THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III Special Circuit Court Judge for Beaufort County

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Case No. 2012-213239

Town of Hilton Head Island, ... Respondent

v.

Kigre, Inc.....Appellant

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

Respondent filed this action against Appellant on March 29, 2006 seeking a Declaratory Judgment and Accounting of business license fee liability for the 2002, 2003, 2004 and 2005 license periods. The Appellant filed an Answer and Counterclaim against Respondent seeking, among other things, a declaration that the Town's business license fee is unconstitutional. Respondent filed a Motion to Dismiss but as a consequence of Respondent's assertion that the license fees from the Appellant would still be due for the years 2006 and thereafter, the Court and the parties agreed that this action should continue to a final resolution.

The parties filed cross Summary Judgment Motions and supporting memorandums Both parties made cross motions for Summary Judgment which the Court heard and denied in its Order Ending Case. (R. pp. 3-16). This non-jury trial in this case was held December 8 and 9, 2010 and April 27, 2011 and the Order Ending Case was filed February 7, 2012. Appellant filed a Motion to Alter or Amend Judgment on February 16, 2012 and arguments were heard on the motion on May 17, 2012. The Court filed an Amended Order Ending Case on September 20, 2012 and Appellant filed its Notice of appeal on October 16, 2012.

STATEMENT OF FACTS

This case involves Respondent's business license fee established in Section 10-1-10 et. seq. of Respondent's Municipal Code pursuant to the authority granted in S.C. Code Ann. §5-7-30. Respondent audited Appellant's business license fee liability for the 2002, 2003, 2004, and 2005 license periods, and as a result, assessed Appellant $41,645.81 for fees and penalties. (R. p. 291, ¶ 3). Respondent filed this action against Appellant on March 29, 2006, and on November 13, 2006, the Appellant paid the amount under protest. (R. p. 291, ¶ 4). The Appellant filed an Answer and Counterclaim against Respondent. Because Respondent failed to provide the

Appellant with a hearing on its appeal of the assessment, the funds were refunded to Appellant on or about February 2, 2007. (R. p. 292, ¶ 6).

Undisputed Facts

Respondent is a municipal corporation organized and existing pursuant to the laws of the State of South Carolina. (R. p. 32, ¶ 1; R. 37, ¶ 3). Respondent is located in Beaufort County. (R. p. 32, ¶ 1; R. p. 37 ¶ 3). Appellant is an Ohio corporation and is authorized by the State of South Carolina to conduct business in South Carolina. (R. p. 32, ¶ 2; R. 37, ¶ 4). Appellant's business is located within the corporate limits of Respondent and has gross income. (R. p. 38, ¶ 7; R. pp. 291-2). Appellant is engaged in the assembling and sales of certain specialized laser devices. (R. p. 43, ¶ 46).

Respondent is authorized to establish a business license fee by S.C. Code Ann. § 5-7-30[1]. Respondent established a business license fee in Section 10-1-10 of Respondent's Municipal Code.[2]

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[1] S.C. Code Ann. § 5-7-30 states in part as follows:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the **authority to levy and collect taxes on real and personal property** and as otherwise authorized in this section, make assessments, and establish uniform service charges relating to them; the authority to ... **levy a business license tax on gross income**, ... (emphasis added).

[2] Section 10-1-10 of the Town of Hilton Head Island's Municipal Code states in part as follows:

> License required. Every person engaged or intending to engage in *any calling, business*, occupation or profession listed in the rate classification index portion of this chapter, **in whole or in part, within the limits of Town**, is required to pay an annual license fee and obtain a business license as herein provided.... (emphasis added).

The following facts are undisputed:

1. Appellant admits owning and operating a business within the limits of Respondent's Town. (R. p. 83, line 17-p. 92, line 4; R. p. 94, line 5-p. 98, line 23; R. p. 99; R. p. 101; R. p. 299; R. pp. 142-45; R. p. 151; R. p. 204).

