THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2011-CP-08-2814
Appellate Case No. 2014-002393

Todd Olds ..... Appellant,

v.

City of Goose Creek ..... Respondent.

RESPONDENT'S FINAL BRIEF

Timothy A. Domin
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
(843) 577-2026
(843) 722-8242 Fax
tdomin@clawsonandstaubes.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court properly affirm the appeal from the decision of the City Council of City of Goose Creek, which itself was acting in an appellate capacity reviewing the decision of the City Administrator and the City Business License Department?

Did the Circuit Court properly grant summary judgment as to the remaining causes of action joined with the appeal of the decision of City Council?

STATEMENT OF THE CASE

Mr. Olds is a real estate developer who buys distressed properties and attempts to sell them for a profit. He often performs repairs and renovations to the properties prior to sale. He sometimes buys and sells the homes through his alter-ego Prime Properties of Charleston, LLC.[1] Mr. Olds claimed on his 2011 business license application next to the line "Actual Gross Receipts (total receipts generated by the business regardless of source, without deduction) for January 2010 to December 2010" a sum of $58,432.46. (R. p. 212). The City of Goose Creek Business License Department matched Olds/Prime Properties to the sale of a home in Goose Creek during the prior year at 123 Evergreen and noted the total sales price was $134,000. Based on this, the City sent notice of recalculation of the business license fee from $460.40 to $928.40. The City provided notice of the increased amount to Olds on May 23, 2011 and demanded the difference without assessing any penalties. (R. p. 213).

[1] The City has allowed Mr. Olds to have only one permit for his company and himself. Because business license fees are calculated on a sliding scale and contain a minimum base fee, allowing consolidation for this purpose saves the taxpayer a small amount of money.

Olds paid the difference under protest and timely appealed on June 7, 2011, contending that the City was not applying "the plain and ordinary meaning . . . [of] Gross Income. (R. p. 214). Per the City's business license ordinance, the appeal went to the City Administrator who set a hearing for July 26, 2011. Olds was present, represented by counsel and submitted a memo. The City Administrator also asked for a memo from the City Attorney on behalf of the Business License Official's position. The City Attorney copied Mr. Olds' counsel on his response. The City Administrator decided on September 1, 2011 to deny the appeal of Mr. Olds and reaffirm the City Staff's interpretation of the business license ordinance. (R. p. 226). Mr. Olds was advised of his right to timely appeal that decision to City Council. Olds first requested that he be allowed to bypass the appeal to City Council as futile. (R. pp. 227-28). Olds then initiated a timely appeal to City Council. (R. p. 229). Olds was advised in writing that City Council would hear the appeal on September 27, 2011 at a Special Meeting of City Council and that the matter was to be heard on the record without additional argument. (R. p. 231). Olds' counsel advised that he would not attend as the Ordinance calls for the matter to be decided on the record below. (R. p. 232). The meeting of City Council was duly noticed and a proper agenda listing the items of business including the appeal of Olds as one of the items of business. The agenda was posted in City Hall and sent to the three local newspapers in the area. (R. p. 233). City Council heard the appeal and did have questions. They directed these to the City Administrator and the Finance Director who are normally present at all City Council meetings. (R. pp. 235-36). City Council voted to affirm the decision of the City Administrator. Olds filed a summons and complaint with the Circuit Court demanding a jury trial and claimed for a first cause of action appeal and additional causes of action for 1) Equal Protection 2)

Abuse of Process 3) Substantive Due Process 4) Procedural Due Process 5) Violation of FOIA 6) Abuse of Process and Attorney's Fees.

Counsel exchanged discovery with respect to the causes of action. Discovery revealed yet another property sold in the City that Mr. Olds entirely failed to disclose. The City provided notice of recalculation of the business license for 2011. (R. p. 314).

Olds refused to pay this sum under protest or otherwise. In fact, he initially claimed that he did not need a business license in 2012 because he was conducting no business and owned no property. (R. p. 347).[2] The City responded that Olds did own property at Aylesbury Road in the City (R. pp. 372-73). Olds sent in in a payment under protest, but not the full amount based on the City's calculation. The City wrote to Olds on April 23, 2012 explaining it would not issue a license without payment in full and would add penalties if payment in full was not made by April 30, 2012. (R. p. 346). Olds did not make payment in full and the City did not issue his 2012 business license.

