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

Todd Olds..... Appellant,

vs.

City of Goose Creek ..... Respondent,

BRIEF OF APPELLANT

September 9, 2015

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STATEMENT OF CASE

This interesting case began its gestation in 2010, when the plaintiff had a disagreement with the City of Goose Creek over the interpretation of an unrelated City ordinance involving repair to his property. (See plaintiff's March 29, 2013, second supplemental affidavit of plaintiff at Record on Appeal page 177: "I have been involved with this dispute with the City of Goose Creek since December, 2010.") As a result of the repair disagreement, the plaintiff became known to Ron Faretra, and in May, 2011, the Town audited his Business License Tax Return. (See correspondence of Jennifer Althoff dated May 23, 2011, in the R.O.A. at page 213; see 2011 return at page 212.) Based on this audit, Jennifer Althoff informed the appellant he owed a deficiency based on her and Mr. Faretra's calculation based on plaintiff's "gross receipts" rather than on "gross income" as specified by the ordinance. (The two returns showing the plaintiff's original submission and the Town's revised calculations after the audit are in the record on appeal at pages 124 and 125 [pages 14-15 of plaintiff's return to summary judgment].) When Jennifer Althoff wrote to the plaintiff, she informed him that he was subject to many penalties, including jail, if he did not pay the disputed tax amount:

> If payment is not received [calculated on gross receipts] by the above date your business license fee due will be submitted to the South Carolina Department of Revenue to be set off against your individual income tax return. Pursuant to the Setoff Debt Collection Act (Section 12-56-10), the amount owed for your business license fee plus a $565.00 fee will be deducted from your South Carolina individual income tax refund. If you file a joint return with your spouse, this amount will be deducted from the total joint return without regard to which spouse incurred the debt or actually withheld taxes. You may also be issued a Uniform Ordinance Summons in the amount of $1,092.50, this includes State assessments, or 30 days in jail, each day in violation will be deemed a separate offense.

Sincerely,

/s/ Jennifer Althoff, MBI
Business License Inspector

R.O.A. page 213 and 113 [page 3 February 4, 2013 memorandum]

As may be seen by comparing the plaintiff's 2011 return with Ms. Althoff's and Mr. Farertra's recalculations of that same return (R.O.A. page 126 [pages 14-16 of plaintiff's return to summary judgment]), the plaintiff reported $121,784.80 in gross income. The Town, on the other hand, calculated plaintiff's tax based on his $643,700.00 in gross receipts. The tax on gross income is $788.00. The tax on gross receipts is $3,852.64. (R.O.A. pages 124 and 126)

As authorized by the General Assembly, § 5-7-30, S. C. Code, Ann., the City of Goose Creek adopted a business license ordinance that authorizes a tax calculated on the taxpayer's previous year's **gross income:**

> **§ 5-7-30. Powers conferred upon municipalities; surtax for parking spaces.**
> 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 . . . ; levy a business license tax on gross income. . . .

The City's ordinance is similar to many of the Business License Tax Ordinances used throughout the state, and § 110.001 Goose Creek Municipal Ordinance, in conformity with state law, defines "gross income" in accordance with the definition mandated by the State:

> 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. . . . 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.
>
> § 110.001, Goose Creek Ordinance. The Goose Creek ordinances appear throughout the record on appeal in the pleadings—see ¶ 9 of the plaintiff's October 12, 2011, complaint and ¶ 12 of the plaintiff's June 26, 2014, amended complaint—as well as the ordinances included in at various filings below and are found in the record on appeal at pages 129, 187, and 245)

The plaintiff is a licensed realtor, who buys distressed properties, rehabilitates them, and then sells them for a profit. After Ms. Althoff, applying her definition of gross income to the plaintiff, informed the plaintiff that his business license fee was insufficient because she calculated it based on "gross receipts," the plaintiff paid the disputed tax under protest. In accordance with the procedure outlined in the Goose Creek Municipal Ordinances, the plaintiff appealed the overpayment to the Town Administrator, Dennis Harmon, of the City of Goose Creek. While plaintiff's administrative appeal was pending, Ron Faretra and Jennifer Althoff acted to coerce the plaintiff by directing the Department of Public Works to shut off his water—see Affidavits of Todd Olds at pages 168 and 171 of the Record on Appeal: "I paid the amount under protest as allowed by law and sued the City for a refund and for declaratory judgment to determine whose interpretation is correct. In retaliation, the City has refused to supply water to me based on what it now contends was an underpayment on business license from 2010." R.O.A. page 168

On July 26, 2011, the plaintiff and his lawyer appeared before the Town Administrator, Dennis Harmon, to appeal the decision of the Finance Director, Ron Faretra,

to misapply its own business license ordinance to the appellant. The Town Administrator upheld the decision of his Finance Director, and concluded that the calculation of the business license tax on gross receipts is the proper method of computation.

After the Town Administrator denied plaintiff's administrative appeal, plaintiff then appealed to the Town Council in accordance with the procedure laid out in the City's Municipal Code, § 110.016. On September 15, 2011, the City's Clerk of Council wrote to counsel, reminding counsel that neither Todd Olds nor a lawyer were permitted to participate in the appeal:

> Please be advised that Section 110.016(c) of the Goose Creek City Code states, in part, City Council shall review the records without further oral argument or presentation of evidence will affirm, modify or deny the appeal.
>
> /s/ Kelly J. Lovette, CMC
> City Clerk
>
> (R.O.A. page 231)

The plaintiff's appeal came before the Town Council on September 27, 2011. At the hearing before the City Council, contrary to the City's own ordinance and adopted process for administrative appeals, the Town Administrator presented oral argument for Goose Creek. As set forth in Ms. Clark's letter, neither the plaintiff nor his lawyer was permitted to participate. (See transcript of September 27, 2011, hearing at pages 20- 22 of the record on appeal.) In the Order under review, the lower court found this procedure "unfair" but granted no remedy because the lower court found that the only issue before the court was strictly one of statutory construction, so plaintiff was not prejudiced. See ¶ C of page 8 of the Order under review at page 8 of the R.O.A.:

> Indeed, Mr. Olds did submit a memorandum setting forth this position that was provided to the City Administrator and the City Council. Because this is strictly a legal issue of statutory construction and because the appellant's position was fully preserved and protected as to preservation of appellate issues by the filing of his brief, I find there are no damages here from the absence of Mr. Olds from the hearing. However, in the future, I would suggest City Council allow litigants to be heard or allow no one to be heard.
> Order at page 8-9

After hearing additional testimony from the Town's Administrator, the Town Council affirmed the decision of the Town Administrator. (R.O.A. pages 20-22 [transcript of hearing])

On October 12, 2011, the plaintiff filed a summons and complaint alleging error in the Town's computation of the business license tax based on gross receipts instead of gross income, and set forth causes of action for violation of equal protection, procedural and substantive due process, abuse of process, violation of the *S. C. Freedom of Information Act*, and for damages and attorney's fees. (R.O.A. page 41) The Town answered on November 21, 2011. As set forth above, after the plaintiff paid his taxes under protest, the Town shut off the plaintiff's water supply, and on August 31, 2012, the plaintiff filed a motion for injunction, alleging Ron Faretra and Jennifer Althoff were further retaliating against him by terminating his water service in an effort to force him to capitulate on the business license tax issue. (R.O.A. page 85). On August 31, 2012, the plaintiff also filed a motion to amend his complaint to add causes of action against the two employees who shut off the water whom plaintiff contended were acting outside the scope of their employment to retaliate against him. (See, for example, the August 31, 2012, affidavit of

Robert Eckhardt at page 166 of the R.O.A. for his sworn statement recounting how Ron Faretra and Jennifer Altoff drove to plaintiff's house, impersonated Goose Creek police officers and detained the affiant.) The motion to amend also sought leave to add the Department of Public Works as an additional party for shutting off the plaintiff's water as a result of the dispute. On October 8, 2012, Judge Harrington denied the motion for injunction (R.O.A. page 18), which the appellant did not appeal because he sold the property, and the City restored the water service making the water dispute moot.