2. Appellant admits applying for and obtaining a business license from Respondent of Town of Hilton Head Island every year they have been in business on Hilton Head Island in the business of manufacturing laser components. (R. p. 83, line 13-p. 92, line 4; R. p. 94, line 5-p. 98, line 23).

3. Appellant admits it does not own or operate another facility nor holds a business license in any other city, county, state or jurisdiction. (R. p. 86, lines 2-23).

4. Appellant admits it does in fact have local clients on Hilton Head Island with which it transacts intermittent business, in direct contradiction to its own pleadings stating they only conduct out of state and international commerce. (R. p. 138, line 10-p. 139, line 4).

Based upon the above undisputed facts, Appellant is a "business" and has "gross income" as defined in Section 10-1-20 of Respondent's Municipal Code, which includes "gross income from interstate commerce."[3]

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[3] Section 10-1-20 of the Town's Municipal Code, n reads in part as follows:

> The following words, terms and phrases, when used in this chapter shall have the meaning ascribed herein:
> (1) *Business*: A calling, occupation, profession or activity engaged in with the object of gain, benefit or advantage, either directly or indirectly. ...
> ...
> (3) *Gross income*: The **total revenue of a business,** received or accrued, for one fiscal year collected or to be collected by reason of the **conduct of business within Town**, excepting therefrom income from business done wholly outside of Respondent on which a license tax is paid to some other municipality or a county and fully reported to Respondent. **Gross income from interstate commerce shall be included in the gross income for every business subject to a business license fee.** The gross income for business license purposes shall conform to the gross income reported to the Internal Revenue Service, the South Carolina Department of Revenue and Taxation, or the South Carolina Insurance Commission. ... . (emphasis added)

Respondent established a "classification" for the Appellant pursuant to Section 10-1-190 of Respondent's Municipal Code.[4] The Appellant's business is the assembling and sales of certain specialized laser devices. (R. p. 43, ¶ 46; R. p. 83, lines 10-4). Appellant describes its business in various business license forms filed with Respondent as "mfg laser and laser glass," (R. p. 151); "medical laser manufacturing," (R. p. 144); and "laser component mfg." (R. p. 143).

Respondent placed the Appellant in a classification based on the type of business conducted by the Appellant pursuant to Section 10-1-190 of Respondent's Municipal Code, which utilizes the Standard Industrial Classification (SIC), a commonly used tool for placing businesses into the proper classification, to which Appellant never disputed. Referencing the Table in Section 10-1-190, the Appellant's Classification Rate was "Class 5" which required a minimum fee of $62.50 for gross incomes from $0 to $5,000 and $1.08 for each thousand dollars of gross income over $5,000. Despite having gross income well in excess of $5,000, the Appellant paid only the minimum of $62.50 each year. (R. pp. 205-90; R. pp. 142-45; R. p. 151; R. p. 204).

Following the audit, Respondent notified Appellant that business license fees and penalties were due in the amount of $41,645.81. On November 13, 2006, Appellant paid the $41,645.81 under protest and Appellant's counsel submitted a detailed letter setting forth 25 grounds as to why Respondent's Business License Fee ordinance is invalid and why Appellant was exempt from payment of the business license fee. (R. pp. 293-97). At trial, Appellant

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[4] Section 10-1-20 of Town's Municipal Code defines:
"Classification" as " That division of businesses by major groups subject to the same license rate, as determined by a calculated index of ability to pay based on national averages, benefits, equalization of tax burden, relationship of services, or other basis deemed appropriate by Respondent council."
"Classification Rate" as "The license fee for each class of business shall be computed in accordance with the following rates and with the Standard Industrial Classification (SIC) Manual 1987, except in cases of conflict between the provisions of the SIC and Respondent Code, Respondent Code provisions shall prevail. TABLE INSET"

argued that it should have been afforded a hearing before Respondent Council for Respondent on its claims related to the validity of the business license fee ordinance and Appellant's claims that it was exempt from paying the business license fee.

