

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

Case No. 2011-CP-08-2814
Court of Appeals Appellate Case No. 2014-002393
Opinion No. 5454

Todd Olds..... Petitioner,

vs.

City of Goose Creek..... Respondent,

**APPENDIX
VOLUME I**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Todd Olds, Appellant,

v.

City of Goose Creek, Respondent.

Appellate Case No. 2014-002393

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5454
Heard June 6, 2016 – Filed November 16, 2016

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger &
Goldstein, PA, of Charleston, for Appellant.

Timothy Alan Domin, of Clawson & Staubes, LLC, of
Charleston, for Respondent.

SHORT, J.: Todd Olds appeals the circuit court's order affirming a decision of the Goose Creek City Council regarding the computation of gross income under the business license tax ordinance of the City of Goose Creek (the City). On appeal, Olds argues the circuit court erred in finding the City (1) was not exceeding its authority under the state constitution by imposing a business license tax on the sale price of real property and (2) was properly applying its business license tax ordinance. Olds also appeals the circuit court's grant of summary judgment as to his claim against the City for a violation of procedural due process, arguing the circuit court erred in finding the City's appeal procedure was unfair but not

granting Olds a remedy. Finally, Olds appeals the circuit court's grant of summary judgment as to various claims he alleged against the City, arguing evidence demonstrated City employees violated his constitutional rights and singled him out for disparate and arbitrary treatment. We affirm the circuit court on all issues.

FACTS/PROCEDURAL HISTORY

The City collects a business license tax on persons doing business within the City limits. The tax is computed according to the business's gross income from the preceding year. This case arises out of Olds's dispute with the City as to the meaning of gross income under its business license tax ordinance.

Olds is engaged in the business of buying and selling real property. In January 2011, Olds filed an application to renew his City business license and reported actual gross receipts for 2010 of \$58,432.46.¹ Based on this information, Olds calculated his 2011 business license tax to be \$460.40, and he paid this amount to the City. In May 2011, City Business License Inspector Jennifer Althoff sent Olds a notice, informing him of a deficiency in his business license payment. Althoff claimed Olds failed to report "revenue" from the sale of real property located at 123 Evergreen Magnolia Avenue in Goose Creek. Althoff explained Olds should have included the sale price of the property as revenue on his 2011 business license renewal application. Accordingly, Althoff claimed Olds underpaid his business license tax by \$468. Olds appealed this decision to City Finance Director Ron Faretra, then to City Administrator Dennis Harmon, and eventually to the City Council.

In anticipation of the City Council hearing his appeal, Olds submitted a memorandum of law in support of his appeal. Prior to reviewing Olds's appeal, the City informed Olds that pursuant to the relevant ordinance, the appeal would be reviewed without further oral argument or presentation of evidence. During the appellate hearing, City officials presented a brief summary of the issue to the City Council and answered questions from council members. Olds attended the hearing; however, neither he nor his attorney was allowed to actively participate. The City Council affirmed the City Administrator's decision.

¹ The City's business license renewal form uses the term "actual gross receipts," rather than "gross income." However, the form also includes a section where the applicant certifies he or she has accurately reported the business's "gross income."

On October 12, 2011, Olds filed a complaint against the City in the Berkeley County Court of Common Pleas. Olds later amended his complaint, adding Althoff, Faretra, and the City Department of Public Works as defendants. In his amended complaint, Olds listed his first cause of action as "Appeal from City Council—substantive/procedural due process." Olds asserted additional claims against the City for (1) violation of equal protection; (2) violation of procedural due process; (3) abuse of process; (4) violations of 42 U.S.C. § 1983 and Article I § 22 of the South Carolina Constitution; and (5) violation of the South Carolina Freedom of Information Act. Olds also included a civil conspiracy claim against Faretra and Althoff and a breach of contract claim against the City's Department of Public Works.

On August 31, 2012, while the case was pending in circuit court, Olds moved for an injunction, requesting the circuit court order the City to turn on water service at a home he owned, located at 834 North Aylesbury Road. Olds alleged the City was withholding water service in an attempt to force him to capitulate to the City's position in the 2011 business license dispute. In support of his motion, Olds submitted an affidavit from himself, explaining the City initially refused to supply water to the property until he paid his 2012 business license tax based on gross sales from 2011. Olds further explained that after he paid this tax under protest, the City still refused to supply water service based on an alleged underpayment of his 2011 business license tax. Olds also submitted an affidavit from Robert Eckhardt, who claimed that while picking up trash at the home one day, he was "detained" by Faretra and Althoff and questioned about how much Olds was paying him and whether he had a business license. The circuit court denied the motion.

On January 16, 2013, Olds moved for summary judgment on the issue of liability on the grounds that (1) the City had denied him due process by not allowing him to appear and be heard in the appeal to the City Council and (2) the City was improperly attempting to levy a business license tax upon his gross receipts, rather than his gross income. In support of his motion, Olds submitted a supplemental affidavit describing his disagreement with the City. In the affidavit, Olds explained that in 2010 he had a dispute with the City regarding repairs he was making to a home he owned. Olds stated that shortly after resolving the repair dispute, he received the City's notice alleging he had incorrectly reported his gross income on his business license renewal application. Olds claimed the City had denied him water service and Faretra and Althoff threatened to "shut off water to all properties" if he did not capitulate to the City's position in the business license dispute. Olds also submitted an affidavit of Kristin Balding Gutting, a professor of

tax law at the Charleston School of Law. In her affidavit, Professor Gutting opined the City was incorrectly applying its business license tax ordinance by levying the tax on the sale price of the homes sold by Olds, rather than his gain.

Subsequently, the City moved the circuit court to hear Olds's appeal from the City Council and for summary judgment as to Olds's other claims. In support of its motion, the City submitted affidavits from Harmon and Faretra. Both Harmon and Faretra explained it is the City's policy to not initiate water service if a business does not have a business license or has failed to pay its business license tax. However, they explained the City will not shut off existing water service in these instances. Faretra also claimed the City had discovered Olds did not report any income from the 2010 sale of a home located at 100 Spalding Drive and stated the City will not provide Olds with new water service until his past due business license taxes are paid in full.

The circuit court affirmed the City Council's decision regarding the meaning of gross income under the ordinance and granted the City summary judgment on Olds's other claims. As to Olds's procedural due process claim, the circuit court found it was unfair for the City to allow its employees to participate in the appellate hearing but not allow Olds to participate. However, the circuit court found Olds was not prejudiced by this process because the issue was one of statutory construction and the issue was preserved for appeal. The circuit court suggested that in the future, the City Council allow persons appealing the City Administrator's decisions to participate in the appellate hearing or review the decision without hearing from either side.

The circuit court also granted summary judgment to the City on Olds's other claims. The circuit court found evidence showed the City was applying the business license ordinance uniformly and not taxing Olds differently from any other business. Additionally, the circuit court found that under the Tort Claims Act, Olds was barred from asserting any tort claim based on the City's assessment of the business license tax. Olds filed a motion for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

This appeal consists of a review of the circuit court's decision affirming the decision of the City Council and the circuit court's order granting the City summary judgment as to Olds's other claims. As to the circuit court's decision affirming the City Council, the issue on appeal concerns the construction of a state

statute and a city ordinance. Accordingly, this court is free to decide this issue without any deference to the circuit court. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The issue of statutory interpretation is a question of law for the court."); *id.* ("We are free to decide questions of law with no deference to the trial court.").

We review Olds's other issues under the standard of review applicable to appeals from a grant of summary judgment. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

I. GROSS INCOME AND THE BUSINESS LICENSE TAX

Olds argues the circuit court erred in affirming the City Council's decision concerning the meaning of gross income under the City's business license ordinance because (1) the City exceeded its authority under the South Carolina Constitution by levying its business license tax on Olds's gross receipts and (2) the plain language of the ordinance imposes a tax on gross income, not gross receipts. We disagree.

"The cardinal rule of statutory construction is that courts will ascertain and effectuate the intent of the lawmaking body." *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000).

Section 5-7-30 of the South Carolina Code (Supp. 2015) grants municipalities the power to "enact regulations, resolutions, and ordinances, not inconsistent with the [c]onstitution and general law of this [s]tate." This statute describes various powers possessed by municipalities, including the power to "levy a business license tax on gross income." *Id.* The statute does not define gross income.

Furthermore, gross income is not defined anywhere within Title 5 of the South Carolina Code, which provides the laws governing municipal corporations.

Olds first argues the City has exceeded its authority under our state constitution by levying a business license tax on the sale price of real property. Olds contends the City's authority to levy a business license tax is limited by the meaning of "gross income," as that term is used in section 5-7-30. Olds further asserts gross income under section 5-7-30 carries the same meaning as gross income under the South Carolina Income Tax Act, which provides that South Carolina gross income is computed by making certain modifications to gross income computed under the Internal Revenue Code (IRC). S.C. Code Ann. § 12-6-1120 (2014). None of the modifications required to compute South Carolina gross income are relevant in Olds's case, and both parties agree that under the IRC, gross income on the sale of real property is equal to the seller's gain. *See id.*; I.R.C. § 61(a)(3) (2012) (explaining gross income includes "[g]ains derived from dealings in property"); Treas. Reg. § 1.61-6(a) (2015) ("Generally, the gain is the excess of the amount realized over the unrecovered cost or other basis for the property sold or exchanged.").

We find the City's power to levy a business license tax is not limited by section 5-7-30. As our supreme court has explained, "the broad grant of power stated at the beginning of [section 5-7-30] is not limited by the specifics mentioned in the remainder of the statute." *Hosp. Ass'n of S.C., Inc. v. Cty. of Charleston*, 320 S.C. 219, 227, 464 S.E.2d 113, 118 (1995). "The only limitation on the broad grant of power to municipalities in [section] 5-7-30 is that the regulation, resolution, or ordinance may not be inconsistent with the [c]onstitution and general law of this [s]tate." *Id.* Olds has not set forth an argument explaining how the ordinance is inconsistent with our state constitution or other state law. Accordingly, our inquiry must focus on whether the City is properly applying its own ordinance.

For the purpose of calculating the applicable business license tax, the City defines gross income as follows:

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.

Goose Creek City Code § 110.001.

Similar to his argument regarding section 5-7-30, Olds contends gross income under the ordinance is the same as gross income under the IRC. Olds asserts the City is misapplying its ordinance by levying its business license tax on the sale price of real property rather than the gain. We disagree.

"The 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, 142-43, 378 S.E.2d 606, 608 (Ct. App. 1989) (quoting *Alexander v. Alexander*, 158 F.2d 429, 430 (10th Cir. 1946)). The ordinance in this case defines gross income as "[t]he total revenue of a business, received or accrued, for one calendar year" Black's Law Dictionary

defines "revenue" as "[i]ncome from any and all sources; gross income or gross receipts." *Revenue*, *Black's Law Dictionary* (10th ed. 2014).

Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission² and that gross income may be verified by the inspection of state and federal tax returns, we find the City intended to define gross income for business license tax purposes as the total revenue of the business. This is consistent with how our supreme court has historically defined gross income in the context of business license taxes. *See Columbia Ry., Gas & Elec. Co. v. Jones*, 119 S.C. 480, 494, 112 S.E. 267, 272 (1922) ("Gross income means the total receipts from a business before deducting expenditures for any purpose."). Applying the ordinance to the facts of the instant case, we find the City intended the business license tax to apply to the total sale price of real property rather than merely the business's gain. Accordingly, we affirm the circuit court on this issue.³

II. PROCEDURAL DUE PROCESS

Olds also appeals the circuit court's grant of summary judgment as to his procedural due process claim, arguing the circuit court erred in finding Olds was not entitled to a remedy for a violation of due process after declaring the City's administrative appeal procedure flawed and recommending the City amend its procedure. Olds contends he was prejudiced by the City Council allowing City employees to present the City's position in the appellate hearing but not allowing him to present his case. We disagree.

² The State Tax Commission is now known as the South Carolina Department of Revenue. We note the standard income tax forms from the South Carolina Department of Revenue do not include a space for gross income to be reported.

³ Olds also contends the circuit court erred in deciding this issue by ignoring (1) evidence of animus that exists between Olds and City employees and (2) Professor Gutting's affidavit. We find any animus that may exist between Olds and City employees is irrelevant in determining the meaning of gross income under the ordinance. As to Professor Gutting's affidavit, the circuit court properly disregarded the affidavit because it was nothing more than a legal argument. *See Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) ("In general, expert testimony on issues of law is inadmissible."); *id.* at 66-67, 580 S.E.2d at 437 (finding the trial court properly refused to consider an affidavit that was a legal argument as to why summary judgment should be denied).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." *Id.* "Rather, due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 172, 656 S.E.2d at 350. "To prevail on a claim of denial of due process, there must be a showing of substantial prejudice." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008).