On January 16, 2013, the plaintiff filed his motion for summary judgment. (R.O.A. page 109) The Town moved for summary judgment on January 23, 2013. (R.O.A. page 196) The matter came before the Honorable Stephanie P. McDonald on February 6, 2013, who took all three motions under advisement. On June 16, 2014, Judge McDonald issued an Order granting the plaintiff leave to amend his complaint, and returning the cross motions for summary judgment back to the roster for rescheduling following the City's responsive pleading to the Amended Complaint. (See page 16 of R.O.A. [Order June 16, 2014])

On July 29, 2014, the cross motions for summary judgment came before the Honorable R. Markley Dennis, Jr. who granted the Town of Goose Creek summary judgment on all causes of action. As set forth above, the lower court found the Town's appeal procedure constitutionally unequal, but granted the plaintiff no relief. See the Record on Appeal pages 23 - 38 for the July 29, 2014, transcript of hearing and pages 1 - 12 for Judge Dennis' September 5, 2014, Order. On September 22, 2014, the plaintiff moved for reconsideration (R.O.A. page 93), which the lower court denied by written

October 8, 2014, Order without a hearing. (R.O.A. page 14) This appeal followed on November 3, 2014.

STATEMENT OF FACTS

There are no material facts in dispute as regards the State's enabling statute, the City's published ordinances, or the legal principle that a municipality has no inherent authority to tax income and may only tax in conformity with the authority granted to it by the State. In fact, the lower court held that the matter before it was **only** a matter of statutory construction and nothing more. R.O.A. page 2.. There is no dispute that the Town defines "gross receipts" and "gross income" differently; however, the Town applies the terms interchangeably when calculating the appellant's business license tax. Professor Gutting explains this on page 6 of her affidavit (R.O.A. page 187), but the lower court ignored this evidence. In fact, the lower court ignored all of appellant's evidence. The appellant asserts that "gross income" is the basis of the business license tax, according to the plain language of the City's ordinance. Likewise, there is no dispute that the City provides an administrative tax appeal process that is closed to oral argument, and yet despite an ordinance requiring the City Council to take up the case without further participation by the parties, the Town allowed its representatives to appear and argue the case for the City but denied that same right to the appellant. There is no dispute that the Council welcomed both Dennis Harmon and Ron Faretra's participation, and they both did so, offering additional testimony on behalf of the City. (See Record on appeal pages 20-22 [transcript]). Even the Town concedes that its appeal hearing was unlawful, but it contends the unlawfulness does not matter because the issue before the court is merely statutory

construction. There are lots of facts in dispute concerning the City's animus for the appellant, also ignored by the lower court, and huge factual disputes over whether the Town can or should start cutting off a resident's water supply when it has a tax dispute with him or her. However, while these factual disputes may not be material to the application of the rules of statutory construction, which require the lower court to apply the clear and plain meaning to the unambiguous words of § 5-7-30, the lower court cannot cut off the plaintiff's right to sue for damages for constitutional/tort violations because the heart of the case involves the application of a state statute that is not ambiguous. Likewise, the lower court erred in not requiring the Town of Goose Creek to adhere to the Constitutional limitations upon its power to tax. The lower court granted summary judgment on the ground that the plain and ordinary meaning of the ordinances being challenged dictates the outcome. The lower court ignored the plaintiff's proof that the Town is deviating from its own ordinance because of animus. Therefore, while analyzing the errors of the Order under review, the application of settled rules of statutory construction demonstrates that the Town's taxation of gross receipts is improper. Moreover, the evidence shows that the Town applies this incorrect application of its ordinance only to the plaintiff, and as the U. S. Supreme Court held in *Village of Willowbrook*, 528 U.S. 562, 120 S.Ct. 1073 (2000), even in cases turning on statutory construction, the Town's animus may be relevant and support an equal protection claim of retaliation. This record contains an abundance of evidence that shows that Ron Faretra and Jennifer Althoff went to great lengths to harass and intimidate the plaintiff into paying an unjust tax. Their interpretation of "gross income" is arbitrary and capricious and designed for the sole purpose of punishing the plaintiff. The lack of

meaningful due process, which prevented the City Council from understanding how its own ordinance is being misapplied to the plaintiff, and the acts of harassment demonstrate that the case cannot be resolved by summary judgment because it is a question of fact as to whether the Town is taxing the appellant on gross receipts because it sincerely believes its incorrect interpretation or whether the Town is taxing the appellant on gross receipts because it has singled him out for disparate treatment or both. The evidence of animus is important to develop because it demonstrates the elements of the plaintiff's constitutional claims of purposeful and intention discrimination. These constitutional claims (due process, equal protection) allow Todd Olds to develop at trial evidence of tortuous acts (abuse of process, civil conspiracy, breach of contract, § 1983 claims) committed under color of state law. This disputed evidence must be developed in a trial. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000), *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996).

As summarized and discussed in detail below, the City contends that it is free to audit and tax the appellant on his gross receipts even though the Town's application to the plaintiff is at variance with the State's statutory definition of gross income and importantly at variance with its own code of ordinances. The State of South Carolina adopts the I.R.S. § 61 definition of income by state statute. (See R.O.A. pages 182-188 [affidavit of Professor Kristen Gutting]) The Town is bound by the state definition especially where it has no power to levy a tax on businesses except as the State allows.

ARGUMENT I

I. The trial court erred in granting summary judgment to the City of Goose Creek because the facts demonstrate that there is at least a genuine issue of material fact the City of Goose Creek is enforcing a punitive tax collection on the plaintiff that it applies to no one else.

A. The trial court erred by allowing the Town to exceed its Constitutional limits by exercising powers it does not possess.

B. The trial court erred by failing to apply the Goose Creek ordinances in their plain and ordinary meaning by imposing a tax based on gross receipts instead of gross income.

While it is impossible to appeal from a lower court's refusal to grant summary judgment, the arguments articulated here are the positive and negative sides of the same argument. The rules of statutory construction positively determine what the Town can and cannot do. The Constitutional limitation of municipal power is a negative check on municipal power like brakes on a train. Whether this Court analyzes the legal issues under a summary judgment standard for the City or a summary judgment standard for the taxpayer, there are no issues of fact that the Town **defines** gross income correctly but discriminated again the plaintiff by calculating his business tax differently from the ordinance. Goose Creek's ordinance defines gross income:

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,

. . .

The **GROSS INCOME** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission.

§1101.001 DEFINITIONS

It is undisputed that "total revenue" means total "profit," which is the same figure reported by the appellant to the **DEPARTMENT OF REVENUE** and the INTERNAL **REVENUE DEPARTMENT**. It is not an accident that these two government agencies call

themselves "revenue" departments as opposed to "receipts" departments, because taxpayers are taxed on income, not receipts. According to *Black's Law Dictionary*, "revenue" is defined as "Return or yield, as of land; profit, as that which returns or comes back from an investment; the annual or periodical rents, profits, interest or issues of any species of property, real or personal; income of individual, corporation, government, etc. The reason the lower court erred is because it made no distinction between "income" and "receipts," and the two are not the same. This is the legal error that permeates the Order under review.

The reason the lower court made this fundamental error is because it never considered any of the appellant's evidence, especially the affidavit of Professor Gutting at pages 182-188 of the Record on Appeal [page 187 of affidavit]. Professor Gutting gives a complete, cogent, and irrefutable explanation of the misapplication of "receipts" for "income." By way of preview, and as an example of the absurdity of the City's position toward the plaintiff, the Court need only contemplate this simple thought experiment. Under the Town's assertion to this Court, if the appellant bought a house for $100,000.00 and sold it for $90,000.00, the appellant would have "income" of $90,000.00.