In July 2012, Olds sought to get water service to a new address at a property on North Aylesbury in the city limits which he had purchased and was trying to sell. The prior owner called for water to be turned off in their name. (R. p. 384). The City has a lock placed on the water meter when someone has water turned off. (R. p. 380). The City refused to turn on water to Olds on a new account as he had not paid in full to get his business license. (R. pp. 380-85). It is the policy of the City not to turn on new water service to a business unless the business has a business license and is not delinquent on any payments for its business license. (R. p. 310).

[2] The letter from Attorney Goldstein is incorrectly dated 2010 due to a typographical error. It was sent in 2012 as is evident from the response. (Record p. 347).

During that same time that Olds was demanding water be turned on without paying the remaining balance under protest and without having been issued a business license, business license officials saw work going on at the location. The business license officials as part of their regular duties go by job sites to confirm that persons have appropriate permits and business licenses. (R. p. 312). Olds was not on the property. There was never any contact between the business license officials and Olds at that time. Two other men were on the property without any business licenses themselves. (R. pp. 312-13). No tickets were issued. The men were told about information on how to get business licenses from City Hall. (R. p. 312). (The men dispute this version of events, claiming they were treated rudely, questioned for a long period of time, and claimed the officials flashed a badge and said they were police.[3] That discrepancy is irrelevant as Olds cannot assert as a cause of action any alleged violation of the constitutional rights of other persons and the conduct complained about by the men does not rise to the level of a constitutional violation.)

Olds continued to refuse the City's suggestion to pay under protest. Olds filed a motion for an injunction requiring the City to turn on water service to the new account. That request for an injunction was filed August 28, 2012 and was heard by the Honorable Kristi Harrington. The injunction request was denied in a written order on October 8, 2012 which concluded that there was no right to have new water service turned on at the location. (R. pp. 18-19). That Order was not appealed at any time.

[3] Business license officials in the City do have metal wallet badges on a shield similar to a police badge, but the badge states "Code Enforcement" and have the authority to issue business license citations.

Plaintiff filed a motion for summary judgment on January 16, 2013 and also a motion to amend his complaint. Defendant filed a "Motion for Hearing on the Appeal and for Dismissal or Summary Judgment of Any Remaining Causes of Action" on January 23, 2013. This was argued and taken under advisement by the Honorable Stephanie P. McDonald on June 16, 2014. Judge McDonald granted the motion to amend, but returned the summary judgment motion to the roster without decision. The City renewed its motion filing a "Motion for a Decision/Hearing on the Appeal" and "Motion for Summary Judgment" filed on July 3, 2015. (R. p. 194).

The matter was heard by the Honorable R. Markley Dennis, Jr. on July 29, 2014. The Court elected to decide the appeal first and then proceeded to determine whether there were any remaining viable causes of action. The court affirmed the appeal on the issue of "gross income" and granted summary judgment as to the remaining causes of action. The Plaintiff timely moved for reconsideration which was denied. This appeal was timely filed on November 3, 2014.

ARGUMENT

I. THE APPEAL OF THE CITY ADMINISTRATOR AND CITY COUNCIL RISES OR FALLS ON THE MEANING OF GROSS INCOME WHICH IS DEFINED IN THE GOOSE CREEK ORDINANCE AS TOTAL REVENUE OF A BUSINESS.

This Court should first differentiate between the appeal from City Council and the summary judgment portion of the case.[4] The Brief of the Appellant consistently refers to the Court's error in granting summary judgment. There is no section devoted to discussing the appeal, although there is certainly discussion of the "gross income" issue which is the essence of the appeal. If the Appellant is indeed appealing the portion of the order affirming the decision of the City Council, then the Court should consider separately the applicable standard and evidence allowed. As to the appeal, it is clear that an appeal would be decided as a non-jury matter without additional evidence; it is not governed by the summary judgment standard or the Rules of Civil Procedure. Further, testimony concerning the imagined animus of the City towards Olds occurred entirely after the filing of the appeal with the Circuit Court and has nothing to do with the appeal.

