibility of the witnesses and the accuracy of the evidence, and having reviewed all of the parties' submissions, I make the following findings by a preponderance of the evidence:

1. Appellant has been operating the Property as an ISTR pursuant to Chapter 117 since 2021. (*City Ex. 8, Ex. 9, & Ex. 10.*)
2. "Any owner wishing to operate a short term rental must maintain a current business license, comply with rental registration permit requirements, and make proper payment of local, county, and state taxes." § 117.03. (*City Ex. 9 & Ex. 10.*)
3. Pursuant to § 117.04(B)(3), "Additional Requirements for Short Term Rentals," owners of ISTR properties are required to provide each person signing a rental agreement with, among other things, a "copy of the city's rules and regulations regarding noise, trash, parking, alcohol on the beach, animals, litter, surfing, dune protection, sea turtles, smoking on the beach, requirements for special events, maximum occupancy, and golf carts." (*Id.*)
4. As set forth in § 117.03(D)(2)(c), the penalties for Code violations under Chapter 117 may include the revocation, suspension, or non-renewal of an ISTR business license upon the receipt of three strikes against the license during a rolling twelve-month period. (*Id.*)
5. Similarly, under § 117.03(B)(6)(m), owners must certify that they are aware that short term rental licenses shall be subject to strikes and that "three strikes during any rolling twelve-month period can result in suspension, revocation, or non-renewal of the license." (*Id.*)

6. Because the key language used in § 117.03(D)(2)(c) and § 117.03(B)(6)(m) is permissive (“may” and “can result”), the License Official’s determination whether to revoke, suspend, or not renew a short term rental business license under the three strike rule is discretionary, not mandatory.
7. Licenses “will be assessed a strike when the owner, agent occupant, or guest of the property has been convicted of any violation of the requirements of this chapter or any other city ordinances related to the use of the property as a short-term rental, including but not limited to noise, trash, parking, litter, dune protection, animals at large, and sea turtle violations and when the registered agent of the property is given notice of the strike as set forth herein.” § 117.03(D)(2)(c)(1). (*Id.*) Per this language, the issuance of a strike is mandatory upon conviction, but is not effective until proper notice is given to the registered agent.
8. “For the purpose of determining the total number of strikes, each strike issued upon conviction shall be considered in effect on the date of the original offense and all convictions related to offenses occurring within a single rental contract period shall be considered one strike. In no case shall strikes exceed one per rental contract period.” § 117.03(D)(2)(c)(2). (*Id.*) This language is so important in this process that it appears twice in the Chapter. *See* § 117.03(D)(1)(s)(2). (*Id.*)
9. The Code directs the City to provide notice of the first strike issued against a property to the registered agent of the property by setting forth “a description of the violation and resultant conviction, and a warning that progressive action shall be taken by the city in the case of further violations.” § 117.03(D)(2)(c)(4)(A). (*Id.*)

10. For a second strike, the City is required to provide the registered agent with a description of the violation and resultant conviction, and a warning that the city shall initiate revocation of the rental license in the case of further violations.” § 117.03(D)(2)(c)(4)(B).  
(*Id.*)
11. For a third strike, the City must provide the registered agent with a description of the violation and resultant conviction, and notice of the initiation of license revocation procedures.” § 117.03(D)(2)(c)(4)(C). (*Id.*)
12. In addition, “[a]ny violation of a noise ordinance that occurs on the property will result in a notice that the owner is strongly encouraged to install noise monitoring.” § 117.03(D)(2)(d). (*Id.*)
13. By expressly limiting the number of strikes issued to only one per rental contract regardless of the number of convictions, the City’s three strike rule is intended to be a progressive penalty system that provides owners with the opportunity to take corrective actions before being given a subsequent strike and before being subjected to the highest level of punishment – the revocation or suspension of their business license.
14. Under § 117.03(D)(1)(f) prior to the February 20, 2024 amendment, “[a]dvertising a short term rental as being available for more overnight occupants than have been permitted pursuant to this chapter” is a violation of Chapter 117 for which a citation leading to a strike may be issued. (*City Ex. 9.*) This version of Code is applicable to Strike 1.
15. When § 117.03(D)(1)(f) was amended the underlined language was added: “[a]dvertising a short term rental as being available for more overnight occupants, or more than the

number of bedrooms, than have been permitted pursuant to this chapter.” (*City Ex. 10.*)

This version is applicable to the advertising violation in Strike 3.