The circuit court found the City Council's appellate procedure unfair; however, it found Olds was not prejudiced because the issue was one of statutory construction and Olds's position was fully preserved by the filing of his brief. We agree with the circuit court. The central issue of Olds's appeal to the City Council was the meaning of "gross income" as that term is used in computing Olds's business license tax under the applicable city ordinance. This is a question of law, which the circuit court reviewed without any deference to the City Council's decision. *See Sloan*, 380 S.C. at 534, 670 S.E.2d at 667 ("The issue of statutory interpretation is a question of law for the court."); *id.* ("We are free to decide questions of law with no deference to the trial court."). Because the circuit court was able to review this issue without any deference to the City Council's decision, Olds suffered no prejudice from the procedure used by the City Council in reviewing Olds's appeal. Furthermore, as noted by the circuit court, Olds was able to submit a written memorandum to the City Council.

Olds also raised an issue to the City Council regarding the City's decision to withhold water service. Olds was able to raise this issue again in circuit court through various claims; therefore, the City Council's procedure did not prejudice Olds as to this issue. Accordingly, the circuit court properly granted summary judgment. *See Olson*, 379 S.C. at 69, 663 S.E.2d at 504 ("To prevail on a claim of denial of due process, there must be a showing of substantial prejudice.").

III. DISPARATE AND ARBITRARY TREATMENT

Olds further argues the circuit court erred in granting summary judgment because evidence showed the City singled him out for disparate and arbitrary tax treatment and shut off the water supply to his properties in an attempt to force him to capitulate to the City's position in the business license tax dispute. We disagree.

First, we note Olds does not clearly identify the causes of action to which this issue applies. His stated issue on appeal refers to his constitutional rights; however, in his argument, Olds also discusses some of his other claims that are not based on a violation of any constitutional right. In his brief, Olds writes:

Whether the Court evaluates [the acts of Faretra and Althoff] as violations to the appellant[']s right to substantive due process, or equal protection or as acts of a civil conspiracy or abuse of process, the classification of [the] 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 [City] did or did not single him out for particular action.

In his reply brief, Olds even suggests he intended this issue to relate to causes of action not mentioned in his argument under this issue in his appellant's brief.⁴ Regardless of Olds's failure to clearly identify the causes of action to which this issue relates, we find there was no genuine issue of material fact regarding Olds's allegation that the City treated him differently from other similar businesses. Olds did not present any evidence to the circuit court to support this allegation. Accordingly, we affirm the circuit court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, the circuit court's order is

⁴ For example, in Olds's reply brief, he contends it was unnecessary for him to set forth an argument regarding the circuit court's grant of summary judgment as to his breach of contract action because "[i]t is not a separate claim, but rather part of the same transaction that forms the plaintiff's claim for abuse of process [and] civil conspiracy."

AFFIRMED.

HUFF and THOMAS, JJ., concur.

The South Carolina Court of Appeals

Todd Olds, Appellant,

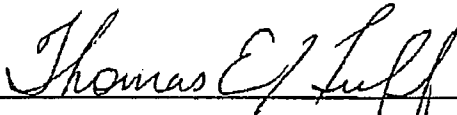
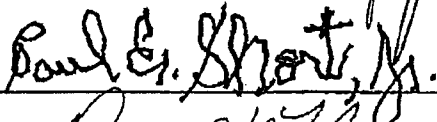
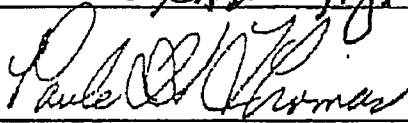
v.

City of Goose Creek, Respondent.

Appellate Case No. 2014-002393

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	J.
	J.
	J.

Columbia, South Carolina

cc:

Thomas R. Goldstein, Esquire
Timothy Alan Domin, Esquire
Danny Calvert Crowe, Esquire

FILED

January 20, 2017

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

RECEIVED

NOV 28 2016

SC Court of Appeals

Todd Olds..... Appellant,

vs.

City of Goose Creek Respondent,

APPELLANT'S PETITION FOR REHEARING

November 19, 2016

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As allowed by Rule 221, appellant petitions for rehearing on the following points misapprehended or overlooked by the Court in Opinion 5454:

1.

THE COURT OF APPEALS MAKES AN ERROR IN ITS STATEMENT OF FACTS/PROCEDURAL HISTORY BECAUSE THE CITY OF GOOSE CREEK DEFINES “GROSS INCOME” AND “GROSS RECEIPTS” SEPARATELY BUT USES THE TERMS INTERCHANGEABLY

The Court of Appeals' November 16th Statement of Facts and Procedural History is a mostly succinct statement of the material facts. Even so, it contains a material error of fact, which prevents an accurate analysis of the legal issue before the Court. The third paragraph of the Court's well-written opinion contains this footnote: "The City's business license renewal form uses the term 'actual gross receipts,' rather than 'gross income.' **However, the form also includes a section where the applicant certified he or she has accurately reported the business's gross income.**" (Footnote 1 of Opinion 5454, emphasis added). As discussed more fully in the next section, the boldfaced statement is the case compressed down to a single sentence because it is undisputed that what Olds reports to the City as his "gross income" **must match** what he reports to the I.R.S. as his "gross income." "The *GROSS INCOME* for business license purposes shall conform to the gross income reported to the State Tax Commission. . . ." § 110.001 As discussed more fully in the next section, the City's tax ordinance provides that the City can and will communicate with the I.R.S., including turning over its figures to the I.R.S. Based on the record of animus in this case, it is certain that Faretra and or Althoff would turn over Old's

gross income figures to the I.R.S. precisely because they do not match. Once the City does so, then Olds' "gross income" reported to the I.R.S. will appear understated because it does not match the "gross income/receipts" reported to the Town, and Olds will find himself in perpetual audit because the City's torture of plain and ordinary language creates the false impression that Olds is understating his income to the I.R.S. The fact that the Court reduces this undisputed and material fact to a footnote demonstrates that appellant failed to present the case with sufficient clarity to allow the Court to appreciate this fundamental point; to wit, that the City's definition of "gross income" requires the reported figures to match the "gross income" reported to the I.R.S. and the State Department of Revenue. (See pages 182 – 188 of the R.O.A., which discusses in detail how gross income is reported to the I.R.S. and the State Department of Revenue.) Professor Gutting's affidavit explains that South Carolina law does specifically adopt the Internal Revenue Code's definition "gross income." Even the City of Goose Creek concedes this point. See pages 224-225 of the Record on Appeal: "Furthermore, the City's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income." Thus, it is not relevant that § 5-7-30 does not contain the definition of "gross income" because the statute uses words commonly understood by everyone in their plain and ordinary meaning.

2.

THE CITY ORDINANCE DEFINES GROSS INCOME.

The City of Goose Creek ordinances incorporate the State of South Carolina

Department of Revenue rules in determining gross income. The Court of Appeals overlooks this dispositive fact, which cannot be questioned. The ordinance says:

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

Ordinance 110.001, quoted in its entirety in the 18th paragraph of the Court's Opinion, emphasis added here, except that emphasis on "GROSS INCOME" is in the original ordinance.

In Opinion 5454, the Court overlooks that without resort to state law, accounting procedures, *Webster's Dictionary*, or any other outside source, the ordinance by its own terms requires that Olds' "gross income" matches the "gross income" reported to the I.R.S. and the South Carolina Department of Revenue. As plaintiff's expert in accounting explained: "... Mr. Olds should calculate his business license for purposes of § 110.001 of the Goose Creek Code by including the portion of his gross income as reported to the South Carolina Department of Revenue on his South Carolina tax return for his business that is properly sourced to Goose Creek." (R.O.A. page 184, affidavit of Prof. Gutting.)

Moreover, § 110.003 and § 110.008 require a taxpayer to turn over his state and federal returns for inspection to make sure the figures match and allows the Finance Director to "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." Because it is undisputed that the figure reported to the I.R.S. and the state Department of Revenue is gross income—and **not** gross receipts—and must match the figures provided to the City, Olds calculated

his tax correctly and the City fails to do so by the very definition adopted by the City. See also page 187 of the Record on Appeal: "... for business license purposes [gross income] shall conform to the gross income reported to the State Tax Commission," citing § 110.001. In Opinion 5454, the Court overlooks that, by its very definition, § 110.001 requires that the definition of gross income match what the State of South Carolina and the Federal Internal Revenue Service require.

3.

THE COURT MISAPPLIES THE RULE OF STATUTORY CONSTRUCTION

The Court of Appeals in Opinion 5454 either overlooks or misapplies the settled rules of statutory construction. While the opinion recites the correct standard, citing *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000), the Court deviates from the standard enunciated in those cases by torturing the word "receipts" to inflate it to mean "gain" or "income." Receipts do not mean income. The Court also ignores both appellant's evidence and the indisputable fact that the words, "receipts" and "income," used in in their "plain and ordinary meaning" do not mean the same thing. Even the City of Goose Creek distinguishes the two terms: "The term **GROSS RECEIPTS** means the value preceding or accruing from the sale of tangible personal property, . . ." (R.O.A. page 129 § 110.001 DEFINITIONS.) Furthermore, reliance on these two cases is a little like a square peg in a round hole. *Historic Charleston* involved a dispute over what the City meant by "nonconforming" in a zoning case, and likewise, *I'On*

involved the question of whether citizens could rezone by referendum. Following the Court's lead in citing zoning cases for guidance on how to interpret unambiguous ordinances, a more appropriate authority is the case relied upon by Goose Creek: *Purdy v. Moise*, 223 S.C. 298, 75 S.E.2d 605 (1953), when, in deciding that the City of Sumter was being obtuse in arguing over the meaning of "tourist court" vs. "motor court," the Supreme Court said: "We have, however, as our guide the well-founded principle of law that statutes or ordinances in derogation of natural rights of a person over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." The Supreme Court said much the same thing in the tax cases in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015) and *Municipal Association of South Carolina v. AT&T Communications*, 361 S.C. 576, 606 S.E.2d 468 (2004) where, in construing § 5-7-30, the Court said: "... the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. [citation omitted] The language must also be read in a sense which 'harmonizes with its subject matter and accords with its general purpose.'" (Word, "fine," used in statute means criminal, not civil fine.)

Here the Court not only tortures the plain and ordinary meaning of gross income, which the City defines and requires to match the amount reported on State and Federal returns, but also the Court ignores Professor Gutting's **accounting** evidence, finding she is giving a legal opinion when all of her opinions are related to the science of accounting not law. To question the intent of the City's ordinance is to turn a blind eye to the plain

meaning of the unambiguous ordinance.

Perhaps the following example will crystallize the dispute because it is one to which every lawyer can relate: If Lawyer A settles a case for \$9,000.00, pays \$3,000.00 to medical providers to resolve liens, pays \$3,000.00 to the client as the net settlement proceeds and keeps \$3,000.00 as her fee, Lawyer A has \$9,000.00 in receipts and \$3,000.00 in gross income. There is no method of interpretation that can change the preceding statement without abandoning the plain and ordinary meaning of words. Calling the \$9,000.00 in receipts income is nothing more than a Humpty Dumpty solipsistic approach to language for the sole purpose of grabbing money that the City is not entitled as condemned by the Supreme Court in *Azar, op. cit.*

Thus, when this Court says in paragraph 20, "The term 'gross income does not carry the same definite and inflexible meaning under all circumstances and wherever used." (Paragraph 20), its statement is in conflict with the Court's duty to interpret the words used in the ordinance in their "plain and ordinary" meaning. The requirement of the rules of statutory construction requires Courts to use words in their "plain and ordinary" meaning in order to avoid the logical cul-de-sac made famous by Lewis Carroll (who was a logician) through his character Humpty Dumpty. Of course words have "definite" meaning. When a police officer cites a motorist for "speeding," she does not mean "driving without a license."

The only way language works is if the speaker and the listener reach an accord on meaning and no amount of torture will transform "receipt" into "income." (See lawyer hypothetical above.) Thus, when this Court says in paragraph 17, "We find the City's power to levy a business license tax is not limited by section 5-7-30," this is an incorrect

statement of law. If the City's power to levy a business tax is not limited by section 5-7-30, then it is infinite. Moreover, it is an indisputable correct statement of law that municipalities can tax only what the State allows them to tax, a well-settled legal point overlooked by this Court.

In saying that the words "receipts" and "income" do not "carry the same definite and inflexible meaning under all circumstances," this Court not only jettisons the rules of statutory construction completely, but also compounds the error by engaging in re-writing unambiguous legislative rules: **"Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, we find the city intended to define gross income for business license tax purposes as the total revenue of the business."** (Opinion at paragraph 21) This sentence leaps the separation between the legislative and judicial branches of government, and the Court is now re-writing the City's ordinance to conform to the Court's view of what it thinks the City of Goose Creek can tax. In doing so, not only does this Court abandon its judicial function to enforce the law as it is written, but also the Court re-writes both the City's ordinance and vetoes the General Assembly's limitation on the power of a municipality to tax. Appellant respectfully submits this Court does not have the authority to enact legislation.

The Court sidesteps this undisputable fact by pretending that "Olds has not set forth an argument explaining how the ordinance is inconsistent with our state constitution or other state law." (Opinion in paragraph 17) However, the Appellant did set forth an

explanation in Argument 1-A of the initial brief, where appellant raised this question and analyzed it from pages 16 to 18, citing the State Constitution, Article VIII and numerous cases on page 16. There, the appellant demonstrated that under South Carolina law, municipalities have no inherent right to levy taxes and possess only the powers granted to them by the State, which they cannot exceed. Appellant's brief stated:

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.