---

[4] Indeed, this Court should consider taking the opportunity to address whether an appeal can be merged with a complaint as they are different actions. Joinder does not create efficient resolution of matters of this type. A new case that is denominated as a summons and complaint with causes of action will inevitably be treated as any other civil action and will not be scheduled for an immediate appeal hearing as would other kind of appeals that are filed. Litigants who are sued for additional causes of action in an appeal will inevitably want and should reasonably expect discovery related to those claims prior to a final hearing date. This creates the potential for additional delays and confusion between the proper scope of the appeal and the civil action. The Rules of Civil Procedure do not govern appeals of lower tribunals such as zoning boards or contested administrative cases. Austin v. Board of Appeals, 362 S.C. 29, 38, 606 S.E. 2d 208, 214 (Ct. App. 2004), citing Smith v. South Carolina Department of Social Services, 284 S.C. 469, 327 S.E. 2d 348 (1985). Clear language rejecting this kind of joinder or language providing directions to immediately sever the matters would be beneficial to the bench and bar.

The appeal of City Council's decision turns entirely on the correct definition of "gross income" as used in the City's business license ordinance. Todd Olds claims that because his business is buying and selling real estate, his business license should be based only on the difference between the purchase price of the homes he sells and the sales price. Olds claims that "gross income" must be exactly the same as it is under the federal Income Tax Code, I.R.C. § 61. The City of Goose Creek disputes this and submits that per the language of the City of Goose Creek's ordinance and consistent with South Carolina law, a business license fee is based on the total sales price of the goods, services, or real estate.

State law allows municipalities to charge a business license fee on "gross income." S.C. Code § 5-7-30. Municipal business license fees are entirely created by and governed by state law. They are not limited or regulated in any sense by federal law. Thus, this is not a matter where the Supremacy Clause of Article 6 of the United States Constitution mandates the application of federal law. No federal law requires that "gross income" be interpreted the same in local or state laws.

A South Carolina Court of Appeals domestic relations case noted "[t]he term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends upon the subject under consideration, the connection in which it was used, and the results intended to be accomplished." Bogan v. Bogan, 298 S.C. 139, 378 S.E. 2d 606 (Ct. App. 1989). This Court should take into consideration the definition used in the Goose Creek ordinance and should also understand the term in the larger context of local business license taxes.

The City of Goose Creek has defined "gross income" as:

> GROSS INCOME. The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term GROSS RECEIPTS means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. The GROSS INCOME for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, GROSS INCOME shall mean gross commissions received or retained, unless otherwise specified. GROSS INCOME for insurance companies means gross premiums collected. GROSS INCOME for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in GROSS INCOME. The GROSS INCOME for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other government agency.

City Business License Ordinance Section 110.001.

Clearly, the City of Goose Creek has defined gross income to include the "total revenue" of a business. Lawmakers' intent embodied in an ordinance "must prevail if it can be reasonably discovered in the language used." Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E. 2d 841, 843 (1995). Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local ordinances. Purdy v. Moise, 223 S.C. 298, 302, 75 S.E. 2d 605, 607 (1953) ("This construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason.") The City of Goose Creek's definition of "gross income" is generally consistent

with the ordinances of other South Carolina municipalities which equate "gross income" to the total revenue or total income of a business. The City submitted to the lower court the ordinances over 25 South Carolina municipalities which have language where gross income is clearly the total income and receipts of the business without deduction for costs. These cities include Abbeville, Aiken, Anderson, Beaufort, Camden, Cayce, Charleston, Chester, Columbia, Conway, Dillon, Florence, Georgetown, Greenville, Greer, Hartsville, Hilton Head, Isle of Palms, Mount Pleasant, Summerville, Myrtle Beach, North Charleston, Simpsonville, Spartanburg, Sumter, Union, and Walterboro. The City of Goose Creek could have submitted additional cities in support of its position. Candidly, it submitted those that were easily available online.

The City of Goose Creek's ordinance and interpretation thereof is consistent with the position taken by the South Carolina Municipal Association which provides in its business license handbook[5]--portions of the handbook were submitted to the lower court and the handbook can also be found online: "A business license fee is an excise tax levied on the privilege of doing business, and the value of the privilege extended is measured by the business's gross receipts." Municipal Association Business License Handbook, page 2. The Handbook goes on to state: "Gross income may be defined by the license ordinance and generally means all revenue received from the business operation without any deductions for such things as the cost of goods, overhead, salaries or cost of sales." Handbook, page 14. And specific to businesses which sell real estate, the Handbook provides: "The full sales price with no deductions for mortgages, commissions, closing costs or purchase cost to the owner is the amount used to compute the license tax." Handbook, p. 37.

