THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM BERKLEY COUNTY
COURT OF COMMON PLEAS
Dale Van Slambrook, Special Circuit Court Judge

Case No.: 2016-CP-08-01261
Appellate Tracking No.: 2017-000796

Benjamin Reyna, d/b/a El Alamo Restaurant,.....Appellant,

vs.

The Town of Hanahan, ...Respondent.

INITIAL BRIEF

December 19, 2018

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STATEMENT OF CASE

This business license revocation case began on April 18, 2016, when the City of Hanahan moved to suspend the business licenses of two businesses, both located in adjoining suites of the same commercial building at 5901 Loftis Road, located feet from City Hall and the Police Department. One business (now closed) was "Latino Mix," which was a convenience store that possessed a permit to sell beer and wine for off premises consumption. Next door is El Alamo, a restaurant with a D.H.E.C. "A" rating and a late night discotheque club that caters to an Hispanic clientele. El Alamo's manager is Benjamin Reyna, and his long-term girlfriend owned and operated Latino Mix. El Alamo includes a full service kitchen with a D.H.E.C. "A" rating, a bar, and a dance floor. It does not sell alcohol, but it allows patrons to bring in beer and wine. On weekends, the business is open until the early morning hours and provides a D.J., cooler service for patrons who bring their own beer or wine, and a bar that serves food and soft drinks. As suggested by the names of the businesses, they are both minority owned and serve a predominantly minority, Spanish-speaking clientele. The notice provided by the City for the revocation never identified the precise grounds for the revocation, and when the appellant's

counsel asked for specific charges, the Town's Building License Official, Joy Krutek, wrote on April 28, 2016 as follows:

> Your clients' business licenses are being considered for revocation because a preliminary determination has been made that (1) the businesses are in breach of the condition upon which the business licenses were issued; (2) the operation of your clients' business constitutes a nuisance; (3) your clients have failed to comply with sections of the business license ordinance; and (4) your clients and its customers have engaged in unlawful activities related to the business.
> See page 3 of Appellant's October 4, 2016, Memorandum of Law, R.O.A. page _____

On April 12, 2016, the City of Hanahan copied the City of Charleston's 2:00 a.m. closing ordinance discussed in *Denene v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 596 (2004), and amended its ordinance, 4-2, to prohibit the sale of alcohol between the hours of 2:00 and 7:00 a.m. R.O.A. page ___ [Ordinance 4-2]. The City realized its amended ordinance did not apply to El Alamo because it did not sell alcohol, and therefore, the City amended it a second time on July 12, 2016, to capture El Alamo under its ordinance by prohibiting a business to permit the consumption of alcohol. This ordinance affected only one business in Hanahan: El Alamo.

At the same time the City amended its ordinance, it instituted a license revocation proceeding against El Alamo and Latino Mix. The City revoked the license for El Alamo, but not for Latino Mix. However, since Latino Mix is now closed, appellant omits any discussion about the process as applied to Latino Mix. Appellant requested a hearing on the business license revocation in accordance with the procedure in Hanahan Ordinance 10-3, and on May 26, 2016, the City Council took up the matter. The City operates under *Roberts Rules of Order.* See Ordinance § 2-51. (R.O.A. page ____) The City Council voted 7-0 to suspend the business license of El Alamo and 4-3 to renew the business license of Latino Mix, which closed in 2018. The appellant sought judicial review for El Alamo, which came before the Honorable Deadra

Jefferson on August 30, 2016.[1] After Judge Jefferson recused herself from the case, without consultation, she asked the Honorable Dale Van Slambrook to hear the case. On November 15, 2016, Judge Van Slambrook issued an Order affirming the City Council's decision to revoke El Alamo's license. On December 2, 2016, the appellant filed a motion for reconsideration, and on January 23, 2017, the circuit court issued an Order denying reconsideration. (R.O.A. pages ____ and ____) The appellant filed a Notice of Appeal on March 14, 2017. (R.O.A. page ____)