16. The maximum overnight occupancy of each rental dwelling unit “shall not exceed two persons per bedroom, plus two additional people” per unit, with certain exceptions that are not applicable here. § 117.03(B)(6)(e). (*City Ex. 9 & Ex. 10.*)
17. On the rental registration permit application, owners must provide the City with “[t]he physical address and email address where the owner and local agent will accept notices and orders from the city and acknowledgement that service via U.S. Mail and/or transmissions to the provided email addresses will constitute acceptable service of any notice, notice of violation, ordinance summons, or ticket.” § 117.03(B)(6)(h). (*Id.*)
18. Appellant provided the following physical mailing address at which he would accept service: 30 Ashton Street, Charleston SC 29403 (“the Aston Street address”). (*City Ex. 4, CoFB-00036.*) Appellant also provided the following email address: RLSCHUBERG@HOTMAIL.COM. (*Id.*)
19. Appellant’s residence at the Ashton Street address is a carriage house behind a main house and while he generally receives his regular mail using this address, he has experienced some difficulties with certified mail being delivered to the carriage house from time to time.
20. As documented on his rental registration permit application, Appellant indicated that the unit has 4 bedrooms, which, pursuant to § 117.03(B)(6)(e), makes the maximum occupancy for the Property 10 persons (2 per bedroom, plus 2). (*City Ex. 4, CoFB-00035.*)
21. Appellant testified that he has installed bunk beds in some of the bedrooms which results in the bedrooms being able to accommodate considerably more than 2 people per

bedroom at Property in some instances.

22. Appellant first began listing the Property on the Airbnb website on August 29, 2021, and on the VRBO site on May 26, 2023. (*City Ex. 3, CoFB-00022.*)
23. The City uses Rentalscape software to monitor the advertisements for short-term rental properties within its jurisdiction. Prior to acquiring Rentalscape in early 2024, the City relied on citizen complaints to be alerted to possible advertising violations with short-term rentals.
24. Freeman admitted that it is the City's typical practice to provide owners whose advertisements are found to be inaccurate with a warning prior to issuing an initial citation for violating § 117.03(B)(6)(e).
25. The City produced a notation from its internal records in Rentalscape that City Code Enforcement Officer Teri Garmon ("Garmon") sent a warning to Appellant via the Airbnb website on February 2, 2024, that the advertising listing the Property on the site exceeded the allowable maximum occupancy. (*City Ex. 3, CoFB-00017.*)
26. Garmon did not appear at the hearing to testify and Freeman testified that the City does not have access to Airbnb's direct messages with owners in order to make a copy of the Airbnb message. Freeman was unable to verify whether the website delivered Garmon's warning message to Appellant.
27. Appellant checked his private messages on Airbnb and found no such communication from Garmon or the City.
28. Appellant testified that he never received any communication from Garmon via the Airbnb system or any other warning email from the City that his advertisements were improper prior to the issuance of a citation or strike.