[5] http://www.masc.sc/SiteCollectionDocuments/Finance/business_license_handbook.pdf

Although the Municipal Association Handbook is not itself law, where a statute or series of similar statutes are interpreted and applied by local governments in a seemingly consistent manner, and the Legislature has taken no action to correct the practice, the inference should be that the matter is being interpreted consistent with the wishes of the Legislature. Conversely, without clear and substantial justification, the Court should be reluctant to upend a system that generates substantial revenues for municipal and county government across the state.

The City of Goose Creek's ordinance and interpretation of "gross income" is consistent with South Carolina case law. In Carter v. Linder, 303 S.C. 119, 399 S.E. 2d 423 (1990), the Supreme Court considered a County business license ordinance which derived its authority to collect business license fees on "gross income" from a substantially similar authorization at S.C. Code § 4-9-30. The court noted, "A license tax upon persons and businesses is an excise tax on the privilege of doing business, and no prohibition against the utilization of excise taxes exists. . . . The tax is not on the property itself, it is on the privilege of dealing with it. The value of such privilege is measured by the gross receipts therefrom and this is a familiar and valid method of ascertaining such value." Id. (quoting, Hay v. Leonard, 212 S.C. 81, 46 S.E. 2d 653 (1948)).

South Carolina has a long history of license taxes (also sometimes known as privilege taxes) based on the total revenue of a business. As stated by a 1921 case explaining application of "gross income" to a franchise tax:

> The tax imposed by Section 269, Vol. 1, Code 1912, therein called a "license fee," is manifestly an excise tax, laid under the benefit theory of taxation upon the public service corporation named for the privilege of exercising their corporate franchise and carrying on their business within

> the State. 26 R. C. L., p. 36, § 19; Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811. The measure of the tax is volume of business or "gross income for business done." Gross income means the total receipts from a business before deducting expenditures for any purpose. Black's Law Dictionary; German Alliance Ins. Co. v. Van. Cleave, 191 Ill. 410, 61 N.E. 94, 96.

Columbia Rwy Gas & Elect. Co. v. Jones, 119 S.C. 480, 112 S.E. 267 (S.C. 1921).

The modern Internal Revenue Code was first enacted in 1939. South Carolina has been operating under a different definition of "gross income" for the purposes of business license or privilege taxes since before 1921.

Nor is South Carolina unique in this regard, as stated by a leading treatise on local and state taxation:

> Gross receipts taxes may be imposed on the "gross income of the business," "gross receipts," "gross proceeds of sales" or any other term that suggests total business revenues before deductions. Consequently, the term is used in a different context than as it relates to federal tax law which defines "gross income" as income net of "cost of goods sold" and similar expenses related to producing the income.

2-29 Bender's State Taxation: Principles and Practice § 29.03

Finally, Plaintiff's reliance on Internal Revenue Code Section 61 is entirely misplaced. And it is irrelevant that South Carolina has statutorily adopted IRS definitions for state income tax purposes. S.C. Code § 12-6-1110. There is no federal or state law which requires "gross income" to be the same for all purposes. There is no federal or state law which requires the use of IRS definitions for "gross income" for business license purposes. The IRS regulation is only applicable to federal taxes. South Carolina statute has only adopted the IRS definition for "South Carolina income tax purposes." S.C. Codes § 12-6-1110.

It is true that under federal Internal Revenue Code § 61, a real estate business only uses the gains on the real estate for "gross income" whereas every other type of

sale "gross income" is the total amount received without deduction for costs of goods sold. As noted by the affidavit of Robert Baldwin, CPA, whose affidavit was submitted to address the affidavit of Professor Kristen Guttting: the federal income tax and the South Carolina state income tax is a tax based on net income or gain. A real estate seller may list the difference between the sales and purchase price when filling out a tax form line requests "gross income." A seller of groceries, or diamonds or even intangibles will include the entire amount of the sale on that same line----and then deduct the costs of goods and other ordinary business expenses on a different line. But, the seller of real estate does not get to deduct the cost of the real estate a second time as an ordinary business expense. The cost of the real estate is only deducted once. Therefore, both businesses reach the same result. The real estate developer and grocery store ultimately pay tax on the net income of the business because the federal system is a tax based on net income after deduction of expenses and costs of doing business.