No hearing was held before Town Council apparently due to oversight. Rather than seek to suspend the license or criminally prosecute Appellant for non-payment of the license fee, Respondent sought declaratory judgment to determine the validity of the defenses to payment asserted by Appellant. Neither party argued that the trial court did not have jurisdiction based on a failure to exhaust administrative remedies. Because Respondent did not suspend Appellant's business license or prosecute Appellant for non-payment, the fact that a hearing was not held was of little or no import to the legal and factual claims before the trial court. Respondent conceded that it had waived its right to collect the $41,645.81 in fees and penalties. (R. p. 292, ¶ 6-8; R. pp. 119-21).

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable but is determined by the nature of the underlying issue. Seabrook Island Property Owner's Ass'n v. Marshland Trust, Inc., 385 S.C. 655, 596 S.E. 2d 380 (Ct. App. 2004). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). However, the appellate court is not required to ignore the findings of the master, because he was in a better position to evaluate the credibility of the witnesses. Siau v. Kassel, 369 S.C. 631, 638, 632 S.E.2d 888, 892 (Ct. App. 2006). The Court is not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Dorchester County Dept' of

Social Servs. V. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) citing Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981). Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved. Aiken County Dep't of Social Servs. v. Wilcox, 304 S.C. 90, 403 S.E.2d 142 (Ct. App. 1991).

ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN FINDING THE RESPONDENT'S BUSINESS LICENSE FEE ORDINANCE VALID AND CONSTITUTIONAL.

A. **Burden of Proof:** Appellants have an extremely large burden to overcome to prove that the Ordinance enacted by Respondent of Hilton Head Island is unconstitutional. "A validly enacted municipal ordinance, including a business license ordinance, enjoys the same presumption of constitutional validity as any other duly enacted law." Eli Witt Co. v. West Columbia, 425 S.E.2d 16 (S.C. 1992). An ordinance is a legislative enactment and is presumed to be constitutional. The burden is upon the taxpayer to prove unconstitutionality beyond a reasonable doubt. The burden requires the attacker to '...negate every conceivable basis which might support it.'" North Charleston Land Corp. v. North Charleston, 281 S.C. 470, 316 S.E.2d 137 (S.C. 1984) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L.Ed. 2d 351, 93 S.Ct. 1001 (1973)).

As stated above, Appellant has an extraordinary burden in this case and no argument presented at trial "proves unconstitutionality beyond a reasonable doubt." Given the numerous arguments presented herein, the case law, and the rational and reasonable basis for Respondent's business license fee, Appellant will be unable to carry its further burden of negating "every

conceivable basis that might support" its argument of unconstitutionality of Respondent's ordinance.

B. **Apportionment:** Appellant asserts Respondent does not apportion the income between the sale of goods in interstate commerce from the manufacturing of the goods. Section 10-1-20(3) of the Municipal Code specifically excepts out of the defined Gross Income that income for which a tax is paid to another municipality. Section 10-1-60 also provides for a deduction for tax paid to another municipality and states in part:

> No deductions from gross income shall be made, except from income from business done wholly outside of Town **on which a license tax is paid to some other municipality or a county**, or income which cannot be taxed pursuant to state law. The applicant shall have the burden to establish the right to a deduction by satisfactory records and proof. (emphasis added)

The fee only takes into account that income which is connected with the Town and which has not been taken into account in another jurisdiction. Appellant freely admits they do not operate another facility in any other location and do not pay fees to any other governmental entity. (R. p. 136, lines 2-4; R. p. 137, lines 4-10). The distinction does not depend on whether or not the income is derived in interstate commerce. The income derived from interstate commerce is treated in the same manner as any other income. There is no question that interstate commerce may be made to pay its way. Complete Auto, Inc. v. Brady, 430 U.S. 274 at 284 (1977). Respondent does not need to provide a method for calculating the portion of Respondent's business license fee which is allocated/derived from interstate commerce. The business license fee does not depend upon income being characterized as derived from interstate commerce. The business license fee applies equally to all income which is connected with the business conducted within Respondent.