(Appellant's brief at page 16)

It is, therefore, clear that Opinion 5454 overlooks and misapprehends the City's clear expression that gross income in the City of Goose Creek means the same as gross income in the rest of the world, and even if it did not, the City is not free to torture

langue to enhance its collections. See *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015):

The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.

Simply put, the statutes do not allow these revenues to be treated as a slush fund.

4.

THE COURT DOES NOT PERMIT A WRONG WITHOUT A REMEDY

Perhaps the most fundamental precept in American jurisprudence is that the law provides a remedy for every legal wrong. *Ubi jus ibi remedium*. (For every wrong, the law provides a remedy.) After the United States declared independence from England, Chief Justice John Marshall made the principle the bulwark of judicial review: The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed.2d 60 (1803) Here, not only did the City Council of Goose Creek take up Old's appeal while barring him for participation, but the trial court found, and the City admits, it violated the appellant's constitutional rights by doing so! This finding is not challenged by the City. In addition, the record shows that Ron Faretra and Jennifer Althoff left their offices together, drove over to Olds' property, detained his friend under false pretenses and trespassed through Olds' property without permission and without a warrant. They also resorted to self-help in forcing Olds to capitulate by interfering in his right to receive water service. Notwithstanding this shocking conduct, the Court regards this

admitted lack of due process and unlawful conduct as unimportant. If the conduct demonstrated in this case is unimportant, then we live in a police state. This is especially true because the only way a citizen can challenge government overreach peacefully is to ask the Court to evaluate the government's conduct. Since the City admits it unlawfully violated Olds' rights, and since the appellant proved—at the summary judgment stage--- that the City shut off his water, invaded his property, detained his friend and excluded him from his appeal before City Council, then Olds is entitled to be heard, at least on the issue of attorney's fees because the award of attorney's fees to citizens who challenge unlawful government conduct is the only means a citizen possesses to address and check unlawful government conduct. See page 12 of the Record on Appeal, paragraphs 60-62 of plaintiff's complaint. The Court's rationalization to avoid evaluating the City's conduct or allowing Olds to be heard on the merits is that Olds was not "prejudiced." This is an incorrect statement of law for two reasons. First, the standard is whether Olds created a genuine issue of fact, and there can be no dispute that Olds met that standard. Second, and more importantly, the most fundamental aspect of American jurisprudence is that a violation of a citizen's basic rights is always a "prejudice" and gives rise to a claim for damages. See 42 U.S.C.A. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom , or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

This Court overlooked that the lower court granted summary judgment, and that

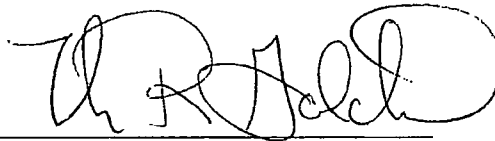
there is no debate that appellant created a genuine issue of material fact on these claims.

CONCLUSION

Thus, as set forth in the appellant's briefs, 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/statutory limitation on a municipality's ability to tax income nor did it apply the proper rules of statutory construction that require it to apply the words in the statute in their plain and ordinary meaning. In affirming the lower court, this Court overlooked the numerous instances in which the City of Goose Creek links its definition of "gross income" to the universally accepted definition as must be reported in State and Federal tax returns. As the Supreme Court said in *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956): "Equally well settled is the rule that the word 'income' as use in a tax statute is to be taken in its ordinary sense of gain or profit." In searching the record for the existence of a genuine issue of material fact, the Court is required to read the words of the tax statute in their "plain and ordinary meaning." The Court is not entitled to re-write the definitions to expand the City's powers beyond the clear import of the enabling statute, and any doubt must be resolved in the appellant's favor. The lower court did the opposite. The lower court substituted its interpretation of the applicable state statutes instead of applying the clear and unambiguous meaning. This Court does not have the authority to rewrite the State's enabling statute to comport with its view of how citizens should be taxed. Finally, creating a genuine issue of material fact about the violation of his rights, and by successfully challenging the City's procedural appeal process, the

appellant already achieved one of the benefits he sought on a significant issue and is a prevailing party as to the procedural due process challenge. He is entitled to be heard, therefore, on his claim for damages and attorney's fees..

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Th R Gold', written over a horizontal line.

November 23, 2016

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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
Appellate Case No. 2014-002393

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SC Court of Appeals

Todd Olds Appellant,

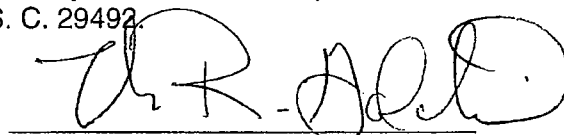
vs.

City of Goose Creek Respondent,

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on November 23, 2016, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492.

November 23, 2016



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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 Appellant,

vs.

City of Goose Creek Respondent,

BRIEF OF APPELLANT

September 9, 2015

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in granting summary judgment to the Town of Goose Creek when there are substantial issues of fact?

A. Did the trial judge err in granting summary judgment when the State Constitution requires that municipalities cannot exceed the statutory authority granted them by the State?

B. Did the trial court err in granting summary judgment for the Town when the question raised is a question of statutory construction and the undisputed facts demonstrate that the Town of Goose Creek is applying a definition of gross income at variance with the statutory definition?

II. Did the trial court err in "suggesting" that the Town of Goose Creek amend its appeal procedure without ordering a remedy for the appellant, who the Town denied an opportunity to participate meaningfully in his own appeal?

III. Did the trial court err in finding there was no violation of plaintiff's constitutional rights when the evidence shows that the Town singled him out for disparate and arbitrary tax treatment and shut off water supply to his properties, etc. to force the plaintiff to capitulate to the Town's manner of calculating taxes?

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 against 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 Faretra'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 Creek's 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 Faretra 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 manner. 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 injury. [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 suffering 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 purpose 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 tortious 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 Faretar 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,

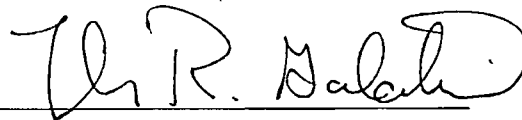


September 9, 2015

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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
Appellate Case No. 2014-002393

Todd Olds Appellant,

v.

City of Goose Creek Respondent.

RESPONDENT'S FINAL BRIEF

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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 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 handbook⁵--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 Gutting: 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 perfect 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 entities 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.

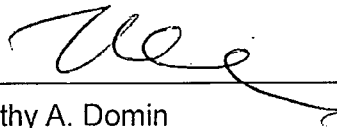
"Provisions establishing limitations upon and exemptions from liability of government entities must be liberally construed in favor of limiting liability." Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E. 2d 808, 816 (2013).

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.



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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.



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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:

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Todd Olds..... Appellant,

vs.

City of Goose Creek Respondent,

REPLY BRIEF OF APPELLANT

September 9, 2015

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REPLY TO GOOSE CREEK'S STATEMENT FACTS

The City's response contains a misrepresentation of a fact. On pages 2-3 of its brief, the City describes the procedural path of the appellant's administrative appeal to the City Council as follows: "They [members of City Council] directed these [questions] to the City Administrator and the Finance Director who are normally present at all City Council meetings." (Respondent's brief at page 3) On page 18 of its brief, in discussing the appellant's due process claim (which the appellant won at circuit court, but the circuit court ordered no relief), the City informs the Court of Appeals that during the City Council Appeal, "Olds and his counsel were not present, although they had a right to be present and were invited." This is a misleading statement.^[fn.1] The City did "invite" Olds to the City Council Appeal, but instructed him that the City Council did not permit either Olds or his legal representative to speak. See City's September 15, 2011 letter at R.O.A. page 231, quoted below at page 20. The appellant and his lawyer sat through the entire appeal, but in conformity with the City's instructions, the City forbid either from speaking. Since there were only two matters on the agenda of the Special Meeting, Mr. Olds and the undersigned were two-thirds of the audience members present, and it is impossible that the City Administrator, Dennis Harmon, or the Finance Director, Ron Faretra, failed to observe appellant sitting in the audience because Harmon and Faretra handled the previous administrative appeal that the City Council was reviewing. Thus, they were familiar with Olds and knew he had legal representation. Appellant's presence before the City Council sheds light on Council's token effort at fairness by purporting to advocate for Mr. Olds:

¹ The oversight is material because the City asserts *Carter v. Linder* as controlling authority on page 10 of its brief. That case holds that a taxpayer must be permitted to participate in his own case. This brief addresses *Carter* below.

"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. . . .

Transcript of Special Meeting, September 27, 2011, R.O.A. pages 20-22, quoted in appellant's brief at page 34.

Even though the City's Minutes do not reflect who was present in the audience, it is an indisputable fact that both the appellant and counsel were present.[fn.2]

REPLY TO GOOSE CREEK'S ARGUMENT I

A. The appeal from the City of Goose Creek City Council and the challenge to the City's ordinance on constitutional grounds involves the same parties, the same facts, and the same legal principles.

The City is correct. The appellant could have filed two separate actions and then moved to consolidate them. Short of generating an extra \$150.00 for Berkeley County, the appellant discerns no procedural or substantive reason why a litigant would do so, and the *Rules of Civil Procedure* do not require it. Rule 18 of the *South Carolina Rules of Civil Procedure* provides a mechanism for **joinder** of claims and remedies, and subsection (c) of that rule provides for separate trials for almost any reason. Thus the City could have requested that the lower court try the appeal separately from the constitutional challenge but did not. The City cannot complain about the procedure now. The appellant cannot sue the

2 If this case is set for oral argument, appellant has no doubt Respondent will correct its statement.

City of Goose Creek in the City of Goose Creek's municipal court, and the appeal from City Council and the allegations brought under § 1983 involve the same parties, the same legal questions, and the same evidence. The purpose of the *Rules of Civil Procedure* is to cut through jargon and technicalities of pleading in order "to secure the just, speedy, and inexpensive determination of every action." Rule 1, *South Carolina Rules of Civil Procedure*

B. Goose Creek can only collect a business license tax in the manner authorized by state law, and state law defines gross income for the municipality.

In argument I, the City argues that it can adopt any definition of gross income it wants: "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 of total income of a business." (Respondent's brief at page 8) The City's statement is wrong, and, as discussed more fully below, reliance on other municipalities who might be collecting unlawful taxes is no legal justification to disobey a state statute.

First, the City of Goose Creek has no authority to redefine legal terms that the General Assembly defines for the City. "Equally well settled is the rule that the word 'income' as used in a tax statute is to be taken in its ordinary sense of gain or profit." *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956). Even the United States Supreme Court has left no doubt about plain meaning of "gross income":

... the general statutory definition of "gross income" requires subtracting the cost from the sales price. See 26 U.S.C. § 61(a)(3), 1012. Under such a definition of "gross income" the calculation would take (1) total revenue from such sales ... minus (2) the cost of such sales.

U.S. v. Home Concrete & Supply, 566 U.S. ___, 132 S.Ct. 1836 (2012) (Taxpayer's error in understating basis did not extend government's recapture period from three years to six.)

Second, the City grounds its incorrect statement of law on the 1953 case of *Purdy v. Moise*.^[fn.3] There, the Supreme Court affirmed the circuit court's decision requiring the Sumter City Council to issue a permit to operate a "tourist court." When the City of Sumter refused to grant the permit on the ground that its zoning classification prohibited a "tourist court," the property owner appealed to circuit court, alleging, like the plaintiff here, that the City was using an incorrect definition of "tourist court." Using settled rules of statutory construction, the circuit court reversed and ordered the City to issue the permit: "The word hotel does have a well-recognized meaning in laws which under its terms are such as to encompass that of 'tourist court' or 'motor court.'" *Purdy* at page 608. Thus, the Supreme Court struck down Sumter's effort to redefine a commonly accepted term, and this entire controversy is brought about because the City of Goose Creek refuses to use the term "income" as the State defines that term. Goose Creek insists that "income" means "revenue" even though there is no support for this interpretation, making Goose Creek the municipal equivalent of Humpty Dumpty.

Third, (and perhaps more surprising about the City's reliance on *Purdy*) is that the Supreme Court held: "We have, however, as our guide the well founded principle of law that statutes or ordinance in derogation of natural rights of person over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases no clearly with their scope and purpose." There is no doubt that a business license tax is in derogation of the common law right to use private property because it is a tax on the "privilege" of working!

3 223 S.C. 298, 75 S.E.2d 605 (1953)

The Constitution's most precious bequest is the right of every citizen to be left alone and pursue whatever lawful trade he or she desires. Likewise, as discussed fully in the initial brief and conceded by the City on page 7, the City's right to tax its citizens is a right that exists **only** as a grant of authority from the General Assembly. See § 5-7-30, S. C. Code. The City of Goose Creek refuses to accept this statutory limitation on its power to tax and refuses to acknowledge that the State of South Carolina adopts the federal *Internal Revenue Code* as its statutory code. Thus, when the City writes: "They are not limited or regulated in any sense by federal law," the City could not be more wrong. In short, this entire case is the result of Goose Creek's refusal to accept that its taxation powers are limited. State law only allows a business license tax on "gross income" not gross receipts.