The position take by Olds produces an absurd result. His argument only applies to businesses "dealing in property." A business selling real estate would only owe a business license fee on the difference between the sales price and the purchase price. However, a business that sells of an equal dollar value of groceries or diamonds would owe on the entire gross sale. The Court should reject statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature. This rule applies even in tax cases. Lexington County Health Servs. Dist. v. S.C. Dep't of Revenue, 384 S.C. 647, 682 S.E .2d 508 (Ct. App. 2009); So. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n, 297 S.C. 492, 496; 377 S.E. 2d 358, 361 (Ct. App. 1989).

Olds claims that the fallacy of the City's argument will be illustrated by an example of a real estate company buying a house for $100,000 and selling it for $90,000. In that situation, Olds asks if the "gross income" is $90,000? Technically and practically, the business does have "gross income" on that transaction for his business license purposes of $90,000. Of course, a non-real estate business may buy something for $100,000 and sell it for $90,000. Olds' argument does nothing for those companies. They have $90,000 in gross income even under Olds' interpretation that IRC 61 applies to local business licenses. Although both companies would be able to show a loss on their federal income taxes, state and county business licenses tied to "gross income" do not take into consideration the profit margin of a business---even if it is a negative profit margin some transactions.

In summary, the City of Goose Creek and other municipalities are correctly interpreting their business license ordinances and the state laws enabling them in a way that is proper as applied to businesses that sell real estate and those which do not sell real estate. Not only is the "total receipts" approach incorporated in the letter and spirit of the various ordinances including the City of Goose Creek's ordinance, such an interpretation is also consistent with state law and a long history of privilege taxes.

II. THE REMAINING "CAUSES OF ACTION" ARE MERITLESS.

Mr. Olds imagines that he is being singled out for unequal and unfair treatment. He suggests this is because of some question that was resolved in his favor some years ago. In reality, the building department investigated a particular home Olds was fixing and concluded that Mr. Olds was not required to change his method of repair. He now attempts to bootstrap this event involving the building inspection department into his dispute with the business license department of the City. However, he also alternatively

claims some animus derives from the act of questioning and appealing his business license assessment.

What Olds sees as harsh and unfair treatment is merely the City's effort to require a business to pay its business license fee on the same basis as every other taxpayer in the City, including companies that are in the business of buying and selling real estate. The City has only exercised reasonable efforts consistent with its normal policies and procedures. The City Business License Ordinance requires payment in full under protest to initiate any appeal and to get a license under protest. City of Goose Creek Ordinance § 110.016(a). No criminal charges have been issued in connection with the matter. Even if the face of being provided incomplete information on business license applications, the City has only assessed penalties after notice to Mr. Olds and refusal to pay the principal sum. Mr. Olds has always been given the ability to pay under protest, to contest the amount, and to seek a refund plus interest of any amounts wrongfully collected, Olds repeatedly cites the claims that his friends were questioned for over an hour and treated rudely and sarcastically by City employees Faretra and Althoff. Faretra and Althoff strongly disagree with this characterization. Part of their job duties include visiting job sites to question contractors whether they have licenses (R. p. 312). Faretra and Althoff claim they spent about 15 – 20 minutes total calmly talking to two individuals who were doing work at a property Olds owned at a time when Olds had no business license because he refused to pay in full under protest. They deny being rude or unprofessional.

However, even if the event happened exactly as Olds friends describe, it would be entirely irrelevant to Olds' case. Olds is not able to assert the rights of others. A plaintiff generally must assert his own legal rights and interests, and cannot rest his

claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Even if he could assert the rights of others, the men were not deprived of any constitutionally protected rights. The men were not deprived of a life, liberty or property interest. The men were not arrested. The men never asked if they were free to leave and were refused the right to leave. There is no protected right of a person performing work on a house to be free from a business license inspector asking questions about whether a person has or needs a business license. Nor is there a protected property interest in being free of rudeness or sarcasm. There is no protected property interest someone being free from confusion as to whether the individual asking questions is a business license inspector with authority to hand out a citation or a police officer with the power to hand out a citation.