Just as there are no issues of fact regarding the discrepancy between the Town's definition and the Town's erroneous application; likewise, there is no issue of fact that the Town's handling of plaintiff's procedure for challenging an improper tax is constitutionally flawed as found by the lower court in the Order under review (discussed separately in Argument II). Thus, there are two components to the appellant's initial challenge:

A) The City's employees ignoring the City's own Ordinance violate the fundamental, Constitutional principle of law that requires a municipality to adhere to state law, and

B) The lower court's refusal to apply the well-settled rule of statutory construction to the Business License Tax Ordinance.

A. The Constitutional Limitation on Municipal Government Authority

Local governments derive their police powers from the state. *S.C. Const.* Art. VIII, § § 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities. S. C. Code § 5-7-30 (1976). This is a recognition that more stringent regulation often is needed in cities than in the state as a whole. *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943). However the grant of power is given to local governments with the proviso that the local law not conflict with state law. *City of Charleston v. Jenkins*, 243 S.C. 205, 133 S.E.2d 242 (1963). A city ordinance conflicts with state law when its conditions, [Page 157] express or implied, are inconsistent or irreconcilable with the state law. *Town of Hilton Head v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662, 664 (1990) (quoting *McAbee v. Southern Rwy. Co.*, 166 S.C. 166, 169-70, 164 S.E.444, 445 (1932)). Where there is a conflict between a state statute and a city ordinance, the ordinance is void. *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).
City of North Charleston v. Harper, 306 S. C.153, 410 S.E.2d 569 (1991)

Whether analyzing the case now before the Court under the principle of Constitutional limits of municipal power (Argument I A) or under the principle of statutory construction (Argument I B), this Court must arrive at the same conclusion by either path of reasoning, and for that reason, appellant treats Arguments A and B in a combined argument, because they are the twin sides of the same argument. The appellant treats the Town's procedural deficiencies in Argument II.

In other words, even though there are no material questions of fact pertaining to either the words used in the Goose Creek ordinance or in the words used by the General Assembly to set the parameters of the municipalities' power to tax, the parties are miles apart on how the Town treated the appellant in this particular case. The lower court erred by overlooking

evidence of animus as the affidavits of Todd Olds, pages 168, 171, 174 and 177 of the record on appeal or the affidavit of Robert Eckert, page 166, or even the Town's own correspondence threatening the plaintiff with jail, page 365, demonstrate. This evidence explains why the town has singled out the plaintiff for disparate treatment, but it is evidence the lower court ignored. The lower court gave evidence of animus no weight—an obvious error of law—as made clear by the U. S. Supreme Court in *Village of Willowbrook v. Olech.* The parties are in agreement that the words used by the Constitution, the State, the I.R.S. and the regulations thereunder, and even the Town's Code of Ordinances are clear and unambiguous, and it is here that the parties find common ground.

The lower court erred in finding that the Town is entitled to summary judgment because the City's Finance Director and Business License Clerk are purposely applying its business license ordinance in violation of the state statute:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances. . . **including the authority to . . . levy a business license tax on gross income**, . . .
> § 5-7-30, S. C. Code, ann (emphasis added)

There is nothing ambiguous or unclear about this statute, and therefore the lower court must apply these terms in their plain and ordinary meaning. Likewise, the Town must conform its tax collection against the plaintiff to only what the State allows it to collect. The evidence in this record demonstrates that the Town has exceeded the limitations imposed upon it by the State Constitution, and the lower court erred in finding there is no question of fact regarding the Town's exceeding its power against the plaintiff. In short, because the enabling statute does not permit the City to impose a tax on gross receipts, the lower court's Order is

controlled by an error of law.

B. The rules of statutory construction require the Town to collect a tax on "gross income."

> "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't. of Revenue*, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6,8 (1993)). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). *Storm M. H. v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012)

Throughout the Order under review, the lower court fails to apply the "clear, definite meaning" of the words used in the state statute and in Goose Creek's ordinances. The lower court incorrectly assumes that Goose Creek can apply any method of calculating a business license tax that it wants without any analysis of the limitations on the taxing authority flowing from the "clear, definite meaning" of the statute. This is a palpable error of law because the power to levy a business license tax is granted and defined by state law and carried out by the adoption of an ordinance by the City Council of Goose Creek. After setting forth the correct statement of law regarding statutory construction, the lower Court holds:

> In Goose Creek's ordinance, the opening line clearly states that gross income shall be the "total revenue of a business." And further states "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." This clearly evidences intent to collect a business license fee on the total sale price of a property without a deduction for the cost of the

property.
Order at page 3, R.O.A. page 3

There are many legal errors contained in this holding. First, the lower court misapprehends the meaning of the word "revenue." Second the lower court mischaracterizes the appellant's challenges. The appellant is not contending he can only be taxed on "net income," which is what a deduction for expenses is. The appellant argues that Goose Creek can only be taxed on "gross income," which is different from "gross receipts." A third error is that the lower court grounds its reasoning on a citation to the *Municipal Association Handbook*: "The City of Goose Creek's ordinance and interpretation is also consistent with the position taken by the *South Carolina Municipal Association* which provides in its handbook. . ." (R.O.A. pages 3-4) This handbook is not controlling and cannot be cited by the lower court as authority. If it could, then this Court would reverse the lower court on that *Handbook* alone because page 14 of the *Municipal Association Handbook* makes clear that the appellant can only be taxed on gross income and not gross receipts:

Gross Income

Basis for Tax

The general statutory basis for levying a business license tax requires it to be measured by gross income. SC Code sections 4-9-30(12) and 5-7-30.

. . .

Gross Income Defined

Gross income may be defined by the license ordinance and generally means all revenue received from the business operation without any deductions for things as cost of goods, overhead, salaries or costs of sale. It should conform to the gross figure reported on the business' federal income tax return. Section 61(a) of the Internal Revenue Code defines gross income as "all income from whatever source derived."

Handbook, page 14 (R.O.A. page 303)

Appellant never challenges the Goose Creek's right to collect a business license tax; the appellant is challenging the way Ron Faretra and Jennifer Althoff misapply the definition of gross income to him. Nowhere is the lower court's misapprehension of Olds' challenge more clear than on page 6 of the Order under review. On page 6 (R.O.A. page 6), the lower court holds:

> In contrast, Mr. Olds advocates an interpretation for local taxes which would result it [*sic*] the merchant paying a municipal business license fee on gross receipts without deduction for the costs of goods sold while the real estate entrepreneur business pays a business license fee only on its net receipts. Mr. Olds' argument that I.R.C. § 61 defines the outer limits of taxation under S. C. Code § 5-7-30 and to Goose Creek's ordinances would produce an absurdly disparate result between real estate businesses and non-real estate businesses.
> R.O.A. page 6

The lower court reverses appellant's position and converts it to a straw man argument. The only argument here is that Goose Creek may tax his gross income, and the definition of gross income is defined by state law. Goose Creek lacks the authority to adopt a different definition specifically tailored to disadvantage Olds. The lower court then compounds its error by holding: "I conclude federal law including I.R.C. § 61 does not provide the definition of "gross income" for purposes of S. C. Code § 5-7-30 or the city of Goose Creek's Business License Ordinance." (R.O.A. page 6) Of course it does! The lower court is wrong because the General Assembly adopts I.R.C. § 61 as the state's definition in §§ 12-6-1110, 1120, S. C. Code, ann.: "Gross income; computation; modifications. South Carolina gross income is computed by making modifications to gross income **provided in the Internal Revenue Code** as follows:" (emphasis added) See § 12-6-1110: "For South Carolina income tax purposes,

gross income, adjusted gross income, and taxable income as calculated under the Internal Revenue Code are modified as provided in this article. . ." (emphasis added) The only sections excluded by the General Assembly are listed in § 12-6-60, S. C. Code, ann. The reason the lower court gets all this wrong is because the lower court gave no weight to the affidavit of Professor Gutting, who explains all this in her affidavit. In evaluating a summary judgment motion, a trial court is not at liberty to ignore evidence.