STATEMENT OF FACTS

El Alamo is a minority owned business, and it serves a minority clientele. The record demonstrates that the City of Hanahan is aware of these twin facts because the business is located mere feet from City Hall and the Police Department, and Hanahan Police spend an extraordinary amount of time there. At the May 26th "hearing," the City Council was not shy about expressing its view of appellant, his counsel, or his immigration status:

> MR. COX: Do you hear yourself [appellant's counsel] say that? I would have to give you an hour and half to get here. I'm going to drive an hour and a half back tomorrow and after an hour and half back here. Your client is not even in the courtroom.
>
> If he were here we could have an open dialogue conversation. My game plan tomorrow is I'm going to find that affidavit [putative search warrant affidavit]. If it ain't sealed I'm going to get it. I'm going to know what is in it by tomorrow morning.
>
> **I think that's the reason he's not here. He didn't answer questions. He was probably directed by an ICE [Immigration and Customs Enforcement] agent not to be here.**
>
> R.O.A. page ____ [tr. Page 139, line 6] (emphasis added)

Councilman Cox assumes that because appellant is Hispanic, he must therefore be "illegal" and have trouble with ICE. Compare this evidence of bias with similar remarks in *Bannum v. City of Columbia*: "After reading the entire record in this case, it is inescapable to us that the ZBA's decision was based, not on the requirements of the 'special exception' ordinance, but upon the fears of neighboring residents who did not want 'those type of people' in their

[1] The complaint included an appeal and civil rights claims. The appellant discontinued the civil rights claims and brought those in a separate case (2018-CP-09-0177). Those claims have been settled.

neighborhood." As the procedural record demonstrates, Hanahan wields unlimited licensing power under a municipal ordinance with no standards of procedure or evidence, which it brought to bear on a single business. Before the City undertook to amend its ordinance to target El Alamo, and before the City undertook to suspend appellant's business license, the City's first salvo came on February 2, 2015, when its administrator sent an e-mail to the appellant's landlord full of false statements and concluding with "I am asking that you address these issues." (R.O.A. page ___[Appellant's Exhibit 2]. When the landlord did not act as the City directed, on April 18, 2016, the City's business license administrator, Joy Krutek, served notice on the appellant that the City was revoking its business license on the ground that the appellant is a "nuisance": "More specifically, the nuisance is due to repeated criminal activity involving and the business type currently operating was currently operating was not submitted and presented initially for zoning approval." (R.O.A. page ___[Joy Krutek April 18, 2016, letter] After appellant requested a hearing before City Council on the revocation, his hearing counsel sent requests on April 15, 2016, under the *South Carolina Freedom of Information Act*, for "your entire file, including all correspondence, reports, documents, memoranda, or any other documents related in any manner to Benjamin Reyna, Aracelis Santos, El Alamo, Latino Mix, or 5901 Loftis Road." In response to this request, the City dumped over 500 pages of police "incident" reports on appellant's counsel, and told him to be ready for a hearing two days later. When hearing counsel asked for more than a day to review the responses, the City Council refused the request. (R.O.A. page ___ [tr. Page 15] Councilman Cox broadcast the prejudice and telegraphed the prejudgment that permeated the "hearing," explaining that the evidence did not matter to him: "Whether we receive this stuff an hour ago or two days ago we're listening to what happens to our Citizens. Some of our Citizens are here today because they've been living with this nuisance." R.O.A. page ___[tr. Page 19]

As discussed more fully in the Arguments, the City had been building its case against El Alamo for months, and this included using the police department to saturate El Alamo with visits, "compliance checks," in order to generate incident reports. As appellant's counsel pointed out at the May 26, 2016, hearing, most of the police reports were not only double and triple hearsay, but also tenuously connected to El Alamo. As the record of the hearing demonstrates, the City denied appellant an adequate opportunity to prepare, denied him the right to cross-exam witnesses, and then decided the case in an illegally convened executive session.