Nor has Olds been deprived of any life, liberty or property interest. He has never been arrested in connection with this matter. Olds complains that he got a letter threatening him with jail. The record shows that when Olds business license application was discovered to contain information that was inaccurate, the City sent a letter which set forth some of the remedies that exist for failure to pay a business license—setoff against income tax returns and a summons for which fines can be up to $1,092.50 or 30 days in jail. (R. p. 365). Olds apparently believes that there is something wrong in advising people of possible consequences. Again, there is no constitutionally protected property interest or liberty interest in not receiving warning letters from the government advising of possible consequences of action or inaction, including fines and jail.

Olds seemingly expects that in all interactions with the government the Constitution mandates all persons will be happy, no one will be frustrated or confused, no difficult questions will ever be asked, and no form will be rejected as inaccurate.

The City of Goose Creek strives to provide high quality essential service and to fairly enforce the applicable laws. However, local governments have to do things like collect fees, enforce traffic laws and other unpleasant tasks. These inevitably lead to some people who are unhappy with their interaction with the government. However, this does not amount to a violation of constitutional rights or create a tort.

A. Equal Protection

Olds claims a violation of Equal Protection on the basis that the City of Goose Creek has "adopted a deliberately tortured interpretation of its ordinance in an effort to single out the plaintiff for disparate treatment . . ." (R. p. 43). The deposition testimony in this case establishes the City of Goose Creek is applying its interpretation uniformly and that there is no person known to be paying a business license fee in any manner different than Mr. Olds. See Althoff Deposition p. 19. (Q: Are you aware of anybody who is buying and selling homes for business purposes in the City of Goose Creek that is not paying based on the total amount of the home sale?" A: No. Q: . . . as far as you know, everybody is paying the way you are asking Mr. Olds to pay. A: Yes.).

In response, Mr. Olds claims he is a "class of one" citing Village of Willowbrook v. Olech, 528 U.S. 582 (2000). First, the Village of Willowbrook case held it was not necessary to identify that a particular group that was being treated differently in some sense---by race, sex, type of business, etc. Willowbrook called into question a long line of jurisprudence where the standard of review hinged on whether the classification was a suspect class or not. Willowbrook would later be eviscerated by a series of holdings starting in 2008 with Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008). See R. Farrell, "The Equal Protection Class of One Claim: Olech, Engquist and the Supreme Court's Misadventure" 61 S.C.Law Rev. 107 (2009).

However, even when Willowbrook was alive and well, the individual class of one had to be treated differently. Olds has not shown that anyone is paying tax based on a different rate or getting new water service to a business location without a license being paid in full. The *sine qua non* of an equal protection claim is showing that similarly situated persons received disparate treatment." Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E. 2d 161 (2013).

B. Abuse of Process

Olds complains that there has been abuse of process because the City terminated his water service as punishment for refusing to pay his business license according to the City's interpretation of its business license ordinance.

First, Olds has no basis to assert his water service was terminated. He only knows that he could not get the water service turned on. He has never testified that the water was flowing under his name and was shut off, only that his water meter was locked. The City has made clear through affidavit and through the deposition testimony of the Public Works director that the prior customer turned off water in their name. It was locked as a matter of standard procedure. It is also required by City Ordinance § 51.44. And, the City refused to turn on a new water account to a business in arrears on its business license fees. (R,. pp. 313, 380-85). This was not a rule created to punish Mr. Olds. It is City policy. (R. pp. 310-311).

It is reasonable for the City not to allow water service to a new business that is not in compliance with business license or zoning laws. In Ruggles v. Padgett, 240 S.C. 494, 126 S.E. 2d 553 (1964) the Court stated: "While in this state it is settled that the operation of water works by a municipality is so far governmental in character as to absolve the corporation from liability sounding in tort, there can be no doubt that in the

fiscal aspect thereof the operation and maintenance of such utility partake largely of the nature of a commercial or business enterprise." If operation of the fiscal matters of a water utility are at all similar to the rights of a business enterprise, it is difficult to imagine any business enterprise being required to open a new water account for a customer who is delinquent with respect to their overall accounts. Mr. Olds specifically went to court to get an injunction to require the City to turn on water service. He was denied this injunction. (R. p. 19). He did not appeal this order.

Of course, Mr. Olds has always had the ability to pay the sum under protest and to pursue an appeal of the same. The City has repeatedly given Olds opportunity to pay outstanding fees under protest. It has even offered to allow the penalties to be left in his own attorney's trust account pending appeal. (R. pp. 402-06). The City has made it clear that it will refund money with interest if it is determined to have been incorrectly calculated.