The Appellant manufactures/assembles components in Respondent and later sells a finished product. Without the manufacturing/assembly side of the business conducted within the Town, the sales would not take place as there would be no product to sell. South Carolina courts have recognized that a municipal corporation has the right to impose a license fee for conducting business within its limits, even though a portion of business is carried on or factually completed outside of the municipality. In Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946), the South Carolina Supreme Court considered the application of a municipal business license tax on a construction contractor who, while conducting his administrative and executive work within the city limits and storing equipment therein, did all of his construction work outside the city. The Court stated:

> We are unable to agree with the soundness of respondent's contention that no part of his business was conducted within the corporate limits of Chester. **It is the privilege of doing business within the municipality that is sought to be taxed. The administrative and executive work, an indispensable phase of respondent's business, was conducted in the office established, maintained and operated in the City....**[5]

The gross income of the Appellant in this case is connected to its business conducted within Respondent and is therefore properly included in the business license fee calculation.

C. **Relation to Services:** Appellant attempts to assert that the business license fee imposed by Respondent is not fairly related to the services provided by Respondent to Appellant's business in interstate commerce and others similarly situated. Respondent does not

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[5] "...His equipment when not in use was stored in the City. This portion of his business enjoyed all the advantages afforded by the municipal government of Chester to any other business conducted within its corporate limits. We cannot dissociate the managerial features of the business which were conducted within the City, along with the storing of equipment, from the manual execution of the work which was done without the City. All are essential functions of the general contracting business in which respondent is engaged. It frequently happens that there is a business located within a municipality that does not do *all* of its business within the corporate limits of such town or city.

...

The tax was imposed for the privilege of maintaining and conducting a place of business within that municipality and it was intended that the business should be considered as a whole. The gross income or volume of such business is merely made the basis on which the tax is graduated."

need to present a detailed accounting of the services provided to the Appellant in order for the business license fee to be considered "fairly related." Oklahoma Tax Comm. V. Jefferson Lines, Inc., 514 U.S. 175 (1995). Police, fire protection, along with all of the advantages conferred by the Town's maintenance of a civilized society are all justifications for imposition of the fee. Appellant admits it in fact receives services such as these. (Supp. R. p. 303, line 4-p. 304 line, 2; p. 305, lines 4-13; p. 306, line 6-p. 309, line 9; p. 310, lines 14-5). The fact that these costs may not be thought of as directly benefiting the Appellant does not mean that they are not fairly related to the fee. See Oklahoma Tax Comm., *supra*; Goldberg v. Sweet, 488 U.S. 252 (1989); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). Respondent provides the benefits of a civilized society to Appellant and therefore the fair relation prong is satisfied. Despite Appellant's argument that the business license fee is a direct tax on the privilege of engaging in interstate commerce, it is rather a fee imposed on the privilege of maintaining and conducting a place of business within a municipality. See Eli Witt Co., *supra.*

D. **Classification:** Appellant asserts that its business is not properly classified, that Respondent uses incorrect and an out of date SIC system to classify businesses, and otherwise claims the license fee ordinance is unconstitutional.

Appellant's initial argument against paying the business license fee charged by the Town of Hilton Head Island was that it solely conducted interstate and international commerce and therefore was exempt from the fees. Despite Appellant's argument that the business license fee is a direct tax on the privilege of engaging in interstate commerce, it is rather a fee imposed on the privilege of maintaining and conducting a place of business within a municipality. See Eli Witt Company v. City of West Columbia, 309 S.C. 555, 425 S.E.2d 16 (1992). The income derived from interstate commerce is treated in the same manner as any other income. There is no

question that interstate commerce may be made to pay its way. Complete Auto, Inc. v. Brady, 430 U.S. 274 at 284 (1977). However, as stated in his deposition, Jeffrey Meyers admits that it does in fact have at least one client located on Hilton Head Island. Accordingly, their previous argument no longer holds water.