29. Garmon did not send the warning to Appellant using the email address Appellant was required to provide for receipt of notices.
30. Because notices under this portion of the Code are to be sent to the email address provided on the permit application if sent via electronic means (rather than U.S. mail), the License Official's use of the Airbnb messenger rather than Appellant's email address did not properly provide Appellant with a pre-citation warning notice regarding the advertising violation.
31. On February 5, 2024, Garmon drafted a letter to Appellant, in which she informed him that the Property was in violation of § 117.03 due to advertising the unit as being available for more overnight occupants than are permitted pursuant to that chapter. (*City Ex. 3.*) Garmon advised Appellant to "update your listing immediately to avoid future fines and penalties." (*Id.*)
32. The letter was accompanied by a screen shot of the Rentalscape Property Overview, dated February 5, 2024, which indicates that the Property was advertised on Airbnb at an occupancy of 16, and on VRBO at an occupancy of 18, both of which exceed the maximum occupancy (10) for a 4 bedroom rental unit under the Code. (*City Ex. 3, CoFB-00020.*)
33. Garmon mailed the February 5<sup>th</sup> letter on February 6, 2024 to Appellant at the Ashton Street address via USPS certified mail, return receipt requested. (*City Ex. 3, CoFB-00018.*)
34. Appellant challenges the accuracy of the information on the Rentalscape software and pointed out discrepancies in the documented reservations as depicted on the Rentalscape print-out in contrast to the reservations shown on his Airbnb records. (*App. Ex. 2.*)

35. Freeman testified that her staff does not rely solely on the Rentalscape information, but also verifies the advertising information by visiting the Airbnb and VBRO listings that are available to the public.
36. Appellant testified that the VRBO website calculates the occupancy count based on the number of beds and will not allow the property owner to manually alter the occupancy rate and, therefore, admitted that the VRBO listing for his property in February of 2024 showed an occupancy rate that exceeded the maximum number permitted by the Code. Accordingly, he has since removed the property listing from VRBO.
37. Appellant further admitted that his Airbnb listing going back to August of 2021, advertised more than the permitted maximum occupancy of 10 persons at the Property.
38. Appellant admitted that his rentals in February, March, and April of 2024 in some instances included parties of more than 10 occupants, but noted that the reservations were made prior to the issuance of Strike 1. (*App. Ex. 2 & Ex. 4.*)
39. Although Garmon's February 5<sup>th</sup> letter referenced both a "notice and citation," the City did not include a copy of the citation or any indication that would amount to notice of the hearing set for March 22, 2024, in *City Ex. 3.*
40. Appellant testified, however, that he learned of the March 22<sup>nd</sup> hearing at some point between March 12 and March 20, but was going to be out of town on the hearing date so he just paid the fine and tried to make the needed changes to his listings to correct the advertising discrepancies.
41. The Certified Disposition of the City of Folly Beach Municipal Court ("Municipal Court") issued on April 1, 2024, indicated that Appellant was "FOUND GUILTY" of the

- advertising offense and paid the fine in the amount of \$500 for citation #10318AG on March 22, 2024. (*City Ex. 3, CoFB-00024.*)
42. On April 2, 2024, Garmon mailed to Appellant at the Ashton Street address via USPS certified mail, return receipt requested a “Complaint and Rule to Show Cause: First Strike,” which was the City’s intended notice to Appellant of the issuance of Strike 1 against the license under § 117.03(D), and included the required information concerning the progressive nature of the penalties and consequences of a second strike, as set forth in § 117.03(D)(2)(c)(4)(A). (*City Ex. 3, CoFB-00023, Ex. 9, & Ex. 10.*)
43. Freeman admitted that a copy of the April 2<sup>nd</sup> letter was not sent to Appellant via email or via regular mail to the Ashton Street address.
44. Appellant signed the USPS certified mail receipt of the Complaint and Rule to Show Cause: First Strike on April 18, 2024, indicating delivery of notice to him of Strike 1 on that date. (*City Ex. 3, CoFB-00018.*)
45. Meanwhile, on April 5, 2024, the City issued a noise violation citation (#106131-AG) to Morgan Potts Schwartz (“Schwartz”), who was the renter responsible for renting the Property on that date. (*City Ex. 4, CoFB-00028.*)
46. Pursuant to the Certified Disposition issued by the Municipal Court, Schwartz was found guilty of the noise ordinance violation and paid a \$100 fine on April 19, 2024. (*City Ex. 4.*)
47. The City took no action to advise Appellant that his renter (Schwartz) had been issued a citation for a noise violation prior to the April 19, 2024 hearing on the violation and there is no provision in the Code for such pre-conviction/pre-strike notice to the owner being required.