The City doubles down on its incorrect statement of law on page 11 of its brief: "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." Like the statement on page 7 of its brief, the City's assertion could not be more wrong. As set forth in Professor Gutting's affidavit (R.O.A. page 184 [affidavit page 3]), the State of South Carolina has adopted the *Internal Revenue Code* except for the sections specifically rejected by the General Assembly in §§ 12-6-1110 and 12-6-50, S. C. Code.[fn.4] As set forth in the initial brief, the lower court ignored Professor Gutting's detailed affidavit. Even without Professor Gutting's affidavit, the City has no authority to change the definition of "income" to "revenue" or "receipts" any more than it can adopt a definition of a mile as 1000 yards in order to increase revenue from speeding tickets.

4 In her affidavit, Professor Gutting says "60," which is a typo for "50."

This argument is fully developed in appellant's brief and does not need to be repeated here. If the Town of Goose Creek is allowed to define "income" as "receipts" or "revenue," then it ceases being a government of laws and becomes a government of men. The City can no more rely on other municipal governments allegedly utilizing an illegal definition as justification for its wrongful act than a person charged with a crime can claim innocence because others are doing the same thing. More importantly, the City submitted, and the lower court relied upon, Goose Creek's claim that 40 other municipalities support Goose Creek's method of redefining "income" as "receipts." The record demonstrates that lower court did not examine the alleged 40 municipalities because if it had, it would have discovered that of the 40 Goose Creek submitted, 16 agree with the appellant, and one, Greenville cannot be determined by reference to its ordinance. (R.O.A. pages 255-295 [ordinances] An examination of the 40 ordinances submitted by Goose Creek that allegedly utilize "gross income" in the business license ordinances demonstrates that 16 of them tax "gross income." In other words, these 16 support the appellant, not Goose Creek. They are: Aiken, Anderson, Camden, Cayce, Charleston, Chester, Gaffney, Greenwood, Summerville, Lancaster, Newberry, North Augusta, North Myrtle Beach, Rock Hill, Seneca, and West Columbia. (Greenville is unclear.)

The City seeks a safe harbor for its definition by relying on the Court of Appeals' analysis of "income" in a family court case, *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989). *Bogan* involved the construction of a private settlement agreement that has no applicability to a municipal government's obligation to operate within the powers granted it by the state. Unlike a private divorce agreement, the state defines "gross income" for the

City of Goose Creek, and Goose Creek is not free to enlarge the definition because it possesses only those powers given to it by the State. In *Bogan*, a divorced physician tried to convince a family court judge that the income he allocated to his profit sharing, retirement, and automobile allowance was not “gross income” for purposes of calculating the wife’s 10% share. The family court did not buy it, and neither did the Court of Appeals: “The language used in a [divorce] decree must be given its ordinary and commonly accepted meaning.” *Bogan* at page 608. Neither the I.R.S., the Department of Revenue, nor a family court judge is going to overlook income because it does not touch the taxpayer’s hands but goes into his retirement account or goes into an automobile allowance account that provides an automobile for him. The matter now before the Court does not involve the question of constructive receipt or the interpretation of a private divorce decree. *Bogan* does not support the City’s unsustainable assertion that it is free to adopt a definition of gross income that allows it to collect more taxes than the General Assembly permits.

The next point argued by the City achieves a new level in reaching a common ground. For the first time since the appellant filed this case in November 2011, the City finally engages the appellant (and this Court) in a candid conversation about the real issue in this case. For once, the parties can agree on what is the central issue. On page 10 of Respondent’s brief (highlighted for emphasis), the City writes:

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.

There it is. After four years, we have arrived finally at the City’s motivation and explanation—generating revenue—for its interpretation of “income” as “receipts”—the ends

justify the means. The City broadens the clear terms of the statute, § 5-7-30, to allow the unjust and unauthorized collection of revenue. The City says to this Court: Do not make us obey the law because we get more money collecting the business license tax our way. (Appellant believes that the City employs its special definition of gross income only to him and to no one else. Because business license tax returns are protected by statute, § 12-54-240, the appellant cannot prove his theory by direct evidence that he is being singled out from other returns. Legally, it makes no difference. Either the City treats everyone like the appellant or just the appellant. Either way is illegal, and if the City wants to defend the case on the ground that it treats every taxpayer illegally, appellant accepts the City's defense.) As set forth in the plaintiff's four page September 22, 2014, motion for reconsideration (R.O.A. pages 93-96), the outcome of this case is controlled by the plain meaning of § 5-7-30, S.C. Code, ann. that limits the authority of a municipality to collect a tax on "gross income." The well-settled rules of statutory construction require that courts enforce the General Assembly's statutes in their plain and ordinary meaning. Applying the rules of statutory construction to § 5-7-30 determines the outcome of this case. The City contorts the rules of statutory construction to justify it collecting more revenue than it is authorized to collect. As set forth by the Supreme Court in *Beard v. S. C. Tax Commission*, 230 S.C. 357, 95 S.E.2d 628 (1956):

It is a well-established rule of construction that a tax statute is not to be extended beyond the clear import of its language, and that any substantial doubt as to its meaning should be resolved against the government and in favor of the taxpayer. [citations omitted][fn.5]

⁵ This is the same conclusion reached by our Attorney General in its opinion to Beaufort County on April 2, 2012, regarding "the proper interpretation of the term 'gross income' in the context of a county business license tax ordinance."

The City's reliance on the money (ends justify the means) argument is shocking since courts exist to protect the rights of the citizen against government overreach and to do justice, not to facilitate a municipality's efforts to bend the rules in order to raise extra revenue. Courts do not sit to provide a cover for municipalities to collect illegal taxes. "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) An appeal to authority not only has no place in a legal argument because legal arguments are built on reason, but it also is a circular argument and amounts to an argument to absolute power: "The act is just because I declare it so, and the ends justify the means." [fn.6] However, the City's argument provides common ground for the parties because the appellant has asserted from the beginning that the City's purpose in twisting the definition is to gain revenue it is not entitled to collect.

To support its position further, the City cites the case of *Carter v. Linder*. [fn.7] *Carter* involved a taxpayer's challenge to Richland County's "classification" of businesses. In other words, Richland County classified a barber shop differently from a used car lot, and the taxpayer asserted that such classifications were irrational because the classifications generated different **rates** of taxation. The Supreme Court adopted the circuit court's Order as its Opinion holding the tax constitutional: "Such a tax is based upon classification and **gross income**, not upon the level of governmental services provided." (emphasis added) More interesting is the fact that the *Carter* case is especially meaningful in regard to the City's

6 In his textbook on logic, Professor Kahane describes the fallacy: "The fallacy of appeal to authority (Latin name: *argumentum ad verecundiam*) is committed when we accept a statement because an authority, expert or famous person accepts it or says he accepts it. Howard Kahane, *Logic and Philosophy*, (Wadsworth Publ., 1973) page 236 7 303 S.C. 119, 399 S.E.2d 423 (1990)

lack of due process, discussed more fully below in Argument II (D), because the Supreme Court held further that the Richland County ordinance scheme passed muster because it provided a mechanism for the taxpayer to pay the tax under protest "with an opportunity to be heard." As the lower court found, the City of Goose Creek does not provide a taxpayer an opportunity to be heard before City Council.

The balance of the City's argument is to assert reliance on its expert's opinion and on the City's assertion that Old's interpretation of § 61, I.R.C. leads to an absurd result. As to the City's reliance on Baldwin's affidavit, the City misses the point. It was Olds who was resisting the City's motion for summary judgment, and Olds is relying on Professor Gutting's affidavit, not Robert Baldwin's. However, as the Order under review reveals, the lower court did not acknowledge, let alone analyze, Professor Gutting's affidavit, and this error of law requires a remand. The lower court cannot ignore the plaintiff's evidence, and because a review of a lower court's grant of summary judgment is *de novo*, it is a straightforward matter to review Professor Gutting's affidavit in the Record on Appeal at pages 182-191 and see that she grounds her analysis on irrefutable and correct statements of law. Even the City concedes this: "It is true that under federal Internal Revenue Code § 61, a real estate business only used 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." (Respondent's brief at page 11) What Respondent's brief glosses over is the irreducible fact that Goose Creek ignores the State's limitation on it. The City also ignores that the state defines "gross income" for the City, and that definition is the definition provided by § 61. Section 61 could not be more lucid and it is, to borrow the City's word, absurd to stand before

this Court and argue that "income" is the same thing as "receipts." Likewise, there is nothing absurd about a taxpayer paying what is due and challenging the City's collection of an illegal tax.

REPLY TO GOOSE CREEK'S ARGUMENT II

- A. The City ignores that this case is an appeal from a grant of summary judgment and that Olds, as the party resisting the motion for summary judgment, is entitled to have the evidence construed in his favor.**
- B. Equal Protection**
- C. Abuse of Process**
- D. Due Process requires that every litigant be afforded the right to be heard in a meaningful manner.**
- E. F.O.I.A. violation**
- F. 42 1983**
- G. Civil Conspiracy**
- H. Damages and Attorney's fees**
- I. Breach of Contract**
- J. S. C Constitution Article I, § 22**

A. This is an appeal from summary judgment; the lower court failed to construe the facts and inferences in the light most favorable to the appellant as the party resisting the motion for summary judgment

In the introductory portion to the City's Argument II (pages 13-16), the City's argument again ignores that this is an appeal from the grant of a summary judgment. The City characterizes Olds' allegations as "imagination": "Mr. Olds imagines that he is being singled out for unequal and unfair treatment." (Respondent's brief at page 13) Mr. Olds does not "imagine" it; he asserts it through his pleadings, through his affidavits, and through the documents submitted in support of his legal position. By criticizing the plaintiff for "imagining" that the City singled him out for disparate treatment, the City is really saying

to this Court: You three appellate judges cannot believe Mr. Olds. He is not credible. Credibility determinations are not decided on motions for summary judgment, and the appellant's pleadings and four affidavits (R.O.A. pages 166-179) detail numerous instances of specific government misconduct.

... since '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict,' the evidence presented by [Olds] 'is to be believed, and all justifiable inferences are to be drawn in his favor.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); see *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003), affirmed 365 S.C. 589, 619 S.E.2d 428 (2005))

Appellant's first affidavit, August 31, 2012 (R.O.A. page 168) details the City's efforts to make him capitulate by withholding water service. Appellants' supplemental affidavit, November 7, 2012 (R.O.A. page 171) details how the appellant obtained water service only to have it turned off and padlocked at the direction of Ron Faretra because of the tax dispute. Appellant's supplemental affidavit dated January 14, 2013, explains how the City's "audit" of the appellant's business license tax followed "shortly after" he resolved a dispute with the City over his business. (R.O.A. page 174 [affidavit January 14, 2013]) Appellant's third affidavit, April 1, 2013 (R.O.A. page 177 "second supplemental affidavit") details how the City refused him an administrative appeal on the 2012 taxes. The clearest example of the City's overreach is the July 26, 2012 affidavit of Robert Eckhardt (R.O.A. page 166), who testifies to being detained against his will for over an hour by Goose

Creek's Finance Director, Ron Faretra, and Business License Clerk, Jennifer Althoff, who led him to believe they were police officers. As Mr. Eckhardt says, it was clear that they were out to get Todd Olds. Moreover, he testifies that when they finally let him go, they remained inside Mr. Olds' house. The City can do its best to pretend that such acts are insignificant: "However, even if the event happened exactly as Olds' friends describe, it would be entirely irrelevant to Olds' case." (Respondent's brief at page 14). Whether the acts are or are not "irrelevant" is a credibility question that is specifically reserved for a jury.

The facts are relevant because they demonstrate that the City's motivation in auditing appellant and imposing a tax definition of "gross income" not supported by law proves the City's motivation is not tied to an even handed application of its limited taxing authority but rather by a desire to get Todd Olds. No one is above the law, and when government officials commit misconduct, they are answerable for it as violations under color of law. Whether Faretra and Althoff were acting in their official capacity when they entered the appellant's property without a warrant and detained someone acting on his behalf, and whether their acts were or were not related to the City's efforts to collect additional taxes from the appellant are all questions of fact, and these questions of fact cannot be resolved against the appellant at a motion for summary judgment. Even private citizens can be held accountable for violations of a citizen's XIVth Amendment rights if they are acting in concert with government officials:

In this respect, our holding in *Adickes v. S. H. Kress & Co.* was as follows: "The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were official or unlawful; [citations omitted] Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private

persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the state or its agents.' *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966)" 398 U.S. at 152, 90 S.Ct. at 1605 (Footnote omitted)"
Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L.Ed.2d 185 (1980)

The City attempts to blunt the bad acts of the City by asserting that Faretra and Althoff's bad acts were directed at Eckhardt and not Olds, and therefore Olds is precluded from asserting a claim. This argument ignores the purpose of the Olds affidavits, which portray a City government that singled Olds out. The City shut off his water supply, harassed his agent, forbid him from participating in his own tax appeal, entered his property without a warrant, and threatened him with incarceration over a dispute whether "income" means "receipts." The appellant's affidavits portray a shocking pattern of government overreach, and while the City's conduct in this case is not as deadly or disabling as police officers shooting unarmed motorists, the government conduct differs in degree only. It is for a jury to say whether the City's treatment of Eckhardt was directed at the appellant or whether it was two diligent City employees discharging their duties in an efficient manner and providing "high quality essential service and . . . fairly enforce[ing] the applicable laws." [fn.8] All these factual questions are factual questions reserved for a jury, and the lower court erred in not giving them any weight.