Appellant then broadened its argument against the fees by Mr. Meyers stating that he believes the entire system upon which Respondent bases its fee structure is illegal, however he gives no logical reason for this opinion. He stated multiple times in his deposition that he believes the entire license fee system is illegal and will be "overturned in federal court". (R. p. 140, lines 9-12; R. p. 141, lines 6-24). However, there is no pending action in federal court challenging Respondent of Hilton Head's license fee structure and the structure has not been found to be invalid by any federal court. Until that time occurs, he is bound by the laws of the Town of Hilton Head Island, the State of South Carolina and any applicable federal laws. He cannot pick and choose which laws he wishes to abide by because he does not agree with them.

Appellant gives no rational argument nor any supporting evidence or case law which supports its claims that Respondent's business license system is illegal, unconstitutional or invalid. Nor does he give any legitimate argument or evidence to support his failure to pay his business license fees.

E. **Equal Protection**: Appellant seeks to attack the constitutionality of the business license fee and classifications. Addressing a similar constitutional attack on a business license fee and the classifications used, the Court of Appeals in City of Beaufort v. Holcombe, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006), determined that classifications in the city's license fee ordinance had a "rational and reasonable basis" and stated:

> Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny.

> If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. Inherently suspect classifications include those based on factors "such as race, religion, or alienage.
>
> In this instance, we agree with the circuit court's determination that "landlords do not constitute a 'suspect' class, [so] the 'rational basis' test is used." "To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis.
>
> Equal Protection Clauses are subject to a wide scope of discretion and legislative enactments are to be avoided only when they are without any reasonable basis. Only "irrational and unjustified classifications" are barred.

If a classification is reasonably related to a proper legislative purpose and the members of each class are treated equally, any challenge under the Equal Protection clause fails. Eli Witt Company v. City of West Columbia, 309 S.C. 555, 425 S.E.2d 16 (1992), citing Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). An ordinance will only be found to violate the Equal Protection clause if it is arbitrary and there is no conceivable hypothesis to support the classification. Medlock v. S.C. State Family Farm Dev. Auth., 279 S.C. 316, 306 S.E.2d 605 (1983).

Respondent's classification system utilizes the Standard Industrial Classification (SIC) Manual 1987, a classification system with a rational and reasonable basis. All businesses in the same classification are treated the same. A review of the Table in Section 10-1-190 shows categories of business types falling within a given rate class, and clearly shows the reasonableness of the classifications. Any reasonable basis for the different classification will satisfy the requirements of the equal protection clause. See Medlock, *supra.*

The license fee system is also reasonably related to a proper legislative purpose as stated in Section 10-1-30 of the Town's Municipal Code.[6]

The Court of Appeals in City of Beaufort, *supra*, further stated:

> A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden is upon the taxpayer **to prove unconstitutionality beyond a reasonable doubt. The burden requires the attacker to negate every conceivable basis that might support it.** The reasonableness of an ordinance is a question of law for the court to decide unless there is a controversy about the facts of the case, which must be decided by a jury. (emphasis added).

Appellant presents arguments regarding unequal enforcement of the license fee as rising to the level of an Equal Protection Clause violation. Appellant argues that some businesses in Respondent do not pay any business license fees while it must pay the same and no rational basis exists for this distinction and that Respondent's enforcement of its Ordinance is arbitrary and capricious. Section 10-1-200 of Respondent's Municipal Code is captioned as "local industry license." The ordinance exempts any person who exclusively engages in the business of offering for public sale at designated locations farm and garden products, or flowers grown on the property of such person, or flower arrangements, arts or crafts produced in the home of such person, or seafood caught by such person from payment of the business license fee.