48. On April 8, 2024, City Ordinance Compliance Officer Peyton Smith (“Smith”) mailed a letter to Appellant at the Ashton Street address via USPS certified mail, return receipt requested advising Appellant that the Property was in violation of Chapter 117 due to advertising over the maximum occupancy. (*City Ex. 5, CoFB-00042-43.*) Smith included a copy of Citation # 103206-AG and an Official Summons for an April 19, 2024 trial date with the letter.
49. Based on the notations on the envelope, the USPS attempted delivery of Smith’s April 8<sup>th</sup> advertising violation letter at the Ashton Street address on April 13, April 18, and April 28, before returning it marked as “Not Deliverable As Addressed” to the City on May 10, 2024. (*City Ex. 5, CoFB-00044.*)
50. Freeman confirmed that Appellant was not sent notice of the April 19, 2024 hearing on the advertising violation via email or regular mail at the Ashton Street address.
51. Pursuant to the Certified Disposition issued by the Municipal Court, Appellant was tried in absentia on April 19, 2024, and found guilty of the violation in Citation # 103206AG pertaining to the advertising discrepancy and was fined \$500, which remained unpaid on the date of the hearing. (*City Ex. 5, CoFB-00056.*)
52. On April 25, 2024, Smith prepared a “Complaint and Rule to Show Cause: Strike 2” letter addressed to Appellant at the Ashton Street address, advising Appellant of the issuance of a second strike against the license for the Property resulting from Schwartz’s conviction of a noise ordinance violation. The notice of Strike 2 did not contain the statement required by § 117.03(D)(2)(d) that the owner “is strongly encouraged to install noise monitoring.” (*City Ex. 4 & Ex. 10.*)

53. The Strike 2 notice was mailed via USPS certified mail, return receipt requested to Appellant at the Ashton Street address on May 2, 2024. (*City Ex. 4, CoFB-0025.*)
54. Also on April 25, 2024, Smith prepared a "Complaint and Rule to Show Cause: Strike 3" letter addressed to Appellant at the Ashton Street address, advising Appellant of the issuance of a third strike against the license for the Property resulting from the April 8<sup>th</sup> citation for advertising over the permitted number of occupants. (*City Ex. 5, CoFB-00046.*)
55. The Strike 3 letter was accompanied by a printout of a Rentalscape Property Overview, dated April 18, 2024, which indicates that the Property was advertised on Airbnb at an occupancy of 16, and on VRBO at an occupancy of 18. (*City Ex. 5, CoFB-00057.*)
56. The Strike 3 notice was mailed via USPS certified mail, return receipt requested to Appellant at the Ashton Street address on May 2, 2024. (*City Ex. 5, CoFB-0046.*)
57. Appellant testified he was not made aware of Strikes 2 or 3 or the underlying citations until May 7, 2024, when he went to City Hall to discuss the noise citation that would become Strike 4. He then went to the post office and picked up the Strike 3 letter that day.
58. The green card acknowledging delivery of the notice of Strike 2 was signed, but was not dated. (*City Ex. 4, CoFB-00275.*) Appellant testified he received the notice of Strike 2 on May 8, 2024.
59. Freeman agreed that copies of the notices for Strikes 2 and 3 were not sent to Appellant via email or regular mail to the Ashton Street address.

60. On May 3, 2024, the City issued a noise violation citation (#106140-AG) to Pierce Hall Reter (“Reter”), who was the renter responsible for renting the Property at that time. (*City Ex. 6.*)

61. Appellant became aware of the citation to Reter on May 4<sup>th</sup> after communicating with the City Police. He went in person to City Hall on May 7, 2024, at which point he learned for the first time about the issuance of Stikes 2 and 3.