The undisputed record in this case establishes that El Alamo has not sustained a single criminal conviction, or civil claim, for material illegal acts.

On review to the circuit court, the reviewing judge gave the case short shrift and addressed the appellant's legal issues in a cursory manner. In short, the procedural history of this case—and the lack of due process—is the most compelling legal reason to remand the case back to City Council to evaluate the case only upon admissible, relevant evidence.

STANDARD OF REVIEW

Where the city council of a municipality has acted after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion. *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). This court will not disturb on appeal such findings of the City Council concurred in by a circuit judge unless they are without evidentiary support or against the clear preponderance of the evidence. *Id.* at 363, 133 S.E.2d at 848 (referring specifically, which affirmed the actions of a city council). *Gary v. City of Beaufort*, 364 S.C. 252 (Ct. App. 2005) However, a municipality may not construe its ordinances in such a way as to prevent a property owner from using his or her property to the "highest utility." *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015):

This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that

> Statutes or ordinances 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 not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

Purdy v. Moise, 223 S.C. 298, 75 S.E.2d 605 (1953) (citations omitted); see also *Keane/Sheratt P'ship by Keane v. Hodge*, 292 S.C. 459, 357 S.E.2d 193, 196 (Ct. App. 1987)

ARGUMENTS

Argument 1.
The circuit court referred the matter to the Master-in-Equity, who lacks subject matter jurisdiction.

Subject matter jurisdiction is fundamental, cannot be waived, and can be raised at any time, even by the Court itself. Lack of subject matter jurisdiction cannot be waived and should be taken notice of by this Court on its own motion. *Harden v. S.C.H.D.*, 266 S.C. 119, 221 S.E.2d 851 (1976); *McCullough v. McCullough*, 242 S.C. 108, 130 S.E.2d 77 (1963) *Felden v. Felden*, 274 S.C. 219, 262 S.E.2d 43 (1980) After Judge Jefferson recused herself, she sent the case to Judge Van Slambrook without consultation with either party, and the record is silent as to either the manner or the reason she picked him to hear the case. (The transcript reveals that in sending the case to Judge Van Slambrook, Judge Jefferson never mentioned that he was the Master-in-Equity:

> . . . And it is only fair that it [the case] be disposed of today. And I have found another judge that can hear it. I recognize that I'm not the only judge that can hear a motion and dispose of it. And I do not have the misapprehension that I'm indispensable.
>
> R.O.A. page ____[tr. Page 21, lines 15-19]

At no time did Judge Jefferson suggest she was referring the case to the Master-in-Equity, and neither party was aware she was doing so. See Rule 53(b), *South Carolina Rules of Civil Procedure* and *First Palmetto State Bank and Trust Co. v. Boyles*, 302 S.C. 136, 394 S.E.2d

313 (1990): South Carolina Rule of Civil Procedure 53(b) authorizes the circuit court to refer an action to a master-in-equity (1) by consent of the parties, (2) if there is a default, (3) in actions with complicated issues to be tried before a jury, and (4) in all other actions, upon application of any party or upon the court's motion.

Since none of the four enumerated paths to a reference occurred in this case, the circuit court was without subject matter jurisdiction to decide the appeal.

Argument 2.
The decision of the City Council is arbitrary, unreasonable, and an obvious abuse of its discretion

A. The Council deprived appellant of procedural due process.

B. The Council deprived appellant of substantive due process.

At the outset, the Court must resolve the question of whether a City Council possesses the authority to strip a property right from a citizen. The parties to this action agree that the possession of a license to do business is a property right that cannot be abrogated without affording due process. *Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006). The parties also agree that a municipal corporation has no inherent power to regulate its citizens' property rights—or even tax—except as granted to it by the General Assembly. § 5-7-30, S. C. Code. § 5-7-30 specifically authorizes a municipality to undertake to abate a nuisance, but it says nothing about a municipality having the right to strip a citizen's property rights. The procedure for nuisance abatement is set forth in § 15-43-10, S. C. Code, ann., and the parties agree the City did not follow this process.