Respondent is not prohibited from taxing different businesses at different rates. See Thompson Newspapers, Inc. v. City of Florence, 287 S.C. 305, 338 S.E.2d 324 (1985) (no equal protection violation where daily newspapers charged higher rate than other businesses); Eli Witt, *supra,* (no equal protection violation where business was taxed on untaxed income earned outside of the municipality). Any reasonable basis for the different classification will satisfy the

[6] The business license levied by this chapter is for the purpose of providing such regulation as may be required by the businesses subject thereto and for the purpose of raising revenue for the general fund through a privilege fee. Each license shall be issued for one (1) calendar year and shall expire on December 31st. The provisions of this chapter and the rates herein shall remain in effect from year to year until amended by council.

requirements of the equal protection clause. See Medlock, *supra*. By way of example, the local industry license could be viewed as enacted to promote tourism. The exemption for local industry encourages the development of the designated areas as tourist destinations. The Appellant is not in the same market as the local producers and is not engaged in a substantially similar business.

For the enforcement of the Ordinance to be declared arbitrary and capricious, Appellant must prove that the arbitrary enforcement was **deliberate** for it to have violated any Equal Protection Clauses.

> "One seeking to show discriminatory enforcement in violation of the Equal Protection Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced. [E]ven assuming [a governmental entity] is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation." Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (S.C. App.2007)

> "Equal protection is satisfied if 1) the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and 3) the classification rests on some reasonable basis. Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 475, S.E.2d 764 (1996); Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990).

"The fact that the classification may result in some inequity does not render it unconstitutional." Davis v. County of Greenville, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

> "To prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate." Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 819 (4th Cir. 1995) (internal citations omitted) "If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim." Sylvia supra.

II ARGUMENT REGARDING ATTORNEYS FEES NOT PRESERVED FOR REVIEW

Appellant seeks to enter into the Record arguments that were never presented to the trial court at the trial of this case. While Appellant did make a passing reference to this argument in its Motion to Reconsider and in its Answer and Counterclaims, the constitutionality of the attorney's fees provisions was never argued in its Summary Judgment Motion, any supporting memoranda or at trial and accordingly not properly preserved for review. "Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments." Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004). "The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error." *Id.* "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 628 S.E.2d 902, 368 S.C. 342 (S.C. App. 2006).

The trial court in this matter was not given the relevant facts, case law and arguments either for or against Appellant's theory that the attorney's fee provision of the Ordinance is unconstitutional. Appellant had the opportunity to present these arguments prior to the Court's filing of the Order Ending Case on February 7, 2012. Respondents, at the direction of the Court prepared a proposed Order Ending Case and circulated the same to Appellant for review and comment. Appellant responded via letter dated January 30, 2012 with requests for changes to be made to the Order, some of which Respondent agreed to. See January 30, 2012 letter. Nowhere in this letter does it request the addition of any language regarding the attorney's fee provision. Appellant filed its Rule 59 Motion on February 16, 2012, again making a passing reference to the attorney's fee provision wherein Appellant stated

> "e. In order to insure that all of Kigre's positions are properly preserved for appeal, Kigre moves this Court to alter or amend the Judgment to address the following claims:
>
> 7. The fact the Ordinance allows the recovery of attorneys fees by the Town for prosecution of an action to collect, but does not provide for the recovery of attorneys fees by a business that defends it actions in refusing to pay business license fees not properly due and payable, denies the equal protection of the law to the defending business." See Appellant's Rule 59 Motion

Nowhere in Appellant's Motion are cites to any relevant case law, arguments or facts to support its contentions. Even at the hearing addressing Appellant's Rule 59 Motion, Appellant failed to argue or even broach the validity of the attorney's fee provision to the Court.

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. Glover v. County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (2004) overruled on other grounds by Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); *see also* Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); Merriman v. Minter, 298 S.C. 110, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court). "Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (S.C. 2011) *citing* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) *see also* S.C. Dep't of Transp. V. First Carolina Corp. of S.C, 372 S.C. 295, 641 S.E.2d 903 (2007)

This attempt to introduce new arguments is in clear violation of Rule 242(d)(1) SCACR and Rules 210(c) and (h) SCACR as well as the long supported rulings of our Courts. To allow Appellant to now, at this late stage of this action, enter new arguments, would be highly prejudicial to Respondent and completely contradict the South Carolina Appellate Court Rules

and substantial supporting case law. Respondent respectfully requests the Court disregard or strike the Appellant's entire argument number 5.