62. After learning about the Reter noise citation, which at the time he believed was the first such violation, Appellant installed a Skybell system, which is a decibel reader that notifies both him and the renter when the noise level reaches approximately 75 decibels, which Appellant describes as roughly the volume of ten people having dinner, and 70 decibels after 9:00 P.M.

63. Pursuant to the Certified Disposition issued by the Municipal Court, Reter was found guilty of the noise ordinance violation and paid a \$150 fine on June 28, 2024. (*City Ex. 12.*)

64. On July 24, 2024, Smith prepared a “Complaint and Rule to Show Cause: Strike 4” letter addressed to Appellant at the Ashton Street address, advising Appellant of the issuance of a fourth strike against the license for the Property resulting from Reter’s conviction of a noise ordinance violation. The notice of Strike 4 did not contain the notification required by § 117.03(D)(2)(d) that the owner “is strongly encouraged to install noise monitoring.” (*City Ex. 6 & Ex. 10.*)

65. Via letter dated October 7, 2024, the City issued Appellant a notice of revocation of the ISTR business license based on the three strike rule, indicating that “[b]ecause the

property was found guilty of three or more violations within the past 12 months, the business license is no longer in good standing.” (*City Ex. 1.*)

66. The City also included in the record evidence of a “possible” Strike 5, stemming from a July 12, 2024 citation for a roll cart violation, for which Appellant has requested a jury trial (*City Ex. 6*) and verbal warnings for noise violations issued to the renters of the Property on November 8 and November 14, 2024, for which notice of the warnings was sent to Appellant via emails on November 20 and November 19, respectively. (*City Ex. 7.*) As none of these incidents have resulted in a conviction, they are not relevant to the consideration of this appeal nor are they ripe for consideration at this time since the Code does not provide a mechanism to appeal an individual strike.

67. There is no evidence in the record to support the City’s assertion that Appellant refused to accept or attempted to escape or evade receipt of correspondence sent to him via certified mail.

~~68. The City bears the burden of providing proper notice of violations and strikes as set forth in the Chapter 117.~~

69. As of the date of the hearing, Appellant had not filed direct appeals of the Municipal Court citations which make up Strikes 1-4.

## DISCUSSION

As referenced in this appeal, the City issued 4 strikes against the Property between March 22, 2024 and July 24, 2024:

- **Strike 1: Advertising Violation:** issued on 3/22/2024, based on the 3/22/2024 conviction on a 2/5/2024 ticket for improper advertising. Appellant timely received notice of the Municipal Court hearing and paid the fine. He received notice of Strike 1 via delivery of certified mail on 4/18/2024. (*City Ex. 3, Ex. 9, Ex. 10, & App. Ex. 2.*)

- **Strike 2: Schwartz Noise Violation:** issued on 4/25/2024, stemming from a 4/5/2024 noise citation issued to a renter, with a 4/19/2024 conviction date. Appellant received no notice of the citation or hearing prior to the renter's conviction. Appellant received delivery of the Strike 2 notice via certified mail on 5/8/2024, after getting actual notice on 5/7/2024, during a visit to City Hall. The notice of the strike did not contain the mandatory statement that owners are encouraged to install noise monitoring. (*City Ex. 4, Ex. 10, & App. Ex. 3.*)
- **Strike 3: Advertising Violation:** issued on 4/25/2024, based on Appellant's conviction in absentia on 4/19/2024 for improper advertising with a 4/8/2024 date of violation. Appellant received no notice of the citation or hearing prior to the conviction. Appellant picked up the certified mailing containing the Strike 3 notice on 5/7/2024, after getting actual notice on 5/7/2024, during a visit to City Hall. (*City Ex. 5, Ex. 10, Ex. 16, & App. Ex. 4.*)
- **Strike 4: Reter Noise Violation:** issued on 7/24/2024, stemming from a 5/3/2024 noise citation issued to a renter, with a 6/28/2024<sup>3</sup> conviction date. Appellant was advised of the citation to Reter on 5/4/2024 after talking with the police and received notice of the impending strike on 5/7/2024, during a visit to City Hall. The notice of the strike did not contain the mandatory statement that owners are encouraged to install noise monitoring. (*City Ex. 6, Ex. 10, Ex. 12, & App. Ex. 5.*)