Instead, the City created a process out of whole cloth, which does not resemble any opportunity for appellant to be heard in "meaningful" manner. See *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972): "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 all opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

The record of the "hearing" before city council is a quintessential example of raw executive power unrestrained by the principles that govern adversary proceedings. What occurred in the City Council chamber on May 26, 2016, was not anything that comports with any notion of a "meaningful" hearing. The City dumped hundreds of pages of incident reports on appellant two days before the hearing, denied him an opportunity to cross-examine witnesses, berated, mocked, and attacked his counsel, and made numerous expressions of raw prejudice. In short, the May 26th "hearing" was the type of action the Supreme Court describes as "arbitrary, unreasonable, or an obvious abuse of its discretion." In analyzing this issue, the circuit court relied heavily on the Fourth Circuit case, *Richardson v. Town of Eastover*, 922 F.2d 1152 (4th Cir. 1991), which case highlights the palpable error of law that permeates the Order under review. In turning a blind eye to the City Council's deplorable conduct, the circuit court relied upon *Richardson* for the proposition that not every instance of a deprivation of property requires a "full blown" evidentiary hearing. Whatever the appellant received, the record shows it was not a "full blown" anything. The lower court's conclusion is erroneous because it ignores both the holding and the reasoning of *Richardson.*

As discussed throughout this brief, whatever term this Court chooses to apply to the evaluation of appellant's property rights before the Hanahan City Council on May 26, 2016, it was not in the same universe of "evidentiary hearing." The evidence shows that the Town convened the hearing in concert with its ordinance amendment designed to eliminate a specific minority business after the City failed to persuade appellant's landlord to throw him out, something the Supreme Court in *Denene v. City of Charleston* specifically warned against. What happened here is not close to the legislative decision reviewed in *Richardson* because there, the

Town of Eastover decided to close **all** nightclubs on Main Street. A comparison of the analysis in *Richardson* with the present case demonstrates that the circuit court cherry picked *Richardson* for an indisputable—and unchallenged—statement of law that in the context of *Richardson* makes sense, but which becomes a powerful indicia of error here. In *Richardson*, the Town of Eastover determined it was not going to renew **any** nightclub license on Main Street. Eastover did not: (1) amend its ordinances twice to target a single business; (2) repeatedly dispatch police officers without reason to generate incident reports to manufacture evidence or tie up unrelated events to El Alamo; (3) contact the nightclub owners' landlords to induce them to throw out the tenants; (4) target a specific minority business owner for elimination because he serves a minority clientele, (5) deny appellant fundamental due process, and (6) take up appellant's adversary case in an unlawful executive session with the prosecuting attorney. In authorizing the City of Charleston to pass a 2:00 a.m. closing ordinance, the Supreme Court in *Denene* foresaw the precise issue of municipalities using their legislative discretion to target minorities In *Denene*, the South Carolina Supreme Court warned that it would not allow local governments to wield their legislative authority to disadvantage protected classes which the Court defined as:

> A class "saddled with such disabilities, or subject to such history of purposeful unequal treatment, or relegated to such a positon of political powerlessness as to command extraordinary protection from the majoritian political process."
> *Denene v. City of Charleston,* 359 S.C. 85, 596 S.E.2d 917 (2004)

As Councilman Cox's numerous and frequent statements attest, there can be no dispute that appellant in this case is "saddled with disabilities" as Councilman Cox's repetitious, prejudicial comments make clear. His comment on appellant's immigration status, quoted above page 6 above makes this clear. Appellant had every right to be represented by counsel, but Councilman Cox hurled one canard after another. The facts did not matter to Councilman Cox because **he knew** appellant was not present because of his immigration status. As the record here demonstrates, appellant had every right to rely upon his counsel to present a defense and