Should this Honorable Court determine that this issue is indeed preserved for review, Respondent states that Appellant's arguments regarding the constitutionality of the attorney's fees provision in Sec. 10-1-120 of the Town of Hilton Head Island's Municipal Code is misplaced.

Appellant relies on Bradley v. Hullander, 277 S.C. 327, 287 S.E.2d 140 (1982) stating that its ruling provided that "a court must determine whether the municipal classification is rationally related to the object of the statute" to determine its constitutionality. However, Appellant misunderstands the ruling of Bradley. Bradley specifically held "the costs and attorneys fees provisions of §35-1-1490(2) (1976 Code) bear a reasonable relation to the legitimate policy objectives of the State of South Carolina and do not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. and S.C. Constitutions." Appellant has provided no argument that the Town's Ordinance, which provides for the collection of attorney's fees, is not "reasonably related to the legitimate policy objectives" of the Town. Quite contrarily, the collection of attorneys fees is directly related to the policy goal of the Ordinance. This Ordinance provides a means to collect unpaid business license fees from business owners who either willfully or not did not remit the same to the Town. "Requiring the unsuccessful defendant to pay the plaintiff's attorney's fees is a legitimate tool in enforcing the underlying public policy of the statute" Bradley, *supra.*

Appellant also relies on the Court's ruling in Southeastern Home Building & Refurbishing, Inc. 325 S.C. 602, 325 S.E.2d 328 (1985) which declared the attorney fee

provision in the Mechanic's Lien Code unconstitutional. However, Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998) subsequently clarified the Southeastern ruling and stated:

> "The Court noted, 'indeed, authorizing fee awards to prevailing defendants, as well as plaintiffs, would not chill the laborer's right to seek relief in court.' Id. at 604 325 S.E.2d at 329
>
> On other occasions, however, the Court has upheld the statutory allowance of attorney's fees to prevailing plaintiffs but not to prevailing defendants. See Bradley v. Hullander, 277 S.C 327, 287 S.E.2d 140 (1982)(securities fraud cases); Coker v. Pilot Life Ins. Co., 265 S.C. 260, 217 S.E.2d 784 (1975) (bad faith denial of insurance claims); see also Missouri, Kansas & Texas Railroad Co. of Texas v. Cade, 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135 (1914) (statute designed to promote prompt payment of small claims providing recovery of attorney's fees to plaintiffs but not defendants did not violate 14th Amendment)...
>
> ...Allowing plaintiffs who successfully pursue an action under the UTPA to recover their attorney's fees encourages individuals to pursue litigation to protect the public interest. Similarly, requiring unsuccessful defendants to pay the plaintiff's attorney's fee discourages tradesmen from engaging in unfair methods of competition and unfair or deceptive acts in the conduct of trade or commerce..."

This same reasoning can and should be applied in the instant case. The Town's Ordinance was established "for the purpose of providing such regulation as may be required by the businesses subject thereto and for the purpose of raising revenue for the general fund through a privilege fee." Sec. 10-1-30 Town of Hilton Head Municipal Code. The provision allowing an award of "costs for collection" are directly related to the Town's goal and enforcement of its public policy and accordingly not in violation of any equal protection laws.

III THE COURT'S RULING ON APPELLANTS' LIABILITIES FOR PAYMENTS WAS CORRECT.

Respondent audited Appellant's business license fee liability for the 2002, 2003, 2004, and 2005 license periods, and as a result, assessed Appellant $41,645.81 for fees and penalties. (R. p. 291, ¶ 3). The Appellant paid the amount under protest. (R. p. 291, ¶ 4-5). Sections 10-1-

150 and 160 of the Town's Municipal Code affords the Appellant a hearing before Town Council.[7]

Because Respondent failed to provide the Appellant with a hearing on its appeal of the assessment, the funds were refunded to Appellant on or about February 2, 2007 (R. p. 291, ¶ 6) and Respondent conceded that it had waived its right to collect the $41,645.81 in fees and penalties. The waiver of the right to collect these penalties and fees was based on the technical violation of the Ordinance by Respondent's failure to hold the appeal hearing. It did not in fact eliminate any claim to future business license fees or enforcement of those fees.