Appellant never questioned the City of Goose Creek's "intent" in enacting the business license tax ordinance. In fact, most municipalities have one. For a complete history of the origin, development and application of the business license tax, see William J. Quirk, "Nature of a Business License Tax," *S. C. Law Review*, Vol. 32 (1981) In tracing the origin and development of the business license tax, even Professor Quirk notes that the tax is valid only to the extent it does not exceed the granting power of the State. Quoting *Southern Fruit Co. v. Porter*, 188 S.C. 422, 199 S.E. 537 (1938), Professor Quirk writes:

> Any and all ordinances [*sic*] enacted under this section must be in the exercise of the police power. . . . [A]n Act or ordinance imposing a license tax under the police power as a means of regulation is valid, only when it is within the limits of such power and is intended for regulation; otherwise it is invalid, as where the license tax is imposed for revenue purposes, in the guise of a police regulation.

The point is that the appellant never challenged the Town's legal authority to collect a business license tax, and it is erroneous for the lower court to suggest otherwise. As the two 2011 returns side by side demonstrate (R.O.A. page 126), this case involves the real question of whether the Court is going to allow the Town to disadvantage the plaintiff and impose a tax on the plaintiff's gross "receipts" rather than his gross "income." When the Town exceeds its statutory (and Constitutional) limits, it cannot cure the defect by the

expedient of changing definitions the way Humpty Dumpty does in *Through the Looking Glass:*

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
> The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, which is to be master—that's all."

Even though the Town recognizes in its definitions that "receipts" and "income" are distinct things, it uses them interchangeably when applying them to the plaintiff, and, as discussed below, the Town has never identified any other taxpayer subject to the same calculation as applied to the appellant. Moreover, appellant can never discover other returns for comparison because state law protects them. See §§12-54-240, 6-1-120, S. C. Code, ann. The question before the Court is whether the Town possesses that power to disadvantage the appellant and ignore the constitutional/statutory limitation on its power to tax by ignoring the plain and ordinary definition of words. The lower court says the Town can because, according to the lower court, other counties do it that way. The appellant asserts the lower court erred.

The parties agree that Goose Creek has a business license tax ordinance, and the City's taxation of the plaintiff is valid if, and only if, it does not exceed the limits of its legal authority the General Assembly grants to the Town. Thus, here is the entire appeal in a single sentence: Goose Creek's Code of Ordinances defines "gross income" and "gross receipts" differently, yet Ron Faretra and Jennifer Althoff **apply** the terms interchangeably to calculate the plaintiff's tax, and they do so arbitrarily and intentionally to disadvantage the appellant. By state law, the Town of Goose Creek may only collect a tax on **gross income**. The lower court concluded that the Town may disregard state law because it concluded other municipalities ignore state law. Leaving aside the observation that the lower court's

conclusion is based on its view of the weight of the evidence, which is not allowed at the summary judgment stage, there can be no dispute that the Town can only collect the tax in the manner the General Assembly authorizes because Goose Creek is a municipality with authority to exercise only those powers granted by the State. See Article VIII, § 10, *South Carolina Constitution*: "No laws for a specific municipality shall be enacted, and no municipality shall be exempted from the laws applicable to municipalities or applicable to a particular form of government selected by any municipality as authorized by Section 9 of this article." Section 9 requires that "The structure and organization, powers, duties, functions and responsibilities of the municipalities shall be established by general law; . . ." *South Carolina Constitution*, Article VIII, § 9. See: *Dunbar v. City of Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976); *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 484 S.E.2d 104 (1997); *City of North Charleston v. Harper*, 306 S. C.153, 410 S.E.2d 569 (1991); *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965)

Here, the Town of Goose Creek's practice in collecting a tax on "gross receipts" against the appellant exceeds its statutory authority, and the lower court erred in its decision by noting that twenty-seven (27) other municipalities calculate their businesses license tax in the same manner as Goose Creek. Leaving aside the fact that there is no evidence in the record that this is true—other than speculation—the lower court errs by relying upon a common logical fallacy known as the "Two Wrongs Make A Right" fallacy—or in this case, twenty-seven wrongs make a right. Howard Kahane's textbook on Logic, *Logic and Philosophy*, (Wadsworth Publishing Co., Second Ed. 1973), on page 236, explains this fallacy thus:

> A person is guilty of the fallacy **two wrongs make a right** (also called the *tu quoque* fallacy) when he answers a charge of wrongdoing, not by showing that no wrong was committed, but rather by claiming that others do the same thing. The erroneous rationale behind this fallacy is that if "they" do it, so can we.
>
> Thus, in wartime (declared or otherwise), charges that our side is committing atrocities are often answered by the countercharge that the enemy engages in similar or even worse atrocities, as though this somehow absolves us from moral responsibility for our acts.
>
> Kahane, page 236

It is irrelevant what other municipalities do, for if it were not, then the appellant would be entitled to summary judgment by tabulating the greater number of municipalities who collect the tax in the proper manner. Either way, such reasoning stands the summary judgment standard on its head. Moreover, the lower court disregarded the appellant's evidence that the Town audited and recalculated his business license tax after he prevailed on an unrelated dispute over termite repair. This is evidence of the Town's purposeful discrimination against Todd Olds and its intention to disadvantage him. (See R.O.A. page 168 [affidavit Todd Olds]) At summary judgment, the trial court must construe all the facts and the reasonable inferences deducible therefrom in the light most favorable to the party resisting summary judgment.

In addition to ignoring the overwhelming evidence of animus, the lower court also ignored Professor Gutting's affidavit explaining how Ron Faretra and Jennifer Althoff misapply Goose Creek's Business License Ordinance tax to disadvantage the appellant. The lower court gave this evidence no weight, which is an error of law. Instead of considering Professor Gutting's learned analysis, the lower court placed all its reliance in the *Municipal Association Business License Handbook*. (See Order at page 4.) As discussed above, the Municipal Association Handbook carries no weight whatsoever, and yet the lower

court cited it as if it were a controlling document. By contrast, Professor Gutting explains in her affidavit, R.O.A. page 185 [affidavit page 4]:

> Thus Treasury regulation § 1.61-6(a) provides three things relevant to the issue before this court: (1) gross income includes *only* the *gain* from the sale of property, (2) property includes all tangible property, and (3) cross-references IRC § 1001 to calculate the gain from the sale of property.

In her January 18, 2013, affidavit (R.O.A. pages 182-188), Professor Kristin Gutting explains how the Town misapplies its own ordinance to appellant. Professor Gutting does not cite to a handbook; rather, she relies on controlling statutory law, all of which can be understood in its plain and ordinary meaning. The lower court gave Professor Gutting's affidavit no weight whatsoever; in fact, the Order under review does not mention it, which alone is sufficient to require reversal because the lower court is not free to ignore affidavits from a party resisting a motion for summary judgment. Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

Professor Gutting, who teaches "Federal Income Taxation, Civil Tax Procedure, and Partnership Taxation" at the Charleston School of Law (R.O.A. at page 182 [affidavit page 1]) explains in detail that:

- The State authorizes municipalities to level a tax on gross income § 5-7-30, S. C. Code, ann.
- The tax must be based on gross income.