8 In the most famous trial in the history of mankind, Hannah Arendt wrote a book about the defendants' employment of the defense of just following orders. She called her book: *The Banality of Evil*. We have a lot of law books, and yet very few, if any, contain cases in which a government bureaucrat **admitted** misusing his or her authority.

B. Equal Protection

The City sets forth the correct legal standard for equal protection claims, except that the City is wrong to suggest the **unanimous** 2000 Supreme Court case of *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000) has been overruled. As of the date of this brief, 2,681 courts have cited the unanimous *Olech* opinion as authoritative. The appellant's argument here is the same as the argument above in II A. The appellant's affidavits make out a clear case of discrimination on numerous fronts. At the trial of this case, if the City wishes to persuade a jury to acquit it of XIV Amendment violations by telling the jury it treats everyone the way it has treated Olds, the jury may well reject plaintiff's equal protection claim, but appellant believes that the size of the verdict on other causes of action will go up. It is a strange defense that can only be asserted in legal briefs because no trial lawyer in the history of trial by jury has urged a jury to acquit a defendant because the defendant mistreats everyone uniformly. As argued in the preceding section, there is abundant evidence in this record that the City singled appellant out for individual treatment designed to punish him for challenging the City on an unrelated matter. (See appellant's affidavits in record on appeal at pages 166, 168, 17, 174, and 177. See ¶¶ 8, 9, 10 amended complaint at page 65.

There is overwhelming evidence in this record of a Fourteenth Amendment violation, and it is for the jury, not the court, to weigh the evidence and determine credibility.

C. Abuse of Process

Likewise, for the same reasons as stated above, there is overwhelming evidence in the record below of the City's misuse of its governmental powers to harass the appellant and force him to capitulate in a tax dispute. The elements of an abuse of process are: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. *Huggins v. Winn-Dixie Greenville*, 249 S.C. 206, 153 S.E. 2d 693 (1967) The lower court found there is no genuine issue of material fact on the abuse of process because "a denial of water service is not an abuse of process." (R.O.A. page 7 [order page 7]) The lower court erroneously concludes that a "process" must be a lawsuit. This is an incorrect statement of law. What is required is: "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of process is required." *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984) The lower court erred by deciding that the City's conduct in invading the appellant's property without a warrant, detaining his associate using a badge of authority, and cutting off his water supply are not authorized by the "processes." Rather, the City aims to punish a citizen who challenges the City's tax calculation. The City committed all of these acts under indicia of authority, and it is for a jury, as the fact finders, to say whether they were "legitimate" or not.

D. Due Process requires that every litigant be afforded the right to be heard in a meaningful manner.

As set forth in the appellant's brief, the appellant prevailed on this action. The lower court found that the City's procedure in excluding the appellant from his appeal to City

Council is a violation of his due process rights. As set forth on page 4 above, the City is not correct in stating that the appellant was not present. The appellant and the undersigned were present in the audience. Whether appellant was invited or not is irrelevant as neither appellant nor his lawyer were permitted to speak. The City wrote a letter to appellant on September 15, 2011 (R.O.A. page 231), telling him that neither he nor his legal representative could speak:

Please be advised that Section 110.016 (c) of the Goose Creek City Code states, in part, "City Council shall review the records and without further oral argument or presentation of evidence will affirm, modify or deny the appeal."

As the minutes of this meeting (R.O.A. page 20-22) show, this is another false statement by the City. The Respondent argued the case fully to the City Council through Ron Farertra and Dennis Harmon and responded to their questions, even (presumably as a nod to the appellant and his lawyer who **were** present) attempted to argue for the appellant. The City attempts to minimize this sorry state of affairs by citing two state cases for the proposition that an appellant cannot complain about an administrative hearing unless he is prejudiced. As set forth in the appellant's brief, excluding a party from participation in his own case is always prejudice of the highest order. This point does not require much discussion because the lower court agreed with the plaintiff and found the procedure "not fair":

City Council called on the City Administrator [Harmon] and City Finance Director [Faretra] 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 side.
Order at page 8, R.O.A. page 8

The lower court sidesteps the issue by concluding that because appellant concedes

(and appellant does concede; in fact, appellant asserts) that the rule of statutory construction governs the interpretation and application of § 5-7-30, that appellant suffered no prejudice. The lower court's conclusion is not logical. As set forth in the appellant's brief, whenever a procedure excludes a litigant from an opportunity to be heard, prejudice is presumed, and prejudice does not evaporate because the excluded party agrees the rules of statutory construction govern the interpretation of a statute. The fundamental right to be heard belongs to the appellant, and the City of Goose Creek has no power to take it away, and when it does, it prejudices the rights of the appellant.

Since *Teague* was decided, this Court has never found a rule so essential to the fairness of a proceeding that it would fall under this exception. In my view, the right in *Simmons*—the right to respond to an inaccurate or misleading argument—is surely a bedrock procedural element of a full and fair hearing. As Justice O'Connor recognized in her opinion in *Simmons*, this right to rebut the prosecutor's arguments is a "hallmark[k] of due process," 512 U.S. at 175 (concurring opinion). See also *id.*, at 174 (Ginsburg, J., concurring) ("This case is most readily resolved under a core requirement of due process, the right to be heard"). When a defendant is denied the ability to respond to the state's case against him, he is deprived of "his fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986)

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969 (1997) Stevens, Souter, Ginsburg, Breyer dissenting.

The lower court erred, and the City tacitly acknowledges it. The City literally employs the passive voice on page 19 of its brief: "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." The choice of passive voice is not accidental because it hides who is "hearing." One thing is certain, and it is this: without the appellant's calling the procedural defect to the City's attention, the City would have

continued on its path of depriving its citizens of fundamental rights. As discussed below, appellant's success on this procedural challenge is sufficient to sustain an award of attorney's fees, and the lower court erred in finding a violation but denying a remedy, especially in failing to consider whether the appellant is entitled to attorney's fees and costs for pursuing a cause of action that cures a serious defect in Goose Creek's ordinances.

E. F.O.I.A. violation

The lower court found no F.O.I.A. violations based on a notation on the agenda that the City posted it 24 hours before its special meeting. Neither the appellant nor his lawyer could find the agenda. The posting of the agenda in conformity with South Carolina law cannot be determined either way from this record. The record does show that the City handled the appeal at a special meeting (R.O.A. page 233 [September 27, 2011 agenda]), and the record contains an e-mail from Clerk Kelly Lovette dated September 19, 2011, purporting to send the notice to two local newspapers (R.O.A. page 234). However, the minutes of the meeting contain no reference to the posting of the agenda, and thus the only evidence in the record are self-serving documents not referenced by City Council. Since the Council made no mention of notice, it is a question of fact. Moreover, the meeting was closed to the appellant and his counsel, which foreclosed any opportunity to explore the issue, and thus the record contains sufficient evidence, a *scienter*, to create a question of fact as to whether the City did or did not comply with F.O.I.A.

F. 42 § 1983

There is an almost universal misunderstanding about the method and effect of 1983

claims. 42 U.S.C § 1983 does not create a substantive right; it creates a procedural path for citizens to challenge unlawful government action. Perhaps the best metaphor for the purpose of § 1983 is Judge Roger Young's description of the section as a wagon. Judge Young sometimes describes § 1983 as wagon that plaintiffs use to carry their causes of action to court. This is a pretty effective description. The U. S. Supreme Court emphasizes that the provision can be used to bring any claim to court including claims against municipalities for acts that impair a citizen's constitutional rights:

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-168 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

Monell v. Dept. of Social Services, 436 U.S. 658 98 S.Ct. 2018 (1978)

Therefore, §1983 can be utilized to assert any claim against Goose Creek that interferes in the appellant's constitutional rights. The City is wrong if it thinks it can retaliate against the appellant by withholding water service, invading his property without a warrant, detaining his associate, denying him the right to participate in his own case, and especially in employing an unlawful and punitive interpretation of a tax collection statute to retaliate

against him because the City singles him out. H. L. Mencken said every citizen lives in fear that he will be noticed by the government. The most precious right any citizen possesses is the right to be left alone and not persecuted by his government. Moreover, if the City chooses to sail into what it thinks is a safe harbor by asserting that it discriminates against all its citizens in the same fashion, the appellant embraces the City's confession of unlawful conduct. Either way, the appellant is authorized to under §1983 to bring an action for both damages and for injunctive relief.

G. Civil Conspiracy

The lower court gave civil conspiracy short shrift. The lower court found—and the respondent argues—that the plaintiff cannot make out a claim for civil conspiracy because the acts taken by Faretra and Althoff were in their “official capacity.” (Order at page 10, R.O.A. page 10) If Faretra and Althoff were acting in their official capacity, then the Tort Claims Act may provide immunity for them if, and only if, they were performing some official government function in which they have discretion. However, if they were acting outside of the course and scope of their authority, or if they were misusing their authority to punish the appellant, then they become liable officially and personally. Whether they were acting in or out of their authority is a critical factual question that can only be resolved by a jury based on its view of the evidence and its view of the credibility of the witnesses. The lower court cannot make such credibility calls on a motion for summary judgment.

H. Damages and Attorney's fees

The issue of attorney's fees will not be fully ripe until the appeal is resolved. However, the appellant is unquestionably the prevailing party on educating the City that it

should allow appellant's to speak during the appeal of their cases. The City concedes the issue on page 19 of its brief, and calls the plaintiff's claim a "good idea." Thus, the appellant persuaded the City to amend its procedures to allow citizens to be afforded their constitutional right to be heard. As such, on this issue alone, the plaintiff is a prevailing party and the lower court erred in not considering whether the plaintiff, as the prevailing party, should be awarded attorney's fees.

. . . Federal courts characterize a plaintiff as the prevailing party when she succeeds on any significant issue that achieves some of the benefit sought in bringing the action; he or she does not have to win it all to be regarded as prevailing . . . Similarly . . . this Court held that plaintiffs may be considered the prevailing parties if a significant issue is resolved so as to achieve some of the benefit through litigation. 662-663
Stevenson v. Branch Banking and Trust Corporation, 159 Md. App. 620, 662, 861 A.2d 735 (2004)

Thus, the lower court erred in not considering attorney's fees, and this Court should remand the case to allow the lower court to consider whether appellant is a prevailing party and if so, to what extent is he entitled to fees.

I. Breach of Contract

The appellant has not abandoned this claim. As the City correctly points out, the breach of contract claim relates to the City's termination of water service. As the plaintiff's complaint sets out in ¶¶ 51, 52, and 53, the City provided water service to appellant, and then Ron Faretra and Jennifer Althoff instructed the water department to terminate the service and lock the meter. These facts are extensively covered in appellant's four affidavits. It is not a separate claim, but rather part of the same transaction that forms the plaintiff's tort claim for abuse of process, civil conspiracy. Thus, it does not require

separate briefing because it is the same cause of action. The only difference is that one is in tort and one is in contract, and the issue of contract vs. tort does not ripen until a jury decides the case. Only then is a litigant required to elect his remedy. "Election of remedies" involves a choice between different forms of redress afforded by law for the same injury. . . . It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). *Keeter v. Alpine Towers Intern., Inc.*, 399 S.C. 179, 730 S.E.2d 890 (Ct.App. 2012)

J. Article I § 22, S. C. Constitution

Article I, § 22 is nothing more than the state version of the Fifth and Fourteenth Amendments to the Federal Constitution. The legal principles, the facts, the parties, and the theories of recovery are identical to those asserted under the federal constitution, and therefore do not need to be briefed separately. The only role of Article I, § 22 in this case is to provide additional state authority for the same violations already extensively briefed.

Reply to Goose Creek's Argument III

The Tort Claims Act does not shield municipalities from constitutional violations.

The remainder of the City's brief is a repetition of the lower court's finding that the tort claims act shields the City from any and all discriminatory acts against appellant. The City relies upon *Health Promotion Specialists, LLC v. South Carolina Bd. Of Dentistry* [fn.9]

9 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013)

to support its assertion. The City's reading of *Health Promotion*, and the lower court's error in the same manner, is that they both construe far too broadly what the Supreme Court specifically rejected in *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992) as an universal shield. The City argues the Tort Claims Act provides a shield for all acts. The purpose of the Tort Claims Act is to abrogate sovereign immunity and provide a shield to government employees who exercise **discretion** in their duties, but there is no such thing as discretion to commit an unlawful act. In other words, there is no Tort Claims Act shield for constitutional violations. As the Court said in *Gardner*:

Clearly, to accept Department's contention and view § 15-78-60 (25) in an "unrestricted sense" would absolve schools, state hospitals, and prisons from liability for virtually *all* acts relating to students, patients, prisoners, *etc.*, absent gross negligence. Such an interpretation of the statute is contrary to the purpose and policy of the Tort Claims Act, which abrogates sovereign immunity.