avoid mistreatment at the hands of Councilmember Cox and others. The sole evidence of "nuisance" here is (1) the City of Hanahan dispatched its police force to generate multiple incident reports to create an impression that El Alamo required excessive police intervention when the record demonstrates the opposite; to wit, that the Police Department created pretexts to generate police reports. (2) In coordination with this effort, Hanahan also amended its zoning ordinance, twice, specifically tailored to address appellant's business. Even that was not enough for the Town of Hanahan, which opened another front by (3) attempting to interfere in appellant's relationship with his landlord. (R.O.A. page ____[Exhibit 2, February 2, 2015, e-mail to appellant's landlord; compare this with appellant's Exhibit 7, Police Department March 21, 2016, e-mail about keeping an eye on El Alamo] The Court can take judicial knowledge of the fact that the appellant's landlord took legal action against it to throw it out of the building, currently pending in the Berkeley County Court of Common Pleas at 2018-CP-08-00266. All of these facts culminated in the unconscionable treatment meted out at the May 26th appearance and combine to make the arbitrary and concentrated attack on plaintiff much worse than similar attacks condemned by the courts when leveled against businesses in cases such as *Bannum v. City of Columbia*, *Helicopter Solutions, Inc. v. Hinde*, and *Wyndham Enterprises v. City of North Augusta*, which look benign by comparison. This record demonstrates that Hanahan did to appellant what the Supreme Court specifically forbid in *Denene*:

> Further, even assuming City is not enforcing the ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation. In *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L. Ed.2d 446 (1962), the U.S. Supreme Court held that, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," **provided the selection is not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.**" *See also Waters v. Gaston County, North Carolina*, 57 F.3d 422, 427 94th Cir. 1995); *Butler v. Cooper, 554 F.2d 645, 646 (4th Cir. 1977)* (before a claim of unlawful discrimination in the enforcement of criminal laws can be established, the plaintiff must allege and prove deliberate selective process of enforcement based upon race or other arbitrary classification).

We hold that even if there is evidence in the record of unequal enforcement, any such evidence only rises to the level of "the exercise of some selectivity in enforcement" of the ordinance. *Oyler v. Boles*, 368 U.S. at 456, 82 S.Ct. 501. **Further, as noted previously, appellants are not members of a protected class.** (emphasis added)

The best evidence of prejudice directed at appellant is the transcript of appellant's May 26, 2016, "hearing." R.O.A. pages ___-____[tr. of hearing] This transcript leaves no doubt as to the prejudice of the Council members or that they made up their minds to target appellant before the parties arrived. As Councilmember Cox stated **before the first witness testified**:

MR. COX: Actually, we live here day in and day out. We listen to our citizens and hear what they have to say. Some of us have relatives who are police officers who have responded to El Alamo and what happens there; so we've been pretty much attuned to what's happened in our City.

Whether we receive this stuff an hour ago or two days ago, we're listening to what happens to our Citizens. **Some of our Citizens are here today because they've been living with this nuisance.**

Record on Appeal, page ___, [tr. page 18, line 22] (emphasis added)

In upholding the City of Charleston's legislative authority to enact a 2:00 a.m. closing time for all bars, *Denene*, like *Richardson*, evaluated an ordinance that applied equally to all similarly situated businesses. Thus, the Fourth Circuit's conclusion in *Richardson*, addressing a legislative decision that applied to all bars, and the Supreme Court's decision in *Denene,* not only circumscribed a local government's ability to disadvantage minorities, but also warned them not to do it. Both the Fourth Circuit and the Supreme Court were careful to warn that the Courts will not allow local government to wield their powers in a discriminatory fashion, especially where, as here, the statutory authority for the City's action is doubtful. And yet, in the Order under review, the circuit court gave no consideration to the racially motivated hostility, or the lack of evidence against appellant, so obvious in the record, or the fact that the City denied the appellant even minimal due process protections. (In law school, Constitutional Law professor, Charlie Randall, taught: "It's no defense to a lynching to say the victim was guilty.")