- The tax reported to the Town must match the gross income reported to the State.
- Gross income is defined by § 61 of the *Internal Revenue Code* as "gain from the dealings in property."
- Treasury Regulation § 1.61-6(a) provides that "gross income" means "only the gain from the sale of property" and cross references I.R.C. § 1001 for the formula to calculate gain.
- The State adopted the I.R.C. § 61 definition in §§ 12-6-1110, 1120, and 12-6-60.
- Goose Creek's audit of appellant to increase his tax by taxing "gross receipts" violates the Town's own ordinance, § 110.001 (quoted above on page 6) which defines "gross income."
- Gross receipts does not appear anywhere in the Goose Creek Municipal Ordinances except to be defined as separate from gross income.

All of these correct statements of law are contained in Professor Gutting's affidavit. Any one of them precludes the lower court from granting summary judgment to the Town. The lower court ignored the affidavit, which it cannot do. Professor Gutting concludes her affidavit as follows:

> Thus, for the foregoing reasons, it is my opinion, that Goose Creek is improperly applying its own statute, because gross income as defined under IRC § 61 is the accepted definition of the term, and nowhere in the Goose Creek Code is there a different definition than the well-settled definition provided by IRC § 61. In fact, as discussed above, Goose Creek, indirectly references IRC § 1.61 as the definition of gross income "for business license purposes *shall conform to the gross income reported to the state Tax Commission.* . . ." Goose Creek Code § 110.001 (emphasis added)
>
> In conclusion, when Mr. Olds reports his "gross income" on the sale of his real property, just like the taxpayer in my hypothetical discussed above, he would report the amount of gain calculated under IRC § 1001 as his gross income pursuant to IRC § 61(a)(3). This is true when Mr. Olds reports his income to the federal government, to the state government, and to local governments. Such reporting of gross income is consistent with the underlying fundamentals and policy of IRC § 61 and with the Goose Creek Code. IRC §§ 61(a) (3) and 1001, and the regulations thereunder, specifically describe how to compute and report gross income from the sale of real

property. Conversely, reporting "gross receipts" as "gross income" from the sale of real property conflicts with the fundamental principles of tax and, therefore, would be a deviation from generally accepted practices.
R.O.A. pages 187-188 [affidavit pages 6-7])

In the Order under review, the Order does not take up, let alone analyze any of these correct statements of law, and thus the lower court erred in granting summary judgment for the Town.

As set forth in Professor Gutting's affidavit, the Town of Goose Creek Code of Ordinances requires a business license applicant to certify that information on the license application is true and that the gross income amount reported is accurate. (See Goose Creek Business License Application at page 126 of the R.O.A.) Importantly, the Town states in § 110.008 that an applicant "may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures." § 110.008 of the Municipal Code says:

110.008 REGISTRATION REQUIRED; LICENSE APPLICATION

(B) Application shall be on a form provided by the Finance Director which shall contain the social security number and/or the federal employer's identification number, . . . **Applicants may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures.**
(emphasis added)

Goose Creek's decision to misapply its Ordinance to the Appellant will prove troublesome to him when the Town's' application of "gross income" is inconsistent with the federal and state government's figures. Goose Creek's punitive calculation of plaintiff's business license tax further disadvantages him because the Town's ordinance authorizes it

to disclose the income of licensees to the federal and state revenue services. In addition to requiring proof of gross income as reported on federal tax forms, the Town also retains the authority in § 110.003 that it "may disclose gross income of licenses to the Internal Revenue Service. . ." for purposes such as tax collection and enforcement.

110.003 INSPECTION AND AUDITS

(C) The Business License Inspector, upon approval of the Finance Director, may disclose gross income of licenses to the Internal Revenue Service, south Carolina Department of Revenue and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement. The disclosure shall be for internal, confidential and official use of these government agencies and shall not be deemed public records.

There is no question that the Town intends that gross income is the basis for calculating the business license tax, and yet the Town applies a different calculation to the Plaintiff's business license to Plaintiff's significant disadvantage.

As authorized by state statute, § 5-7-30, S.C. Code, Goose Creek may levy a business license tax on all business transacted in the Town computed as a percentage of **gross income**. To demonstrate the patent absurdity of Goose Creek's reasoning, appellant relies again upon the absurd hypothetical posited above where a taxpayer who buys a house for $100,000.00 and sells it for $90,000.00 has $90,000.00 of gross income. If this Court grants oral argument on this case, it will be interesting to see how Goose Creek will address this hypothetical in oral argument because the Town will have to torture English to explain how losing money is "income." The answer is, of course, obvious. As set forth above on page 16, if Olds buys a house for $100,000.00 and sells it for $90,000.00, he has no income from the sale. He does have $90,000.00 in "receipts," but

as discussed throughout this brief, the tax is levied on income, not receipts. There is at least a genuine issue of material fact that Ron Farertra's and Jennifer Althoff's justification for the imposition of a punitive tax is to retaliate against the plaintiff. At that very least, their application of the tax to Olds is arbitrary and capricious. By statutory definition, "gross income" is not the same thing as "gross receipts." Under the well-settled rules of statutory construction that require that the Town adhere to plain meaning of the General Assembly's statute, neither Faretra nor Althoff can identify any authority for their punitive application of the tax except their desire to get the plaintiff. Thus, the lower court erred when it failed to apply the words used by the General Assembly in their plain and ordinary meaning.

As explained in lucid detail by Professor Gutting in her affidavit (pages 182-188 of R.O.A.), which the lower court erroneously ignored, the State of South Carolina defines gross income for the municipalities in §§12-6-1110, 1120, S. C. Code, ann. In those statutes, the General Assembly adopts the Internal Revenue Service definition of gross income just as set forth in the *Municipal Association Handbook*. As defined in § 61 of the *Internal Revenue Code*, "Gross Income Defined" says:

> **§ 61 "Gross Income Defined**
>
> **(a) General definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> . . .
>
> (3) Gains derived from dealings in property;

When the lower court granted summary judgment for Goose Creek on September 5,

2014, it was clear that the lower court erred in failing to apply the statutory definitions of gross income. Thus, in an effort to refocus the inquiry back to the issue—whether Goose Creek must follow the State's definition of "gross income" or chart its own course, the appellant filed a motion for reconsideration on September 22, 2014, in an effort to crystallize the purely deductive reasoning necessary to resolve the issue. (R.O.A. page 93 [motion for reconsideration]) In the motion for reconsideration, the appellant set forth eight premises of undisputed fact and law as follows:

PREMISE 1: The function of a court in construing and applying a state statute is to enforce the statute as written. *Storm M.H. v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012)

PREMISE 2: Municipal governments are creatures of statute and possess only the powers given to them by the State. *S. C. Constitution*, Article VIII, §§ 7, 9.

PREMISE 3: Municipal governments cannot deviate from the State's pronouncement of law. When a municipal ordinance is at variance with State law, the municipal ordinance is void. *City of North Charleston v. Harper*, 306 S. C.153, 410 S.E.2d 569 (1991); *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965)

PREMISE 4: Municipalities are authorized by the State to collect a Business License Tax. §5-7-30, S. C. Code, Ann.

PREMISE 5: The State of South Carolina authorizes municipalities to impose a Business License Tax **computed on a business's gross income**. §5-7-30, S. C. Code, Ann.

PREMISE 6: The State of South Carolina defines "gross income" by adopting the definition established by the Internal Revenue Code § 61. See § 12-6-1110 ("Modifications of gross, adjusted gross, and taxable income calculated under *Internal Revenue Code*; federal Section 1354 elections), § 12-6-1120 (Gross income; computation; modifications), and § 12-6-50 (listing the sections of the I.R.S. code **not** adopted by the State)

PREMISE 7: § 61 of the *Internal Revenue Code* defines "gross income" as being "gains derived from dealings in property."