The Code's three strike system is intended to be progressive and is structured in such a manner as to minimize successive strikes being issued without providing the owner an opportunity to cure the violation or violations involved. § 117.03(D)(2)(c)(2). (*City Ex. 9 & Ex. 10.*) *See also*, § 117.03(D)(1)(s)(2). (*Id.*) This intent is made clear by, among other factors, the inclusion of a limitation on the number of strikes that can be levied per rental period and the built-in warning requirements. A key component in this system is the timely delivery and receipt of proper notice. The notice provisions in Chapter 117 are not particularly onerous, but because the chapter holds licensees to stringent standards in requiring compliance with its provisions, it is only fair that the City be held to a similar standard.

A failure to provide timely and proper notice is not only a procedural technicality, but may also rise to the level of a violation of Appellant's due process rights. Under Article 1, § 22

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<sup>3</sup> The Certified Disposition found in *City Ex. 6, CoFB-00059* is acknowledged to have been incorrect. The correct Certified Disposition is found in *City Ex. 12, CoFB-00114*.

of the South Carolina Constitution, “no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” “The fundamental requirements of [procedural] due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 171–72, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. art. 1, § 22; Stono River Env'tl. Protection Ass'n v. S.C. Dep't of Health and Env'tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)). “Due process is flexible and calls for such procedural protections as the particular situation demands.” Bundy v. Shirley, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). While it is beyond the scope of the jurisdiction of the Hearing Officer to determine whether the notice and hearing provisions in Chapter 117 fully satisfy due process requirements overall, it is within this forum’s jurisdiction to determine whether the City followed the notice requirements that are set forth in the ordinance in regard to the process provided to Appellant with each strike.

In regard to notice of the strikes under § 117.03(D)(2)(c)(4), the City must provide the owner with a description of the violation and resultant conviction constituting the strike and notice of the progressive nature of the strike system. In addition, notices of strikes based on noise ordinance violations must advise the owner of the recommendation to install noise monitoring system. § 117.03(D)(2)(d).

Under 117.03(B)(6)(h), the City has the option of providing Appellant with notices of hearings, summons, and of violations either via “service via U.S. Mail” to the Ashton Street address or via email at the address he provided on the permit application or both. In most instances under consideration here, the City opted to use USPS certified mail. In choosing to use

the certified mail system in these instances, the City had an obligation to ensure that the notice of the strikes was delivered to the intended recipient before they can take effect.<sup>4</sup>

The City argues that merely sending the certified letters to Appellant's address was sufficient, but that argument ignores the plain wording of § 117.03(D)(2)(c)(1), which reiterates that the "license will be assessed a strike when the owner . . . is convicted of any violation . . . and when the registered agent of the property is give notice of the strike as set forth herein. (*City Ex. 9 & Ex. 10.*) That argument also flies in the face of the intend progressive nature and warning system of the three strike rule when owners do not actually receive the notices in a timely manner.

### **Strike 1**

The License Official admits that it is her office policy to provide owners who are found to have rental advertisements that do not comply with the permit requirements with a warning prior to issuing a citation. Here, Garmon did not use the email address Appellant provided in order to communicate this warning, but rather purportedly used the Airbnb messaging system, with the result that the message was never delivered to Appellant. Accordingly, this warning was insufficient notice of a violation.