Finally, abuse of process has nothing to do with turning off water or refusing to turn on water. It involves abuse of the legal process not proper in the course of regular conduct of the proceeding for ulterior purpose. Scott v. McCain, 275 S.C. 599, 274 S.E. 2d 299 (S.C. 1981). It involves the perversion of a legal procedure for a purpose not intended by the procedure. Food Lion, Inc. v. United Food & Commer. Int'l Union, 351 S. C. 65, 567 S.E. 2d 251 Ct. App. 2002.

C. Due Process

Plaintiff's due process complaint seems to focus solely on the idea that the City Council asked the City Administrator and Finance Director about the matter during the hearing. Olds and his counsel were not present, although they had a right to be present

and were invited. The Circuit Court concluded that this was not fair, but the lower court did not find a constitutional violation because, in part, the defendant did not lose any rights. Olds was not damaged in any way. Olds had his brief on file with the City raising all of his points for the City Council to consider. In fact, Olds' counsel had already requested in writing the appeal to City Council to be waived as a futile requirement. (R. p. 228). The decision of the City Council is strictly a legal determination and not a factual one. As such, it does not matter what the City Council did or said. The question was and remains a legal question of the proper interpretation of "gross income" in the City's Ordinance. This Court will decide what "gross income" means in this context regardless of what was decided by the City Council. Because it is simply a legal question, there is absolutely no prejudice or consequence to Olds. This Court has held that even when there is a violation of due process, including defective due process in an administrative hearing or hearing by other government body, this will not invalidate the decision absent prejudice. Ross v. Medical Univ. of South Carolina, 328 S.C. 51, 492 S.E. 2d 62 (1997) ("in an administrative proceeding, a demonstration of substantial prejudice is required to establish a due process claim.") quoting Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 233, 363 S.E. 2d 683, 687 (1987).

There is no constitutional right to a perfect hearing much in the same way that there is no right to a perfect trial. While courts strive to give prefect trials, the only kind of errors that matter are those which are of consequence.

The suggestion by the Circuit Court to consider allowing all to speak or none to speak is a good idea. It has been heard and will likely be followed in the future as a

good idea. However, there is no constitutional right to equal time or the right to speak at every level of a proceeding. There is no constitutional guarantee at a meeting that all persons get to speak or none get to speak. There is no right for a person who has a matter before a board or commission to speak at every stage of the proceeding. Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E. 2d 62 (1997) ("[The South Carolina Constitution]. . . does not require notice an opportunity to be heard at each level of the administrative process. . . . [but merely] opportunity to be heard at some point before the agency makes its final decision").

D. Violation of Freedom of Information Act

Mr. Olds still continues to claim some kind of violation of the Freedom of Information Act. However, he fails to come forward to show that any meeting of a public body was not properly noticed. The record contains the agenda for the City Council Meeting. At the bottom it shows it was posted at least 24 hours in advance and it was sent to local media sources. (R. p. 233). The agenda identifies the items of business including the Business License Appeal Hearing of Todd Olds. (R. p. 233). This complies with the South Carolina Freedom of Information Act in every respect. S.C. Code § 30-4-80.

E. 42 U.S.C. § 1983

As it relates to 42 U.S.C. § 1983, Plaintiff can show no deprivation of a constitutionally protected right. As noted above, there no way Olds can claim the violation of constitutional rights of others. His friends' constitutional rights were not violated. Even if they were, Olds does not have standing to assert a violation of their rights.

Nor does Olds have any constitutionally protected "life, liberty, or property interests" that was taken or violated. As noted, he was not arrested. He has not been placed in custody. He was requested to pay a tax under protest if he wished to operate a business in the City limits and has been provided an entirely constitutionally adequate post-deprivation process to be able to secure reimbursement plus interest of that money if he is correct in his interpretation.

Refusing Olds new water service at a time when he did not have a business license because he had not made payment in full on his business license fees is not a constitutionally protected property interest. To invoke a constitutionally protected property interest, "a person must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564 (1992). There is no known constitutional right to new water service at a business location which has no business license. There is no known right to require a City to provide water service to someone who is delinquent in their accounts to a City.