PREMISE 8: "Gross Receipts" – "basis" = "Gain." § 1001, *Internal Revenue Code* and

Income = Gain

Once the above premises are admitted—and they are not only correct, but also irrefutable—the conclusion necessarily follows as pure deduction. In short, municipalities must adhere to state law, and they have no independent taxing authority other than that granted by the state. The lower court erred in not applying this fundamental principle of law. In granting summary judgment for the City, the lower court did not mention, let alone analyze or give any weight to the fact that Goose Creek is not free to adopt legal definitions at variance with the State.

Thus, whether this Court halts its inquiry with a Constitutional limitation analysis or goes on to apply the well-settled rules of statutory construction, the outcome is the same. Ron Faretra and Jennifer Althoff exceeded their authority by collecting a tax that is not authorized by federal law, not authorized by state law, and not even authorized by Goose Creek's ordinance. As discussed in the next two arguments, these two employees threatened the appellant with incarceration, terminated his water system, imposed significant financial penalties on him, and prevented him from participating in his own tax appeal. The lower court erred in granting summary judgment for Goose Creek when the evidence is so overwhelming that it collected a tax it has no authority to collect.

ARGUMENT II

The lower court erred in finding that the Town's administrative appeal procedure is flawed but granted the plaintiff no remedy because the outcome was a foregone conclusion.

The argument here is more succinct because there is no disagreement between the

parties or the lower court that the Town failed to provide procedural due process to the appellant. Even the lower court found that the procedure is "unfair" to the appellant:

> However, when the Court examined the record of the appeal, it appears that the appeal was held at a City Council meeting where the City Administrator and the City Finance Director were present. City Council called on the City Administrator and City Finance Director to explain the appeal and the City's position to Council. The City employees obliged. I find that this system is not fair. Either City Council should hear from no one or from both sides, but not just one.
> R.O.A. page 8 [Order page 8]

The lower court then goes on to declare no harm to the appellant because his lawyer submitted a written memorandum of law to the City Administrator on August 5, 2011, when the parties appeared before the City Administrator as the first step in the municipal appeal process. (See R.O.A. pages 220-223 [page 21 of City's memorandum in support of summary judgment]) Thus, when the lower court concludes on page 8 of its Order that the procedure before City Council was "unfair," it also holds that the appellant was not prejudiced. If the procedure is not fair, then the appellant is prejudiced. Had Olds not been excluded from participating, he would have had an opportunity to explain to Town Council that its employees, Faretra and Althoff, were disobeying the City's own ordinance! When Faretra and Harmon excluded Olds from his own appeal, they not only guaranteed the result, but also their act and statements to Council (R.O.A. pages 20-22) proves the vindictive nature of the entire case in the same way the evidence of the Village of Willowbrook's animus infused the Supreme Court's opinion in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). (In the transcript "Faretra" is typed "Fletcher.") Just like in *Village of Willowbrook*, the appellant here is alleging and proving numerous acts of governmental misconduct that violate

his civil rights. The explanation for the City's misapplication of its ordinance is explained by the animosity for the plaintiff. The memorandum submitted to Goose Creek's Town Administrator laid out the plaintiff's complaints of unjust government treatment, including the following: "Thus, in *Owen v. City of Independence, supra*, a municipality's claim that it could assert the immunity of its officers and agents in a § 1983 damages action was rejected since there was no basis for such a right at common law." Had Harmon and Faretra permitted Olds to participate, he would have had an opportunity to correct their misstatements and explain to Council what his position was. Thus, the lower court's Order under review is in error in holding that the issues put before the City were "strictly a legal issue of statutory construction." (R.O.A. page 8 [Order page 8]) When the lower court held: ". . . I find there are no damages here from the absence of Mr. Olds from the hearing," (R.O.A. page 9), this statement is clearly erroneous because by excluding Mr. Olds from his own case, the Town Council prevented the opportunity for the legal issues to be resolved. By refusing to hear from Mr. Olds, the Town Council never heard how its employees were misapplying the statute and exacerbated the due process and equal protection claims.

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [citations omitted]
> *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (ordinance providing for hearing after seizure declared unconstitutional)

Here, the lower court found that the Town's administrative appeal process that excludes the appellant is deficient but it found no remedy because "neither the appearance

of Mr. Olds or his exclusion would have any impact on this appeal." (R.O.A. page 8, Order at page 8) The transcript of the September 27, 2011, hearing is in the record on appeal at pages 20-22, and even the Town Council itself instinctively realized what it was doing was unfair because it attempted to argue **for** the appellant to create an appearance of fairness:

> Uh, well then let me try to be an advocate for Mr. Olds. Uh, well if I was an advocate for Mr. Olds I would ask you some questions regardless whether they were misleading or not.
> R.O.A. page 21, transcript page 2

The Town Administrator's characterization of Mr. Olds as "misleading" is laughable, especially where the record reveals that Goose Creeks own lawyer agrees that I.R.C. § 61 controls the definition of gross income. In his August 30, 2011, memorandum to Dennis Harmon, Goose Creek's counsel writes: "Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income." (R.O.A. page 224 [August 30, 2011 memo]) Yet, the lower court was not troubled enough by this patently unfair administrative process to fashion a remedy. The simple remedy is to remand the case to the Town Council with instructions to obey the law.

In short, the lower court's legal analysis is not supported by any case law or any logical foundation. In essence, the lower court held that because Olds would have lost anyway, he had no right to appear in his own defense. Whether Mr. Olds would or would not have prevailed before Town Council is not a factor in considering a violation of procedural due process. Every citizen has a right to participate in legal matters involving him or her, and it is error for the lower court to conclude that the Town gets a pass on its responsibility because the appellant stood no chance of prevailing.

ARGUMENT III

The trial court erred in granting summary judgment when there is abundant evidence in the record to demonstrate that the Town's employees violated the appellant's constitutional rights and singled him out for disparate and arbitrary treatment in retaliation for the appellant prevailing against the Town on an unrelated dispute.

The plaintiff made claims against the Town for violation of his civil rights—equal protection and substantive due process, for abuse of process and civil conspiracy regarding the termination of his water supply, and for handling his administrative tax appeal at a special Town Council meeting without proper notices as required by the *South Carolina Freedom of Information Act*. (The plaintiff also requested an award of attorney's fees, but of course, the issue of attorney's fees does not arise unless the plaintiff is a prevailing party. Since the issue of attorney's fees does not arise until the appellant is a prevailing party, the appellant does not brief that issue here because it has not arisen yet.)

Since the method of computing appellant's tax burden is determined by the application of clear, unambiguous state statutes, Faretra's and Althoff's extraordinary treatment of appellant naturally raises the question: why? The record explains when and how and why the Town initially took notice of the appellant:

> I have been involved with this dispute with the City of Goose Creek approximately since December 2010. Prior to business license tax controversy that gave rise to this lawsuit, I had a previous disagreement with the City over the City's interpretation of an internal memorandum published by the City. The City put a stop work Order on me when I was making repairs to a home I owned. The City also turned off my water service. After numerous discussions, the City finally agreed with me and allowed me to continue work. The experience had the unfortunate consequence of making me known to the City, in particular Ron Faretra and Jennifer Althoff, who have since harassed me.
>
> After I satisfactorily resolved the repair dispute, I received shortly thereafter—around May of 2011—a notice from the City that it had audited my business license returns and informed me that I had not properly reported my gross income. This

> touched off the present dispute that led to the City doing various things that are not ordinary in the course of government because I questioned the interpretation of a City ordinance. For example, Ron Faretra and Jennifer Althoff drove over to my property and entered it and harassed a friend of mine. (See the affidavit of Robert Eckhardt, which is already on file.) Thereafter, the City once again, denied me water, and I recently discovered that Mr. Faretra and Ms. Althoff directed the Department of Public Works to shut off my water and lock a meter. Since I have had a disagreement with the City, rather than address the substance of the disagreement, Ron Farerta and Jennifer Althoff tell me that if I do not capitulate, they will shut off water to all properties. Throughout the controversy, the City has treated me in a rude and unprofessional matter. As to the tax dispute, I will leave that analysis to the Court and its review of the City's ordinances and the affidavit of Professor Gutting.
> R.O.A. pages 174-176 [Supplemental Affidavit of Todd Olds filed Jan. 16, 13])