Because this pre-citation warning is not strictly required in the Code, however, the failure to provide the warning is not fatal, but it, combined with the slow nature of certified mail, resulted in a situation where the notice of Strike 1 was delivered to Appellant on April 18, 2024, which arrived one day before the April 19, 2024 hearing on a second citation for improper advertising of which Appellant had been provided no notice. Nonetheless, Appellant received

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<sup>4</sup> This situation differs from those in which owners contend they did not receive business license renewal notices because the general deadline for renewing a business license is a matter of state statute. S.C. Code Ann. § 6-1-400. Moreover, the duty to timely renew a business license is not based on receipt of an individual notice. § 110.13. Here, however, individual notice of the components of the three strike rule is expressly required by the Code.

timely and proper notice of Strike 1 in compliance with the Code provisions under the letter of the law, if not the spirit.

I find, however, that this strike falls outside of the rolling 12 month cycle that would support this action for revocation of Appellant's license. Per § 117.03(D)(2)(c)(2) and § 117.03(D)(1)(s)(2), a strike is "considered in effect on the date of the original offense." Appellant argues that since he began posting ads over the 10 occupant limit on Airbnb in August of 2021, the date of the original offence should harken back to August of 2021, even though the violation was "caught" in February of 2024. Based on the plain wording of the ordinance and giving the taxpayer the benefit of the doubt as required by Hadden<sup>5</sup> and its progeny, Appellant's interpretation appears to be correct. Accordingly, Strike 1 should have been deemed to have been effective in August of 2021, for which the 12-month time period for additional strikes would have elapsed in August of 2022.

### **Strike 2**

Appellant received no notice of the noise ordinance citation issued to Schwartz on April 5, 2024, or of the hearing set for April 19, 2024, but the Code does not require that such notice be provided to the owner. In regard to the conviction that forms the basis for Strike 2, Appellant was not made aware of the April 19<sup>th</sup> judgment until May 7, at which time a direct appeal would be untimely under S.C. Code § 14-25-95, which requires municipal court judgments to be appealed within 10 days or the appeal is deemed waived. Moreover, it is not clear whether Appellant would have standing to make a direct appeal of Schwartz's conviction, but likely not. Rather this forum appears to be only means by which Appellant can at minimum address procedural errors stemming from the convictions of his renters that affect his rights.

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<sup>5</sup> Hadden v. S.C. Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 251 (1937); Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946).

Accordingly, any notice and opportunity to be heard afforded as a matter of due process rights must be provided in this forum.

Here, Appellant received delivery of the April 25<sup>th</sup> letter providing notice of Strike 2 via certified mail on May 8, 2024, after getting actual notice on May 7, 2024, during a visit to City Hall. The notice was deficient, however, because it did not include the mandatory warning required by § 117.03(D)(2)(d) that the “owner is strongly encouraged to install noise monitoring.” Until such notice is properly provided as required by the Code, the notice provisions for Strike 2 have not been fulfilled and it may not serve as a basis for revocation.

**Strike 3:**

This strike concerns a second citation issued for improper advertising. Appellant received no notice of the citation issued to him on April 8, 2024, or of the April 19, 2024 hearing prior to the conviction. (*City Ex. 5*.) Although Smith mailed a copy of the citation and the summons for the hearing to Appellant at the Ashton Street address, the USPS not only failed to deliver the certified letter to him prior to the hearing date, it did not deliver it all. The letter was returned as undelivered to the City on May 10, 2024, before which time Smith had already issued the notice of the strike. Accordingly, I find that Appellant was not properly served with the summons and citation for the underlying conviction which supports Strike 3.

The City contends that the lack of notice to Appellant concerning the underlying conviction is not properly before this forum, but I disagree. While parties who had an opportunity to appear before the Municipal Court and offer their defense to a citation may not relitigate their convictions here, Appellant was denied that opportunity due to the City’s failure to timely provide him with notice of the Municipal Court proceeding. Moreover, the delay in

service nullified his ability to appeal the underlying conviction since notice was not provided until well after the 10 day appeal period for municipal proceedings had run.