It is a question of fact as to whether Ron Faretra and Jennifer Althoff's acts were taken in and during the course and scope of their authority, just as it is a question of law as to whether the City of Goose Creek can overrule the General Assembly's limitations of § 5-7-30. The plaintiff is entitled to bring an action for declaratory relief, injunctive relief, and damages. The Tort Claims Act cannot be read by the lower court as providing carte blanche to a municipality to ignore the limitations on its municipal powers and to misuse those powers to deprive a citizen of constitutionally protected rights.

CONCLUSION

Thus, as set forth in the appellant's brief, 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/statutory limitation on a municipality's ability to tax income nor did it apply the rules of statutory construction that require it to apply the words in the statute in their plain and ordinary meaning. As the Supreme Court said in *Beard*, the Court is required to not read the tax statute to extend the City's powers beyond the clear import of its language, and any substantial doubt must be resolved in the appellant's favor. The lower court did the opposite. The lower court substituted its interpretation of the applicable state statutes instead of applying the clear and unambiguous meaning. The lower court never gave any consideration to the appellant's evidence of animus—which sheds light on the City's motivation—and even though the lower court found the Town's administrative appeal procedure to be flawed, it granted the appellant no relief. By successfully challenging the City's procedural appeal process, the appellant already achieved one of the benefits he sought on a significant issue and is a prevailing party as to the procedural due process challenge, and the lower court failed to consider the appellant's entitlement to attorney's fees as the prevailing party. 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. The lower court should also consider the appellant's request for attorney's fees as the prevailing party on procedural due process.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

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

Todd Olds.....Appellant,

v.

City of Goose Creek.....Respondent.

**AMICUS CURIAE BRIEF OF THE
MUNICIPAL ASSOCIATION OF SOUTH CAROLINA**

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STATEMENT OF ISSUES ON APPEAL

The Appellant raises three issues on appeal. By this brief, the Municipal Association of South Carolina ("the Municipal Association") addresses only the first issue: whether the trial court correctly held that the City of Goose Creek's business license ordinance is valid.

STATEMENT ON THE INTERESTS OF THE AMICUS

The Municipal Association is a nonpartisan, non-profit association of the State of South Carolina's incorporated cities and towns with 270 member municipalities. The Municipal Association, in addition to offering services and programs to its members, promotes and represents the collective interests of municipalities throughout the State.

Municipalities have a substantial and vital interest in judicial and legislative determinations pertaining to local business license taxation given the potential statewide impact on local ordinances. The Municipal Association believes the trial court correctly held that the City acted within its statutory authority in enacting a business license tax ordinance defining "gross income" as "total revenue of a business" or "gross receipts" and that such terms are consistent with state and federal law.

Municipalities have broad authority to enact ordinances pursuant to S.C. Code §5-7-30 (1976). South Carolina jurisprudence has long established that municipalities have authority to define the terms to levy a business license tax if those definitions are consistent with state and federal law. South Carolina does not define "gross income" for business license tax purposes; however, our courts have upheld ordinances that define the use of "gross income" as "gross receipts" or "total revenue". State and federal income tax definitions do not dictate or control municipal business license tax definitions.

STATEMENT OF THE CASE

The Municipal Association adopts the Statement of the Case in the Final Brief of Respondent.

ARGUMENT

The Municipal Association agrees with the clear arguments as set forth in Respondent's Final Brief.

I. THE TRIAL COURT CORRECTLY DETERMINED THE CITY OF GOOSE CREEK'S BUSINESS LICENSE TAX ORDINANCE IS VALID

The central issue on appeal to be addressed by the Municipal Association in its Amicus Curiae Brief is whether the business license tax ordinance of the City of Goose Creek (Ord. §110.001) defining "gross income" as "total revenue" or "gross receipts" is valid.

South Carolina law is well settled that the test for the validity of a municipal ordinance is 1) whether the municipality enacting the ordinance had the power to do so and 2) whether the ordinance is inconsistent with state or federal law. Hospitality Association of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 117-118 (1995).

a. THE TRIAL COURT CORRECTLY HELD THE CITY OF GOOSE CREEK ACTED WITHIN STATUTORILY CONFERRED AUTHORITY TO DEFINE "GROSS INCOME" AS "TOTAL REVENUE" OR "GROSS RECEIPTS"

Appellant argues that the City of Goose Creek (hereinafter "the City") exceeds the authority granted to municipalities by S.C. Code §5-7-30 to "levy business license taxes on gross income" because the City does not adopt the State's income tax definition of "gross income". The Appellant's argument fails on at least two separate grounds. First, Appellant has provided no authority to support the imposition of income tax definitions on an excise tax and such a sweeping application has been rejected in South Carolina. Second, the ordinance defines "gross

income" as "the total revenue of a business" or "gross receipts" employing the well settled and long standing definitions found in both South Carolina jurisprudence and common definitions.

i. Municipalities Act Within Statutorily Conferred Authority In Defining "Gross Income" for Business License Tax Purposes When No State or Federal Excise Tax Definition Is Imposed

Appellant contends that the definition of "gross income" found in S.C. Code §12-6-1110 defining "gross income" expressly for "income tax purposes" must be adopted by municipalities. However, Appellant provides no state or federal law requiring that the use of the income tax definition of "gross income" and such an argument misapprehends the very nature of the business license tax. Appellant provides no authority for his position because none exists.

S.C. Code §5-7-30 grants the ability to municipalities to levy business license taxes; however, this statute remains completely silent on the method, terminology, modifiers or specifics of said taxes. No attempt is made by the legislature to define "gross income" in this context nor does this statute invoke other definitions by reference. The legislature made no attempt to constrain municipalities in exercising their broad authority to levy a business license tax by imposing particular definitions. Appellant's argument suggests that one definition of "gross income" is applicable in all contexts but such an expansive application has been rejected in this State. South Carolina has held that "[t]he term 'gross income' does not carry the same definite and inflexible meaning under all circumstances and wherever used. Its meaning depends on 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, 142-143, 378 S.E.2d 606, 608 (Ct. App. 1989). The subject ordinance employs a definition of "gross income" for purposes of a tax completely different in nature than the income tax definition relied upon by Appellant.

A business license tax is an excise tax which is a tax on the privilege of conducting business within a geographical area and, in this instance, a municipality. A business license tax can be thought of as a tax on a transaction or activity. The value of the privilege is measured by the gross receipts therefrom. Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 425 (1990) (citing Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948) *superseded on other grounds by Constitutional Amendment as stated in Home Builders Association of South Carolina v. Sch. Dist. No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013)).

Contrastingly, an income tax is a tax on the gain realized. "Income" in the context of an income tax is defined as the gain derived from capital, from labor, or from both combined, including profit gained through sale or conversation of capital. Stratton's Independence v. Howbert, 231 U. S. 399, 415, 34 S. Ct. 136, 58 L. Ed. 285 (1913). A business license tax is not an income tax. Town of Hilton Head Island, S.C. v. Kigre, Inc., 408 S.C. 647, 649, 760 S.E.2d 103 (2015).

Appellant's argument that the City must employ the income tax definition of "gross income" in an excise business license tax ordinance is improper for three reasons. First, Appellant has no state or federal law on which to rely to institute such a broad application of the "gross income" definition which has been rejected in South Carolina. Second, such a definite and inflexible application as suggested by the Appellant is contradictory to prevailing law. Finally, a business license tax is a tax on a privilege, not on the gain realized; as such, Appellant's argument fails to consider the circumstances for which the tax is employed and the results intended to be accomplished. In sum, no state or federal authority exists imposing the income tax definition on municipalities as Appellant contends, and without legislative direction otherwise, municipalities are within their authority to establish such definitions.

ii. The Definition of "Gross Income" Adopted by the City is Consistent with South Carolina Jurisprudence and Common Definition

Appellant also argues that municipalities only have authority under S.C. Code §5-7-30 to levy a business license tax on "gross income" and not on "total revenue" or "gross receipts". Specifically, Appellant contends that the City's ordinance defining "gross income" as "total revenue" or "gross receipts" institutes a meaning of "gross income" not contemplated by the statute; therefore, using any other definition conflicts with state law falling outside the authority granted to municipalities.

Appellant's argument continues to rely heavily on the State's income tax definition of "gross income". Rather than employing income tax terms on an excise tax ordinance as Appellant suggests, the City's definitions are more rationally and historically based on prevailing authority.

Appellant's argument fails to consider that South Carolina jurisprudence does not support such a severe partition of "gross income", "gross receipts" and "total revenue"; instead, South Carolina has long employed the interchangeable and synonymous use of these three terms. Black's Law Dictionary defines these terms as follows:

- Gross income: total income from all sources before deductions, exemptions, or other tax reductions.
- Gross receipts: total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deductions.
- Revenue: income from any and all sources; gross income or gross receipts.

- GROSS INCOME, GROSS RECEIPTS, REVENUE, Black's Law Dictionary (10th ed. 2014).

Historically, ordinances using "total revenue" to define "gross income" for business license tax purposes are valid. Eli Witt Company v. City of West Columbia, 309 S.C. 555, 559, 425 S.E.2d 16, 18 (1992); Town of Hilton Head Island, S.C. v. Kigre, Inc., 408 S.C. 647, 650, 760 S.E.2d 103, 104 (2015) (holding ordinances that define "gross income" as "total revenue" are within municipal authority and valid); Carter v. Linder, 303 S.C. 119, 122, 399 S.E.2d 423, 425 (1990) quoting Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948) ("gross income" defined as "gross receipts" is a "familiar and valid business license tax method"). In fact, the interchangeable use of these terms in the law dates back to the turn of the century prior to the establishment of state or federal income taxes when a business license tax defined "gross income" as "total receipts from a business before deducting expenditures for any purpose". Columbia Railway, Gas & Elect. Co. v. Jones et al., 119 S.C. 480; 112 S.E. 267, 272 (1922) citing Black's Law Dictionary and German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N.E. 94, 96 (1901).

Also in support of the interchangeability of these terms is a long line of South Carolina Attorney General (hereinafter "Attorney General") opinions acknowledging a "gross receipts" or "total revenue" formulation for "gross income". Based on the predecessor statute to S.C. Code §5-7-30, a 1972 Attorney General opinion justifies a town's ordinance for business license taxes measuring "gross income" by "gross receipts" using the terms interchangeably throughout. 1972 S.C. Op. Atty. Gen. 201 (S.C.A.G.), 1972 S.C. Op. Atty. Gen. No. 3356, 1972 WL 20487. In 1979 the Attorney General opined that both prevailing case law and §5-7-30 authorize a "gross receipts or gross income tax" method for business license purposes as imposed by a

municipality. 1979 WL 42955 (S.C.A.G.).¹ Further entrenching the parallel use of these terms, by 1983, the Attorney General took the position that the term “gross income” is given its common meaning when defined as “total receipts of a business, before any deductions are taken”. 1983 S.C. Op. Atty. Gen. 121 (S.C.A.G.), 1983 S.C. Op. Gen. No. 83-76, 1983 WL 142745. As recently as 2005 and 2012, the S.C.A.G. has regarded “gross income” and “gross receipts” as synonymous and within a municipality’s authority to define; therefore, the use of the terms interchangeably within an ordinance does not, without more, render the ordinance invalid. 2005 WL 774157 (S.C.A.G.) (citing Eli Witt Company v. City of West Columbia, 309 S.C. 555, 559, 425 S.E.2d 16 (1992)); 2012 WL 1615813 (S.C.A.G.) (supporting the principle that municipalities have authority to define the terms of their business license tax as long as those terms do not conflict with state or federal law).

Appellant’s argument that the use of the terms “gross income” and “gross receipts” interchangeably creates an unauthorized ambiguous definition of “gross income” is fatally flawed for relying on a definition of “gross income” not applicable in the context of business license taxes. Also, this position is unavailing on the grounds that the subject ordinance employs a definition of “gross income” previously upheld by South Carolina Courts, firmly entrenched in South Carolina jurisprudence and long supported by the South Carolina Attorney General.

The trial court correctly applied South Carolina law in holding that the City acted within statutorily conferred authority to define “gross income” using the common definition of the term as “total revenue” and/or “gross receipts”. The City’s business license tax ordinance is valid unless determined inconsistent with state or federal law.

¹ Citing Dravo Corp. v. Tacoma, 496 P.2d 504 (1972); Stork Diaper Service, Inc. v. Richmond, 173 S.E.2d 859 (1970); Suburban Title & Investment Corp. v. District of Columbia, 180 F.2d 387 (1950); Cedar Hill Cemetery Corp. v. District of Columbia, 124 F.2d 286 (1941); Food Center of St. Louis, Inc. v. Village of Warson Woods, 277 S.W. 573 (1925); New Yorker Magazine, Inc. v. Gorosa, 144 N.E.2d 367 (1957).

**b. THE CITY OF GOOSE CREEK'S BUSINESS LICENSE TAX
ORDINANCE IS CONSISTENT WITH STATE AND FEDERAL LAW**

Appellant argues that the City's business license tax ordinance provides a definition of "gross income" inconsistent with state law rendering the ordinance invalid.