The initial letter from Jennifer Althoff, dated May 23, 2011, and quoted above at page 5 is an example of intentional discrimination against the appellant, and it is the type of arbitrary discrimination not authorized by the governing body. When appellant resisted paying the **disputed** tax, the Business License Clerk, Jennifer Althoff, threatens the appellant with all kinds of bad results, including incarcerating him for up to 30 days for each day he fails to pay the disputed amount! No one in this dispute challenges the Town's right to collect a business license tax, but employees using their badges to give the impression that they are police officers, denying the appellant the right to water, and threatening the appellant with what amounts to a lifetime sentence are all examples of the Town's employees overreaching their authority to harass the appellant and deny him fundamental civil rights. The U. S. Supreme Court found much less aggressive action gave rise to a claim for violation of equal protection in *Village of Willowbrook, supra.* The lower court's analysis of the history of the business license tax is irrelevant. Nothing in state or municipal law allows Mr. Faretra and Ms. Althoff to misuse their authority to harass and intimidate the appellant and his friends. It is an affront to due process and equal protection for the Town's employees to conduct

themselves in the manner demonstrated by this record.

The lower court (and the City) turn a blind eye to the plaintiff's constitutional/tort causes of action. The City's employees intentionally discriminated against the plaintiff by misapplying its own code of ordinances, as adopted by the governing body of the City, involving its business license tax and its appeals hearing process. City Council's legislative function cannot be delegated to any individual, and to do so is discriminatory and violation of equal protect and due process:

> In addition the Due Process and Equal Protection Clauses of the Fourteenth amendment prohibit the delegation of legislative functions to private person or associations. *Prudential Property and Gas Co. v. Insurance Comm. of S. C. Dept. of Ins.*, 534 F.Supp. 571, affirmed 699 F.2d 690 (4th Cir. 1983). As our Supreme Court recognized in *Ashmore v. Greater Grville. Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88, 96 (1947), an improper delegation to a private group or association is discriminatory to the degree of violation of the state Constitution, Art I, Sec. 5, which contains our 'equal protection' and 'due process' clauses. This Office likewise has concluded that a governmental agency may not delegate its functions to private entitles without specific legislative authority. See. Op. Atty. Gen., April 4, 1996 (M.U.S.C. may not delegate operation of its hospital to private, for profit corporation.)
> S. C. Attorney General Opinion December 1998 to Honorable James S. Klauber

Here, the City Administrator and the Finance Director contend that its business license fee is calculated differently for owners or real estate, like the plaintiff, but city employees cannot make a distinction between taxing different businesses or the definitions used—only the City Council possesses that legislative authority. Likewise, only City Council has the legislative power to differentiate as to different rates of taxation. Faretra and Althoff disregarded the City's business license ordinance in miscalculating the plaintiff's business tax on gross receipts when the ordinance specifies gross income is the only basis. Furthermore, the City disregarded its own appeal process when it invited the City's Administrator and its

Finance Director to add testimony at the appeal hearing—even asking them to speak for the appellant! According to the City's own ordinance, the appeal is based on a close record with no allowance for additional argument or testimony. As argued above, clearly the City violated the appellant's procedural due process, but what the lower court missed was that the City also violated the plaintiff's substantive and equal protection rights as well. The City disadvantaged the plaintiff by its actions, and the plaintiff is further damaged by the individual actions of Ron Faretra and Jennifer Althoff, who acted beyond the scope of their official duties when they took it upon themselves to impose a tax on the plaintiff through an improper delegation of power that is reserved only for the governing Council. Further, these individuals falsely imprisoned the plaintiff's friend, threatened the plaintiff with incarceration for not paying the unlawful additional "tax," and took it upon themselves to terminate his water service. The threat of criminal process is the unlawful use of criminal process to for an ulterior purpose. At the appeal before City Council, if the plaintiff had been allowed to speak as the City Administrator and the City Finance Director were allowed to speak, the plaintiff could have testified about the actions of the employees, Ron Faretra and Jennifer Althoff. Importantly, far from being "strictly" a matter of statutory construction that only a court could decide, in fact, City council could have remedied the plaintiff's causes of action regarding the illegal misapplication of its ordinance, and the City would have eliminated, at least, the procedural due process violations that occurred when the City disobeyed its own appeals hearing ordinance.

Whether analyzing the Town's conduct under due process, equal protection, abuse of process, or civil conspiracy, it is at least a genuine issue of material fact that Faretra and

Althoff misused their authority to single out the appellant for harsh and unlawful treatment. At page 7 of the Order under review, the lower court finds no evidence of an equal protection violation because the City's Business License Clerk gave her opinion that she believes no one else is being treated dissimilarly. As the Supreme Court made clear in *Village of Willowbrook, supra*, where a citizen makes allegations of disparate treatment, such allegations give rise to a colorable claim of denial of equal protection. Her opinions are not facts, and it is well within a jury's province to find Ms. Althoff less than credible, especially where she demonstrated a willingness to use the City's criminal process against Olds for not paying a disputed tax. (See her May 23, 2011, letter at page 213 of the R.O.A. and quoted above at page 5.) Even though the Town says it is treating appellant like any other taxpayer, the record demonstrates that Mr. Faretra and Ms. Althoff are retaliating against him through the business license tax audit and through the exercise of their authority—both in and outside their scope of employment—because he prevailed in a previous and unrelated dispute, and they are out to teach him a lesson. A jury could find them both guilty of overstepping their authority in threatening the appellant with jail, falsely imprisoning his friend, turning off his water and calculating his tax in a way not permitted by their own ordinances. The lower court erred in ignoring the proof in this record supporting plaintiff's allegations of serious governmental misconduct.

It is clear that neither Mr. Faretra as the Town's "Finance Director" or Jennifer Althoff as the Town's "Business License Clerk" have the authority to terminate utility service. They have no authority to pretend to be police officers and hold a citizen against his will. (R.O.A. page 166 [Eckhart affidavit]) Faretra and Althoff's conduct in this case is outrageous, and yet

the lower court granted summary judgment for the Town across the board based on the lower court's conclusion that the only issue before the court was one of statutory construction. (The parties agree that the construction of § 5-7-30 is a question of applying the rules of statutory construction cited above on page 8.) However, the principles of statutory construction do not shield a municipal government whose employees exceed their governmental power to harass and intimidate citizens:

> . . . Section 1983 is akin to tort law and that determining damages pursuant to Sections 1983 is governed by principles of the common law of torts, with the hallmark of these principles being one of compensation for actual insure. [citation omitted] In describing the types of injury for which compensatory damages may be recovered pursuant to Section 1983, the *Stachura* Court observed that "out-of-pocket loss and other monetary harms [and] impairment of reputation . . ., personal humiliation, and mental anguish and suffer could be awarded. [citation omitted] After explaining that damages for emotional distress can be recovered under Section 1983, the Court reaffirmed *Carey* by stating that "the basic propose of Section 1983 damages is 'to compensate persons for injuries that are caused by the deprivation of constitutional rights,'" id. (quoting *Carey*, 435 U.S. at 254), and to receive compensatory damages, a plaintiff's damages must be "grounded in terminations of plaintiffs' actual losses," id at 307. Hence *Stachura* reaffirmed the holding that the purpose of Section 1983 is to compensate a plaintiff whose constitutional rights have been violated; to recover compensatory damages for such violations, a plaintiff must suffer actual, demonstrable injury.
> *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996)