Respondent filed a Motion to Dismiss the suit but because of Respondent's assertion that the license fees from the Appellant would still be due for the years 2006 and thereafter, the Court and the parties agreed that this action should continue to a final resolution, which it did, with the

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[7] Sec. 10-1-150 in relevant part: When the license inspector determines that:

(2) A licensee has breached any condition upon which his license was issued or has failed to comply with the provisions of this chapter;

....the license inspector shall give written notice to the licensee or the person in control of the business within Respondent by personal service or certified mail that the license is suspended pending a hearing before town council for the purpose of determining whether the license should be revoked. The notice shall state the time and place at which the hearing is to be held, which shall be at a regular or special council meeting within thirty (30) days from the date of service of the notice. The notice shall contain a brief statement of the reasons for suspension and proposed revocation and a copy of the applicable provisions of this chapter.

Sec. 10-1-160 in relevant part:

(a) Any person aggrieved by a final assessment or a denial of a business license by the license inspector may appeal the decision to town council by written request stating the reasons therefor filed with Respondent clerk within ten (10) days after the payment of the assessment under protest or notice of denial is received.

(b) An appeal or a hearing on revocation shall be held by town council within thirty (30) days after receipt of a request for appeal or service of notice of suspension at a regular or special meeting of which the applicant or licensee has been given written notice. At the hearing all parties shall have the right to be represented by counsel, to present testimony and evidence and to cross-examine witnesses. The proceedings shall be recorded and transcribed at the expense of the party so requesting. The rules of evidence and procedure prescribed by town council shall govern the hearing. Town council shall by majority vote of members present render a written decision based on findings of fact and the application of the standards herein which shall be served upon all parties or their representatives and shall be final unless appealed to a court of competent jurisdiction within ten (10) days after service.

(c) No person shall be subject to prosecution for doing business without a license until the expiration of ten (10) days after written notice of denial or revocation which is not appealed or until after final judgment of court upholding denial or revocation.

Court reaching the conclusion that the Business License fee was valid, enforceable and applicable to Appellant.

CONCLUSION

Respondent submits that Appellant has not carried its burden in proving that Respondent's business license fee ordinance is unconstitutional or has violated any equal protection clauses beyond a reasonable doubt under any of its arguments. Nor has the Appellant carried its burden requiring it to negate every conceivable basis that might support its argument of unconstitutionality. On the other hand, Respondent has carried its burden to show that, as a matter of law, its business lines fee ordinance is constitutional, especially given the legal presumption in favor of constitutionality, and is not enforced in an arbitrary and capricious manner.

Respondent respectfully urges this Court to uphold the lower court's ruling.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III Special Circuit Court Judge for Beaufort County

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Case No. 2012-213239

Town of Hilton Head Island, ... Respondent

v.

Kigre, Inc.....Appellant

CERTIFICATE OF COUNSEL

I, Gregory M. Alford, attorney for the Respondent, Town of Hilton Head Island, do hereby certify that **Respondent's Final Brief** complies in all material respects with Rule 211 SCACR.

Respectfully submitted this 14th day of October, 2013,

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PROOF OF SERVICE

I, Gregory M. Alford, Attorney for the Respondent, Town of Hilton Head Island, do hereby certify that on October 11, 2013, I served **Respondent's Final Brief** by depositing a copy of the document in the United States mail, with postage prepaid, at Hilton Head Island, South Carolina, addressed as follows:

Thomas C. Taylor
Law Office of Thomas C. Taylor, LLC
P.O. Box 5550
Hilton Head Island, SC 29938

Respectfully submitted this 11th day of October, 2013,

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