F. Civil Conspiracy

Plaintiff alleges in an amended complaint that Ron Faretra and Jennifer Althoff conspired to do certain things including miscalculating his business license fee and questioning his friends as to any possible business license violations. As noted in the affidavit of City Administrator, Dennis Harmon, these actions were taken in the official capacity of Faretra and Althoff. Therefore, this action against them individually is barred by S.C. Code § 15-78-70. Further, there is no cause of action for conspiracy where employees of a company work together to undertake an act in furtherance of the

company's business. McMillan v. Oconee Memorial Hospital, 367 S.C. 559, 626 S.E. 2d 884 (2009). Olds cannot assert that his friends were questioned as his damages.

G. Damages and Attorneys Fees

Plaintiff asserts a cause of action for attorney's fees pursuant to § 15-77-300 and § 30-4-100. The latter is the Freedom of Information Act which is addressed above. The former is the provision which allows for attorneys fees against government entitles if the government entities position is not "substantially justified." The City of Goose Creek is correct. Even if this Court were to disagree, there is substantial justification for the position it has taken.

H. Breach of Contract

Plaintiff has seemingly abandoned this cause of action as it is not referenced in his brief. This relates to water service. There was no contract, written or oral.

I. S.C. Constitution Article I, §22

Appellant appears to have abandoned this argument. There was no mention of it in his brief. This provision is inapplicable to this matter.

III. ALL STATE LAW CAUSES OF ACTION ARE BARRED BY THE TORT CLAIMS ACT.

Olds fails to address or contest that part of the Circuit Court order that notes Olds state law claims are barred under the South Carolina Tort Claims Act, S.C. Code § 15-78-60 subsection 11. The lower Court expressly noted subsection 11 bars claims arising out of assessment or collection of taxes or enforcement of tax laws. In failing to contest this portion of the order in his brief, the appellant is bound by it. The City would renew its position that state claims are barred by subsection 11.

The City also argued the application of several other subsections of the South Carolina Tort Claims Act including § 15-78-60 subsections 1, 2, 3, 4, 11, 12, and 13 which retain sovereign immunity for:

(1) legislative, judicial, or quasi-judicial action or inaction;

(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;

(3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

. . . .

(12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner;

(13) regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

In the present case, the actions of City Council in hearing the appeal, including the manner of hearing the appeal and decision to ask questions of the City Administrator and Finance Director are clearly either legislative or quasi-judicial powers for which immunity exists. Likewise, any decision to issue or not issue a business license or to conduct an inspection of property to determine whether the contractors on the property are in compliance with the business license code would fall within the scope of subsections 13 and 14, in addition to subsection 11.

"Provisions establishing limitations upon and exemptions from liability of government entities must be liberally construed in favor of limiting liability." Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E. 2d 808, 816 (2013).

To the extent Plaintiff's claims are barred by the Tort Claims Act retained sovereign immunity, it was proper for the Court to grant summary judgment as to those claims.

CONCLUSION

The Respondent requests this Court affirm the decision of the Circuit Court, the Goose Creek City Council, the City Administrator and the Business License Director who properly concluded that "gross revenue" is a term which includes the total income of the business before deduction for the cost of goods and property sold. This is consistent with the plain language of the municipality's ordinance as well as a long history of business license fees and other privilege taxes.

The Appellant's remaining causes of action which were joined with the appeal are meritless and were properly dismissed.

Timothy A. Domin
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
(843) 577-2026
(843) 722-8242 Fax
tdomin@clawsonandstaubes.com
Attorney for Respondent

September 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2011-CP-08-2814
Appellate Case No. 2014-002393

Todd Olds ..... Appellant,

v.

City of Goose Creek ..... Respondent.

CERTIFICATE OF COUNSEL

I certify that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court of Appeals.

Timothy A. Domin
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
(843) 577-2026
(843) 722-8242 Fax
tdomin@clawsonandstaubes.com
Attorney for Respondent

September 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2011-CP-08-2814
Appellate Case No. 2014-002393

Todd Olds ..... Appellant,

v.

City of Goose Creek ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of September, 2015, three copies of the foregoing Respondent's Initial Brief was served upon opposing counsel of record by placing a copy of same in the United States Mail, First Class, postage prepaid, addressed as follows:

Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein, P.A.
PO Box 71121
N. Charleston, SC 29415-1121

Timothy A. Domin
CLAWSON and STAUBES, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
(843) 577-2026
(843) 722-8242 Fax
tdomin@clawsonandstaubes.com
Attorney for Respondent