Under South Carolina law, a plaintiff may recover both actual and punitive damages for the torts of abuse of process and civil conspiracy; however, as argued above, the lower court never considered the plaintiff's evidence because it erroneously concluded that the plaintiff could not overcome the bar of statutory construction. This is a palpable error of law. Even though the parties agree that the rules of statutory construction govern the application of § 5-7-30 to Goose Creek's Business License Tax, this area of agreement does not prevent the appellant from seeking redress for the Town's tortuous conduct. The only reason courts

exist is to provide remedies to individuals who demonstrate they have suffered a legal wrong. "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or excusive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). Here, the level of animosity displayed by Goose Creek's employees, Finance Director, Ron Faretra and Business License Clerk, Jennifer Although, is extraordinary. Here, Faretra and Althoff, broke into the plaintiff's property, detained his friend, interrogated his friend, shut off his water, and then told him he could avail himself of the administrative appeal, which involves:

- Appealing Ron Faretra's decision to the Town Administrator, who is Ron Faretra' s supervisor.
- Appealing the Town Administrator's decision to Town Council without participation by the appellant.
- His appeal to Town Council is then handled by the Town Administrator, Dennis Harmon, without the appellant's participation. (See Municipal Ordinance § 110.016 at page 136 of R.O.A., transcript of September 27, 2011, hearing at pages 20 -22:

> "Mr. Mayor I read the packet that we receive on this appeal and it really stressed out what the state is saying and also what your ordinances say about uh what's involved in this and uh, so I really don't see any connection on the letter that we received from Mr. Olds concerning why he shouldn't be require to pay the amount that, the four hundred and some dollars that is still owed on, on this appeal.
>
> Uh, well then let me try to be an advocate for Mr. Olds. Uh, well if I was an advocate for Mr. Olds I would ask you some question regardless whether they were misleading or not. . . .
>
> Dennis Harmon presenting the case on September 27, 2011 to Town Council

In addition to the foregoing procedural violations, the record reveals an extraordinary degree of personal animus for the Appellant manifested by the unlawful combination of Ron Farertar and Jennifer Althoff to deny to appellant his fundamental rights to government services.

Following the repair dispute—on which the appellant prevailed, the Town began by auditing the appellant's business license return and then:

- Ron Faretra and Jennifer Altoff traveling multiple times together to Appellant's properties.
- Ron Faretra and Jennifer Altoff travelled to plaintiff's property and impersonating police officers to intimidate plaintiff. R.O.A. page 166 [Eckhardt affidavit]
- Ron Faretra and Jennifer Altoff placed a padlock on plaintiff's water supply R.O.A. pages 171, 70 [Olds Supplemental Affidavit, Amended Complaint]

Whether the Court evaluates these acts as violations of the appellants right to substantive due process, or equal protection or as acts of a civil conspiracy or abuse of process, the classification of violation is not important at the summary judgment stage when all the plaintiff has to demonstrate is the existence of genuine issues of material fact as to whether the Town did or did not single him out for particular punitive action. The lower court gave this evidence no weight.

In 1939, the Supreme Court upheld a criminal conviction against a citizen who refused to pay a "sanitary tax," which the court characterized as an inspection fee rather than a tax. *Town of Marion v. Baxley*, 192 S.C. 112, 5 S.E.2d 573 (1939) Here, the appellant paid his business license tax on gross income when due and only challenged the right of the Town to collect a tax on gross receipts. There can be little doubt that a municipality incarcerating citizens for challenging an overpayment of disputed taxes would violate Article I § 19. However as this record shows, the Town threatened just that and then proceeded to lock appellant's water meter, an act that is not authorized by any Town ordinance or state law.

Even though the Town's withholding water was mooted by its voluntary removal of the padlock, this record contains an abundance of evidence of animus, which the lower court refused to consider. All of this evidence shows that the plaintiff created genuine issues of material fact that Ron Faretra and Jennifer Althoff were on a course to harass and intimidate the plaintiff in unlawful ways. This evidence of animus supports the plaintiff's tort causes of action in his amended complaint, including civil conspiracy.

Like the Fourth Circuit in *Price*, when our Supreme Court has evaluated such governmental misconduct, it held that a plaintiff must demonstrate something more than "run-of-the-mill" government action:

> Moreover, Appellant has failed to produce any evidence that the denial of its rezoning petition was motivated by discriminatory goals. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 566, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (Breyer. J, concurring) (noting that the distinguishing factor between "run-of-the-mill zoning cases [and] cases of constitutional right" is the presence of a factor demonstrating "'vindictive action,' 'illegitimate animus' or 'ill will'"); *Whaley*, 337 S.C. at 576, 524 S.E.2d at 408 ("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." (emphasis in original)); *Butler v. Town of Edgefield*, 328 S.C. 238, 250-51, 493 S.E.2d 838, 845 (1997) (plaintiff did not establish Equal Protection claim where he failed to allege or set forth any facts which could establish purposeful or intentional discrimination). Accordingly, we affirm the grant of summary judgment with respect to the equal protection claim. *Dunes West Golf Club v. Mt. Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013)

Just as the lower court ignored Professor Gutting's affidavit on the statutory construction issues, the lower court ignored the plaintiff's evidence of "ill will." It did not analyze or even mention the four affidavits in the record that attested to the Town's treatment of the plaintiff. The plaintiff's September 22, 2014, Motion for Reconsideration

(R.O.A. page 93) says in applicable part: "The Court does not consider or give any weight to the Plaintiff's numerous affidavits of animus, including, but not limited to, the affidavit of Robert Eckhart, which states in applicable part:

> While I was there putting trash in plastic bags, two City of Goose Creek employees showed up at the residence and confronted me. I had no idea who they were. One of them showed me a badge, and I assumed that he was a police officer. Later on, I found out that the two people who showed up were Ron Faretra and Jennifer Althoff. Mr. Faretra and Ms. Althoff detained me for somewhere between one and half and two hours. They continued to ask me questions over and over, and were aggressive and mocked my answers. They made it clear that I was in a lot of trouble, and up until the very end of the meeting, I thought that one or both of them were Goose Creek Police Officers. I now know that they are not police officers, but while we were there, they led me to believe that they were law enforcement authorities and I was not free to leave.
> (R.O.A. page 166)

This is powerful testimony, and yet the lower court gave it no weight. This is an error of law that requires reversal because it is evidence of "vindictive action, illegitimate animus or ill will." By refusing to consider the evidence, the lower court committed an error of law, and this error of law requires reversal.

CONCLUSION

The lower court failed to consider the appellant's evidence in the light most favorable to him as the party resisting summary judgment. The lower court never considered the Constitutional limitation on a municipality's ability to tax income nor did it apply the rules of statutory construction that required it to apply the words in the statute in their plain and ordinary meaning. Rather, it substituted its interpretation of the applicable state statutes

instead of applying the clear an unambiguous meaning. The lower court never gave any consideration to the appellant's evidence of animus, and even though the lower court found the Town's administrative appeal procedure to be flawed, it granted the appellant no relief. The appellant respectfully requests that this Court reverse the entry of summary judgment and remand the case to the lower court with instructions to consider the appellant's motion for summary judgment on the Constitutional/statutory construction claim and to place the case on the jury roster for disposition on the appellant's constitutional and conspiracy claims.

Respectfully submitted,

September 9, 2015

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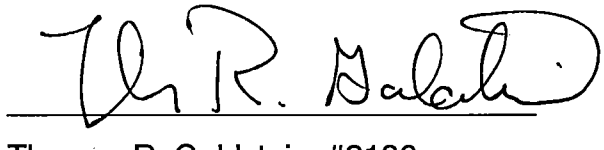
CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules.*



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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

Todd Olds..... Plaintiff,

vs.

City of Goose Creek ..... Respondent,

of whom

Todd Olds is the..... ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on September 10, 2015, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

September 10, 2015

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