In fact, the only demonstrable criminal act in the entire case is the Council's own illegal convening of an executive session to decide the case without appellant's participation. See § 30-4-110: "Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense, . . ." Compare this with the City's decision to decide appellant's fate outside of his presence:

MR. McQuillin: I think now y'all need to decide whether you want to go into executive session.

MR. COX: I make a motion we go into executive session to discuss a legal issue.

MR. McQUILLIN: You've got to state a specific purpose to—or threaten litigation.

MAYOR NEWMAN: Our Council needs to go into executive session to discuss pending new threatened litigation related to a business license revocation. Council may take action following the executive session on the matters that we discussed in executive session, but there will be no action taken in executive session.

So, now, do I have a motion to go into executive session and discuss the matter?

MR. OWENS: So moved.

R.O.A. page ____[tr. page 155, line 20—page 156, line 11

Whatever this word salad was supposed to mean, it does not come close to saying anything meaningful about the requirements for an executive session. Worse, it ignores that the purpose of the hearing was an adversary proceeding in which the Council acted in the capacity of a jury and Mr. McQuillin acted in the capacity of a prosecutor. Reviewing this record as a whole leads any fair minded reader to expect this contempt for due process. What is surprising—and

what constitutes legal error—is that the circuit court failed to examine either the evidence or the conduct of the Council, and instead the circuit court adopted without question or examination the City's evidence—in the light most favorable to the City—even though the record demonstrates that the City's evidence is unreliable, and its incident reports are 95% hearsay, double hearsay, and triple hearsay. (As discussed below, Councilmember Cox announced that police incident reports are not hearsay, an obvious misstatement of law. The circuit court in reviewing the record ignores this.) Any page of the record demonstrates how irrelevant and inadmissible the City's evidence is. For example, the Chief of Police testified that one element of appellant's "nuisance" is that the appellant exceeded his capacity of 99 persons on one occasion on May 18. (R.O.A. page ___[tr. page 34, line 15]. This is false because the Chief of Police has no information about how the City determines building capacity, which is determined by the International Fire Code, which calculates the safe capacity of a building by the number of exits and their size. The number, 99, is an arbitrary number based on the false assumption that El Alamo has one entrance/exit instead of three. Neither the Chief of Police nor the City Council are interested in knowing what the facts are for the simple reason that they have targeted El Alamo for elimination regardless of the facts. Of course, appellant had no idea this was an issue until he heard it from the witness stand, thus preventing any meaningful hearing. All of this rendered the appeal something less than a hearing held in a "meaningful" manner.

Almost any page in the record demonstrates this unrestrained animus unsupported by fact. A representative example is the police chief's emphatic, but unsupported, testimony about a sawed-off shotgun's relationship to El Alamo and alleged drug use at El Alamo, none of which are supported by the record:

November 23rd, 2014, 2:27 in the morning, we were dispatched there to a call. An individual accidentally walked into the men's bathroom and witnessed the subjects ingesting—according—the way it is in our call signal report, signal 31 is our code for drugs.

Obviously **they went in there and they couldn't locate anything.** Then we did—we did have December 24th of 2014. We responded there in reference to them receiving forged checks. They were the victim in that situation.

Record on Appeal page ___, line 1 [tr. page 44, line 1] (emphasis added)

This is obviously useless information that does not support a license revocation in any way, but yet, it is representative of all the evidence of imputed vicarious liability, which, when translated into plain English says: Someone, but we do not know who, said that someone, but we do not know who, saw someone, but we do not know who, who might be using drugs in the men's bathroom, so we rushed right over, investigated and found nothing, but we wrote it all down in this report, which we are handing up to prove El Alamo is a nuisance. When appellant's counsel tried to point out that the police reports are hearsay, Councilmember Cox, whose open prejudice corrupts the entire appearance, made this wildly incorrect assertion:

MR. ROMEO: I've heard a lot of hearsay today.