First, to be deemed inconsistent with state or federal law, the City's definition of "gross income" must directly conflict or be irreconcilable with state or federal authority. Appellant has provided no relevant authority requiring the City to adopt the definition of "gross income" that Appellant has plucked from S.C. Code §12-6-1110. This statute chosen by the Appellant provides a definition of "gross income" expressly limited to "income tax purposes". This statute is unrelated to excise taxes. Second, Appellant fails to identify any other relevant state or federal law defining "gross income" for business license tax purposes or, at the very least, any law that imposes federal or state definitions of the term on municipalities. Generally speaking, a tax statute is not to be extended beyond the clear import of its terms. Beard v. S.C. Tax Commission, 230 S.C. 357, 368, 95 S.E.2d 628, 634 (1956). An extension of the term "gross income" applied outside of the South Carolina state income tax statute (§12-6-1110) to a municipal ordinance would directly conflict with well-established principles of statutory construction for a tax statute.

Providing a more relevant analysis on the subject ordinance, the South Carolina Supreme Court has held that the issue of whether a state tax definition conforms to a federal tax definition is strictly for legislative judgment and that federal adaptations of "gross income" are not automatically imposed on the state. Scott v. South Carolina Tax Commission, 262 S.C. 144, 146-147 (1974). In Scott, the Court set out the principle that the governmental body implementing the tax has the ability to define a respective taxpayer's obligations. South Carolina has also held the definition of "gross income" as adopted by the State does not carry the same "definite and inflexible meaning" under all circumstances and wherever used. Bogan v. Bogan, 298 S.C. 139,

142-143, 378 S.E.2d 606, 608 (Ct. App. 1989). As recently as 2014, South Carolina continued to agree with the Scott and Bogan holdings in a municipal context, deeming a business license tax defining “gross income” as “the total revenue of a business” consistent with state and federal law. Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 649, 760 S.E.2d 103, 103 (2014), *reh’g denied* (July 24, 2014), *cert. denied sub nom. Kigre, Inc. v. Town of Hilton Head Island*, S.C., 135 S. Ct. 959, 190 L. Ed. 2d 832 (U.S.S.C. 2015); Eli Witt Company v. City of West Columbia, 309 S.C. 555, 559, 425 S.E.2d 16 (1992) (holding an ordinance defining “gross income” as “total revenue” constitutional).

As previously mentioned, the South Carolina Attorney General, has an established history of opinions analyzing municipal ordinances defining “gross income” as “gross receipts” or “total revenue” without the inclusion of deductions. None of these opinions regarding ordinances with substantially similar or identical language as the City’s subject ordinance have been deemed inconsistent with state or federal law by the S.C.A.G. on the basis of the “gross income” definition. *See* 2012 WL 1615813 (S.C.A.G.) (analyzing substantially similar “gross income” definition and language from a Beaufort County business license tax ordinance); 2005 WL 774157 (S.C.A.G.) (analyzing identical “gross income” definition and language from the City of Conway’s business license tax ordinance); 1979 WL 42955 (S.C.A.G.) (providing that the City of Newberry’s gross receipts tax was consistent with §5-7-30); 1983 S.C. Op. Atty. Gen. 121 (S.C.A.G.), 1983 S.C. Op. Gen. No. 83-76, 1983 WL 142745 (Town of Leesville ordinance defining “gross income” as “gross receipts” was not inconsistent with state or federal authority).

In sum, a municipal ordinance is valid when it is enacted within the authority granted by the state and is consistent with state and federal law. The trial court correctly found that the business license tax ordinance of Goose Creek Ord. §110.001 defining “gross income” as “total

revenue" or "gross receipts" was within the City's authority and consistent with prevailing state and federal authority.

CONCLUSION

For the reasons stated above, and for the reasons stated by the City of Goose Creek in their Brief, the Court should affirm the holding of the Circuit Court that municipalities have the authority to define "gross income" as "total revenue" or "gross receipts" and that such a definition is consistent with both state and federal law.

Respectfully submitted,



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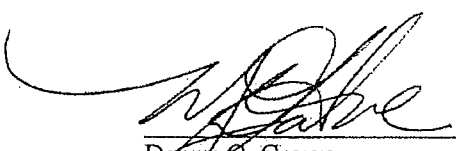
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City of Goose Creek.....Respondent.

CERTIFICATE OF COUNSEL

The Municipal Association's counsel hereby certify that the *Amicus Curiae* Brief of The Municipal Association of South Carolina as required by Rule 213, SCACR, complies with Rules 208(b) and 211, SCACR.



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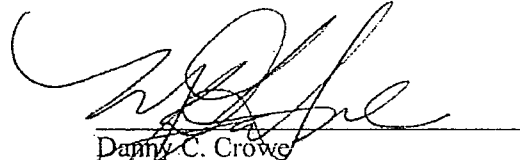
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CERTIFICATE OF SERVICE

I certify that I have this 17th day of May, 2016, mailed a copy of the Municipal Association's *Amicus Curiae* Brief to the following via U.S. Mail with sufficient postage thereto to the below listed attorneys.



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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..... Appellant,

vs.

City of Goose Creek Respondent,

APPELLANT'S REPLY BRIEF TO AMICUS BRIEF
OF MUNICIPAL ASSOCIATION

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REPLY TO MUNICIPAL ASSOCIATION'S STATEMENT OF INTERESTS

In an effort to influence the Court's decision in this case, the Municipal Association mischaracterizes this case. This case is about a single taxpayer and a single local government's misapplication of its unambiguous ordinance due to animus for the taxpayer stemming from an unrelated disagreement in which the taxpayer prevailed. (See Appellant's testimony at R.O.A. page 174:

Prior to [this] 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 although 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 not properly reported my gross income.

The Municipal Association not only ignores these undisputed facts, but also makes several misstatements of law and misstatements of fact in an effort to influence the Court's review of straightforward legal issues.

First of all, the taxpayer/appellant in this case called the gross income issue to the Municipal Association's attention in October and November of 2012, and two highly placed officials of the Municipal Association responded to the appellant in writing, confirming that the business license tax is calculated on gross income in conformity with the statute, § 5-7-30, S. C. Code. On November 7, 2012, appellant consulted with the Municipal Association's, Mellissa M. Carter, its "Research & Legislative Liaison." In response to the appellant's inquiry, she wrote appellant: "Thank you for following up on our conversation.

You have stated my understanding correctly. If you have any further questions please give either Warren [Harley, Governmental Affairs Liaison] or me a call." The subject of this November 7, 2012, correspondence is "Business License Calculation," in which the appellant laid out the following example for Ms. Carter: "The example you [Mellissa Carter] shared was if you pay \$200,000. And sell for \$300,000 the license fee should be calculated on \$100,000 gain, not the sale price \$300,000." (November 1, 2012, e-mail Olds to Mellissa McCullough Carter.) Prior to that email, on October 31, 2012, the Municipal Association's Governmental Affairs Liaison, Warren Harley wrote to appellant: "For the purpose of determining gross income our business license guide references Section 61(a) of the IRS code. Your business license is calculated on the amount you show as your gross income on your tax return." Mr. Harley's answer is, of course, not only exactly what Goose Creek's ordinance says, but also exactly what the City of Goose Creek says in its administrative appeal memorandum of Law, quoted below on page 6. (R.O.A. page 224)

Of course, the Municipal Association's October and November 2012, written answers are correct and in exact conformity with the state's enabling statute, § 5-7-30, and conform to the exact wording of Goose Creek's ordinance § 100.001. Therefore, applying the standard rules of statutory construction to this issue demonstrates the circuit court's error. On page 10 of its reply brief, the City of Goose Creek identifies the central issue from the City's point of view by asking this Court to ignore the plain words of the statute and the City's ordinance in order to torture the meaning so that "gross income" is twisted into becoming "gross receipts" because that interpretation "generates substantial revenues for municipal and county government across the state." (City's Brief at page 10.) The

South Carolina Supreme Court rejected this end-justifies-the-means reasoning in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015).

Neither the City nor the Municipal Association identifies any authority that justifies such a metamorphosis to transform "receipt" into "income." (Lawyers deal with this on a daily basis. When a lawyer settles a case for \$10,000.00, she does not have \$10,000.00 of income. Rather, she takes her fee out of the settlement amount and reports her fee as "income." In a typical tort case, a lawyer would have \$10,000.00 in "receipts" and \$3,333.00 in "income." Anyone with the slightest familiarity with a closing statement in a real estate transaction knows the difference between the sales price and the gain. The gain is income.)

Lest there be any ambiguity about what is indisputably clear, the Court can refer to page 224 of the Record on Appeal and read the City of Goose Creek's August 30, 2011, memorandum of law to the City Council:

Furthermore, the city's definition of gross income is in accord with the Internal Revenue Code ("IRC"). IRC Section 61 defines gross income. IRC Section 61(a) states that "[e]xcept as otherwise provided in this subtitle, gross income means **all income from whatever source derived**" (Emphasis added), which is consistent with the broad definition of "total revenue" used by the City's ordinance."

City of Goose Creek Memorandum of Law, August 30, 2011, R.O.A. page 224-25

Oddly, the Municipal Association now takes an opposing view to the City of Goose Creek's 2011 memorandum and its 2012 written statements. On page 3 of its brief, the Association contradicts the City's Memorandum and its previous written statements regarding how the City's definition is in accord with the income tax definition: "The subject ordinance employs a definition of gross income for purposes of a tax completely different in nature than the income tax definition relied on by appellant." (Amicus Brief at page 3)

Appellant and the City of Goose Creek find common ground and agree about the definition of its ordinance. The Municipal Association is uninformed about the City's ordinance because it inaccurately states its provisions. Both Appellant and the City of Goose Creek agree that the gross income reported to the Town must match the gross income reported to the I.R.S. and to the State Department of Revenue, and "receipts" are never reported as "income." The Municipal Association ignores the requirements of Goose Creek's ordinance. In fact, the 2011 Goose Creek Memorandum Of Law supports appellant's position that the City's definition is in accord with the income tax definition, which is what the enabling statute requires.

The Municipal Association ignores § 5-7-30 and errs when it states on page 1 of its brief that the City enacted an ordinance defining "gross income" as "total revenue of a business" or "gross receipts." In fact, as shown below the City's ordinance does not equate "gross income" as "gross receipts," but rather distinguishes between the two:

GROSS INCOME. The total revenue of business, receive or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefore, 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 count.

The term **GROSS RECEIPTS** means the value proceeding or accruing for 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 of or 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.

§ 110.001 DEFINITIONS (R.O.A. page 129; See also page 187 R.O.A. for Professor Gutting's discussion of this issue, which demonstrates just how wrong the Municipal Association in reversing course.)

The Municipal Association states "no state or federal authority exists imposing the

income tax definition on municipalities . . . and, . . . municipalities are within their authority to establish such definitions." (page 4 of amicus brief) First, the Municipal Association is just wrong. Second, and more importantly, the City of Goose Creek did just that: it established separate and distinct definitions for "gross income" and "gross receipts" and imposes a tax on "gross income." See Professor Gutting's affidavit at pages 182 – 188 of the Record on Appeal because she explains this in detail, which the lower court simply ignored.

Rather than address the City's definition adopted by ordinance, the Municipal Association turns its back on state law and on the Goose Creek's ordinance and relies, instead, on *Black's Law Dictionary* for abstract definitions without context. However, resort to a law dictionary is not dispositive when the State and the City provide clear definitions. "Law dictionaries are not particularly helpful to [a court] in determining the precise meaning of a term in context." *Heilker v. Beaufort County Board of Zoning Appeals*, 346 S.C. 401, 552 S.E.2d 42 (2001)

On page 7, the Municipal Association states that the South Carolina Attorney General has regarded "gross income" and "gross receipts" "synonymously" and "within a municipality's authority to define; therefore, to use the terms interchangeably within an ordinance does not, **without more**, render the ordinance invalid." (emphasis added) It is the "more" the Association ignores. First, state law limits what a municipality can tax, and it is "gross income." § 5-7-30, S. C. Code. Second, the City's ordinance does provide more authority. The City defines the terms in two ways. First in its definitions, and second, in the context of its ordinance provisions:

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

The **GROSS INCOME** for business licenses 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 governmental agencies.

§ 110.001 DEFINITIONS, R.O.A. page 129

See also § 110.003 INSPECTION AND AUDITS, R.O.A. page 130:

(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.

See also § 110.008 REGISTRATION REQUIRED; LICENSE APPLICATION, R.O.A. page 132:

(B) . . . Applicants may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures.

Therefore, it is impossible to apply read the Goose Creek Ordinances in their proper context, all of which are clear and unambiguous, without concluding that the ordinances support appellant, not the Municipal Association. It is the Municipal Association, not appellant, which is reading the ordinances in a disjointed fashion and without any context and in violation of the well-developed rule of statutory construction that requires courts to enforce ordinances in their plain and ordinary meaning. The ordinances are written in clear, precise language, consistent with the enabling statute and thus there is no support in this record or in case law to assert that "income" = "receipts." The Municipal Association ignores the City's obvious misapplication of its ordinance to the appellant in this case, and the lower court erred in failing to find the appellant raised a genuine issue of material fact.