It is by proper service that a court obtains personal jurisdiction over a party. A judgment issued by a court without personal jurisdiction is void. BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). See also, Forfeited Land Comm'n of Bamberg Cnty. v. Beard, 424 S.C. 137, 148, 817 S.E.2d 801, 806 (Ct. App. 2018)(finding that failure to give required notice amounts to a jurisdictional defect in the proceedings). Moreover, the burden regarding service of notice rests with the party who is attempting such service, not on the intended recipient. See Christian v. Heal, 435 S.C. 507, 511, 868 S.E.2d 403, 405 (Ct. App. 2021). Because the underlying conviction obtained without proper service is void due to lack of service and personal jurisdiction over Appellant, it cannot be used to support a strike.

The cases and rules cited by the City in its brief are not persuasive otherwise. Rule 16 of the South Carolina Rules of Criminal Procedure requires that before a criminal defendant can be tried in absentia, the court must make a finding that the “person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.” To reach such a determination in this instance would require some evidence that that Appellant knew the citation had been issued and had been made aware of the impending hearing prior to its taking place, but there is nothing in the record to support such a contention. Neither is there any evidence that supports the City’s contention that Appellant refused to accept delivery of the certified letters at any time or that he was attempting to delay or evade delivery. Speculation of such evasions is not sufficient for a court to use in finding proper notice was provided to a party. See BB&T, 369 S.C. at 554-55, 633 S.E.2d at 504-05 (“[T]here must be something more than a mere suspicion of a defendant’s refusal to accept the summons

and complaint before we are willing to find a defendant was sufficiently served with process by a means other than strict compliance with” the rules.).

Rather, it is more instructive here to look to the how the South Carolina Rules of Civil Procedure in Rule 4(d)(8) and Magistrate Court Rules 6(d)(6) evaluate service via certified mail. In each instance, service is effective only upon delivery of the mail to the intended recipient and service is not effected if the mailing is returned or even if it is refused. The Rules state in part: “Service is effective upon the date of delivery as shown on the return receipt [of the certified mailing]. Service pursuant to this paragraph shall not be the basis for the entry of default judgment unless the record contains a return receipt showing the acceptance by the defendant. . . . If delivery is refused or returned undelivered, service shall be made as otherwise provided by these rules.” Accordingly, I find that the failure to ensure proper service of the underlying summons renders that conviction void for purposed of supporting a strike and that Strike 3 is void.


#### **Strike 4**

Strike 4 is based on a noise ordinance citation issued to another of Appellant’s renters on May 3, 2024. Appellant was advised of Reter’s citation on the next day after talking with City police and was advised of the impending strike on May 7, 2024, during a visit to City Hall. As with Strike 2, the notice comprising Strike 4 is lacking the mandatory warning required by § 117.03(D)(2)(d) that the “owner is strongly encouraged to install noise monitoring.” Accordingly, the notice provisions for Strike 4 have not been fulfilled and it may not serve as a basis for revocation until such notice is properly provided as required by the Code.

## CONCLUSION

Because I find that Strike 1 falls outside of the rolling 12 month period, it is not properly counted as one of three strikes to support the License Official's revocation of Appellant's ISTR business license. I further find that Strike 3 is void due to the lack of notice to Appellant of the underlying conviction. Due to the failure of the notices for Strikes 2 and 4 to fully comply with the notice provisions regarding noise monitoring, those strikes are not yet effective to support a revocation, but can be cured by provision of full proper notice. Therefore, as of this time, Appellant has not accumulated three strikes within a rolling 12 month time period and his appeal of the revocation of his ISTR business license is GRANTED.

IT IS SO ORDERED.



Christie Companion Varnado  
Hearing Officer  
City of Folly Beach

February 12, 2025

Charleston, South Carolina

*NOTE: Appeal of this decision may be made to the Charleston County Circuit Court pursuant to S.C. Code Ann. § 18-7-10 et. seq., within 30 days after notice of the judgment. The appealing party must serve notice of the appeal on the Hearing Officer so the Hearing Officer can timely file the Return per S.C. Code Ann. § 18-7-60.*