REPLY TO MUNICIPAL ASSOCIATION'S ARGUMENTS

The rest of the Municipal Association's argument is a repetition of the same arguments made by Goose Creek and fully briefed except that the Municipal Association cites 13 cases not previously briefed by the parties. The Municipal Association relies on out-of-state and federal cases that have no bearing on the well-developed body of South Carolina law on the rules of statutory construction, especially where our jurisprudence instructs courts not to look out of state when South Carolina law provides the definition. When a municipal ordinance provides a clear definition, the Municipal Association needs look no further than the local law. Only when South Carolina law is silent on a legal issue do out-of-state authorities become pertinent: "No reported case in South Carolina jurisprudence provides s definition [use] thus this Court must look to the law of other jurisdictions for assistance." *Heilker v. Zoning Board of Appeals for the City of Beaufort*, S.C. S.E.2d (2001). Here the definitions are provided in the ordinances being applied, and South Carolina law is clear on how such ordinances are to be read. Here the definitions are clear. Here the definitions all fit in the context, and therefore, there is no need to look out-of-state to provide what the City of Goose Creek and the South Carolina General Assembly already provide.

However, since the Municipal Association relies on out-of-state cases to support its position, appellant summarizes each one below. Those cases are as follows:

STATE CASES

Case from Illinois (1)

Case from Missouri (1)

Case from New York (1)

Cases from South Carolina (5)

Case from Washington State (1)

Case from Virginia (1)

FEDERAL CASES

Cases from the District of Columbia (2)

Case from the United States Supreme Court (1)

Not one of these cases supports the Municipal Association's assertion that a municipality can expand the definition of gross income to support increasing the taxes on a business.

Case from Illinois

German Alliance Ins. Co. et. al. v. Van Cleave, 191 Ill. 410, 61 N.E. 94 (1901) is about as far removed as authority as one can imagine. "The matter in controversy is the proper construction of the act approved April 19, 1899, entitled 'An act providing for a tax on gross premium receipts of insurance companies and associations other than life.' . . . That act provides that every insurance company of the class to which complainants belong 'shall at the time of making the annual statements as required by law, pay to the insurance superintendent as taxes, two per cent. Of the gross amount of premiums received by it for business done in this state. . .'" The conclusion of the Supreme Court of Illinois was: "In the construction of the act, effect is to be given to the intention of the legislature, and that intention appears to be to levy a tax on the gross income of foreign fire insurance companies." The Illinois Supreme Court went on to say that the tax collector could not

include return of unearned premiums as part of the company's gross income. "An insurance company would not be authorized to omit from its statement any part of premiums received merely on the ground that policies might be cancelled in the future; but, where they have been in fact canceled and the money returned, the entire or gross premium receipts cannot, by any fair interpretation, include the moneys so returned." The Municipal Association cited this case without reading it.

Case from Missouri

The Municipal Association provides an incorrect citation for *Food Center of St. Louis, Inc. v. Village of Warson Woods*. The correct citation is: 177 S.W.2d 573 (Mo. 1945). This case has no bearing on the issue before the Court because the issue there involved a unusual situation involving a business that straddled a boundary. *Food Center of St. Louis, Inc.* involved a supermarket located on the line dividing the City of Rock Hill from the Village of Warson Woods. The check-out stands, cash registers, etc. were all in Rock Hill. Part of the shelves of merchandise were in Rock Hill and part in Warson Woods. A large parking lot and other auxiliary facilities were located in Warson Woods. In this situation the court decided that *each* community might levy an occupation tax measured on the *full amount* of the sales at the supermarket. This was, in part, based upon the language of Warson Woods' occupation license ordinance which, as a basis for the tax, included not only the sale of goods but rendering of services in connection with sales. A November, 1956, law review article discussing the case did not think the same result would have obtained had the Warson Woods' ordinance been drafted differently. In other words, the issue in the case is apportionment, not a discussion of receipts vs. income.

Case from New York

The Municipal Association provides an incorrect citation for this case. It is not *New Yorker Magazine, Inc. v. Gorosa*. It is *New Yorker Magazine, Inc. v. Gerosa*, 3 N.Y.2d 362, 165 N.Y.S.2d 367, 144 N.E.2d 367 (N.Y., 1957). Once again, the case has no bearing on the issue before this Court. In *Gerosa*, *New Yorker Magazine* complained that it was being treated differently from other media outlets, and thus the issue in *Gerosa* was whether or not it was fair to apportion taxes on electronic media but not the *New Yorker*. "The tax here involved was imposed on appellant's total receipts from advertising less advertising receipts received from its Chicago branch office."

Case from Virginia

Stork Diaper Service, Inc. v. City of Richmond, 210 Va. 705, 173 S.E.2d 859 (1970) is another allocation case. Stork Diaper Service objected to its tax being calculated on business done outside of the City of Richmond. The Court of Appeals held that because of an omission in the ordinance, the City was allowed to consider the taxpayer's income from other counties. "Either by legislative advertence or inadvertence, Code § 58-266.5 contains no provision that permits a licensee like Stork, which has a place of business or office only in the City of Richmond, to exclude any of its gross receipts from the City's license tax base. We cannot supply a provision that was not enacted by the General Assembly." The Court uses "receipts" in a casual way and in no way analyzes the issue now before the Court.

Case from Washington State

Dravco Crop. V. Tacoma, 80 Wn.2d 590, 496 P.2d 286 (1972) addresses the right

of taxing authority to tax an out-of-state entity doing business within the State of Washington (dam construction). It does not attempt to construe a formula for collection of a business license tax and provides no authority for the Municipal Association's assertion.

Case from United States Supreme Court

In *Stratton's Independence v. Howbert*, 231 U.S. 399, 34 S.Ct. 136, 58 L.Ed. 285 (1913), the U.S. Supreme Court upheld the right of Colorado, under federal mining law, to assess an income tax on a British mining company. The Supreme Court held: "The act prescribed that the tax should be 'equivalent to one per centum upon the entire net income over and above \$5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations,' etc., or, with respect to foreign corporations, 'upon the amount of net income over and above \$5,000, received by it from business transacted and capital invested with the United States,' etc. And the net income was to be ascertained by taking, first, the 'gross amount of the income of such corporation. . . . received within the year from all sources,' or, in the case of foreign corporations, 'from business transacted and capital invested within,' etc., and deducting therefrom losses sustained, interest paid, etc." This case does not support the Municipal Association's assertions.

Cases from District of Columbia

(1) *Cedar Hill Cemetery Corp. V. District of Columbia*, 124 F.2d 286 (1941). This case has no bearing on the issues presented here. In *Cedar Hill*, the petitioner challenged the applicability of a business licenses tax on it because it was an out-of-state corporation. The Court held that the District of Columbia could impose a business license tax on an out-

of-state corporation. This case has nothing to do with the manner in which the District of Columbia computed its tax.

(2) *Suburban Title & Investment Corp. V. District of Columbia*, 180 F.2d 387 (1950)

This case decided the same issue as *Cedar Hill*, to wit, that the District of Columbia is authorized to impose a business license tax upon a corporation that is located in the State of Maryland. As in *Cedar Hill*, this case does not construe or even address the issue raised here.

South Carolina Cases

Neither the out-of-state nor the federal cases offer any guidance to the Court in deciding this issue. The five newly identified South Carolina cases cited by the Municipal Association are:

(1) *Eli Witt Company v. City of West Columbia*, 309 S.C. 555, 425 S.E.2d 16 (1992)

(2) *Home Builders Association of South Carolina v. Sch. Dist. No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013)

(3) *Hospitality Association of South Carolina Inc. v. County of Charleston*, 320 S.C. 219, 464 S.E.2d 113 (1995)

(4) *Scott v. South Carolina Tax Commission*, 262 144 (1974)

(5) *Town of Hilton Head Island, S.C. v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2015)

In *Eli Witt*, the taxpayer challenged the classification of its business and complained that he was being unfairly classified. The South Carolina Supreme Court held that the classification was proper: "If a classification is reasonably related to a proper legislative

purpose and the members of each class are treated equally, any challenge under the equal protection clause fails." That is not the issue here, and more importantly, the Supreme Court noted that "Under the ordinance, the business license tax is assessed upon a **business's gross income** for the year," (emphasis added) which supports the appellant's legal position.

In *Home Builders*, the South Carolina Supreme Court reversed the grant of a judgment on the pleadings and remanded the case back to the circuit court to evaluate the constitutionality of an ordinance that imposed an impact fee on property owners who constructed a new residence within the school district. This case has no bearing on the issue before the Court.

In *Hospitality Association of South Carolina Inc. v. County of Charleston*, the issue was the Charleston's and Hilton Head's enactment of a 2% "hospitality tax." The taxpayers argued that the hospitality tax was pre-empted by a state law. The South Carolina Supreme Court disagreed and held "Because the defendants had the power to enact the ordinances at issue, and the ordinances are not inconsistent with the Constitution or general law of the State, we hold that the ordinances are valid." Thus, this case has no bearing on the issue before the Court. Here, the parties agree that § 5-7-30, S. C. Code, authorizes a local government to impose a business license tax on "gross income."

In *Scott v. S. C. Tax Commission*, which correct citation is 262 S.C. 144, 202 S.E.2d 854 (1974), the South Carolina Supreme Court held that an irrevocable assignment of an annuity should be included in gross income for tax purposes. (This is not surprising to anyone who took a tax class.) The Supreme Court held, consistent with every court that

ever addressed this issue, "[t]he power to dispose of income is the equivalent of ownership of it." This is a similar argument that Bogan advanced to the Family Court and lost. *Bogan v. Bogan*, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989), discussed in appellant's reply brief at pages 9 -10.

Finally, we reach *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2015), the one and only case the Municipal Association cites that sheds any light on the issue before the Court. However, the light of *Town of Hilton Head* unequivocally supports appellant, not the Municipal Association's position. In *Town of Hilton Head*, the South Carolina Supreme Court upheld the constitutionality of the business license tax—not an issue here—and states with its own emphasis: "The legislature has specifically granted municipalities the authority to enact ordinance and "levy a business license tax on *gross income*." The Supreme Court italicized "gross income," in order to emphasize the very legal principle that the Municipal Association is **now** refusing to recognize. (We emphasize "now" because in October and November, 2012, when appellant asked the Municipal Association to weigh in on this issue, the Municipal Association wrote back that appellant's legal position is correct.) The parties in *Kigre* did not ask the Supreme Court to define "gross income," and neither do we because Goose Creek has already done it in conformity with § 5-7-30, S. C. Code. All this appellant ever asked of Goose Creek is to apply its ordinance to him as it is written and not retaliate against him because he succeeded against the Town in an unrelated legal matter. The Hilton Head ordinance is clear just as the Goose Creek ordinance is clear, which should be a surprise to no one since the enabling act limits a municipality's right to collect a business

license tax to "gross income." The Municipal Association simply refuses to see the issue before the Court, which is Goose Creek's misapplication of its ordinance to the appellant.

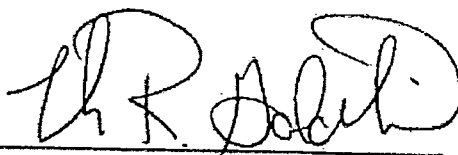
In short, not a single case cited by the Municipal Association supports the Municipal Association's shifting position that municipalities can impose a business license tax on "gross receipts."

CONCLUSION

The Municipal Association makes an end-justifies-the-means argument, an argument rejected by the Supreme Court in *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). Not once does the Municipal Association evaluate, let alone mention, Goose Creek's ordinances and the consistency with which its definition of "gross income" appears in all its sections and in all its contexts and how the figures reported to Goose Creek must match up with the figures reported to the I.R.S. and the State Department of Revenue. Every time Goose Creek uses the term "gross income," it is consistent and comports with the State's enabling statute. Professor Gutting addressed this in detail at pages 182-191 of the R.O.A. Not once does the Municipal Association address these facts or Goose Creek's misapplication of its unambiguous ordinance to the appellant, which is the issue before this Court. Moreover, because the Municipal Association waited until the last possible moment to file an amicus brief, it has escaped any examination for its rationale in asserting to this Court that "gross income" means "gross receipts."

Respectfully submitted,

May 31, 2016

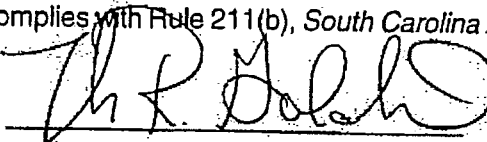


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CERTIFICATE OF COUNSEL

I certify that this final brief complies with Rule 211(b), *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
Appellate Case No. 2014-002393

Todd Olds..... Appellant,

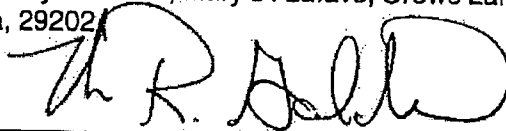
vs.

City of Goose Creek Respondent,

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Designation of Contents of Record on Appeal on the Respondent, City of Goose Creek, by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2016, addressed to its attorney of record, Timothy A. Domin, 126 Seven Farms Drive, Suite 200, Daniel Island, S. C. 29492 and to the Municipal Association by depositing a copy of it in the United States Mail, postage prepaid addressed to its attorney of record, Mary D. Lafave, Crowe Lafave, P. O. Box 1149, Columbia, South Carolina, 29202.

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