MR. COX: Police reports aren't hearsay.
R.O.A. page ____ [tr. page 111, line 18]

Police reports are hearsay, especially where they contain alleged statements by **unknown** third parties, especially when the statements by unknown persons are about additional unknown persons: "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; *provided, however*, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S. C. Code Ann. §§ 56-5-1260 to 1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages." Rule 803(8) "Public Records and Reports," *South Carolina Rules of Evidence.* Even where such reports might be admissible under the *Rules of Evidence*, the due process and confrontation clauses of

the U. S. and State Constitutions prohibit their introduction. Such reports are not admissible even in the lower threshold of proof in a civil case: "Reports containing opinions, judgments, or conclusions are outside the scope of the public records exception to the hearsay rule." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (Court reversed jury verdict for homeowner in bad faith case because the trial judge admitted the fire chief's "truck report.") Here, the prejudice is compounded because almost the entire body of police reports contain multiple layers of hearsay. Yet, the circuit court gave this portion of the case no analysis at all other than to say that the *Eastover* case does not require a "full-blown evidentiary hearing." (R.O.A. page ___[Order at page ____]) Not requiring a "full-blown evidentiary hearing" is not a license to jettison all fairness.

On the issue of the evidence, which is another way of saying, fundamental due process, Councilmember Cox's proclamations of ignorance characterize the entire May 26th appearance. The legal error is that the circuit court was not troubled either by the absence of admissible evidence or by the absence of fundamental fairness, which gives a free pass to the City Council, notwithstanding that appellant is entitled to some minimal level of due process, and this record demonstrates that the testimony failed to identify any criminal acts of the appellant. Appellant pointed this out to the circuit court in his appeal and in his June 3, 2018, complaint, and in his December 2, 2016, Motion for Reconsideration, but the court summarily denied this application by form Order. (R.O.A. pages ____ and ____[Complaint, Motion for Reconsideration]) Rather than address the appellant's operation, the City's evidence consists of manufactured "incidents," and each "incident" goes down as a mark against El Alamo no matter how unrelated it may be to the appellant. El Alamo became a scapegoat for anything in its galaxy, and if there is a Hispanic person accused of a crime, the City equates this with El Alamo. By analogy, consider that there are large numbers of "incidents" involving College of Charleston students, but no one suggests

the college should be eliminated. If the Hanahan police department saturated any location and focused its effort on any bar in the State, it could manufacture the same "evidence" if "evidence" is nothing more than an incident report. Since City Council's decision to terminate appellant's property rights is based entirely on this hearsay evidence, the decision is controlled by an error of law. The "hearing" outcome before City Council was never in doubt due to its undisguised animus for El Alamo and its willingness to accept any evidence no matter how unrelated or how inadmissible. Although City Council was acting in a quasi-judicial capacity, not a legislative one as was the case in *Richardson*, the circuit court failed to apply the slightest analysis of due process in evaluating this record, and that is the legal error that requires reversal. Neither the City Council, nor the circuit court, recognize the absurdity of counting every "incident" as a mark against El Alamo, including even incidents when appellant was a victim. Blaming El Alamo for being the victim of a forgery is about as clear of evidence of racial animus as one can imagine. This representative testimony came in the same colloquy regarding a sawed-off shotgun in the trunk of a car from Goose Creek, another example, demonstrating how a bad act by a Hispanic person anywhere is a mark against El Alamo:

> On October 18th, 2014 at 3:12 a.m. the officer was sitting in the parking lot of the Kwik Fill gas station when he observed a blue 2016 Nissan Altima make a left turn from Yeamans Hall Road onto Loftis Road. Once the car turned left on Loftis Road he observed it driving down the road over the center line.
>
> R.O.A. page ____, lines 5-12 [tr. page 41, lines 5-12]

The chief went on to describe how an officer pulled over the car and allegedly smelled marijuana, which justified a search of the car turning up a sawed-off shotgun. When Chief Turner asked El Alamo's counsel if he wanted to see the shotgun, counsel replied: "I've seen it. I'm not sure what it has to do with El Alamo. But . . ." (R.O.A. page ___, lines 20-21 [tr. page 43] Of course, the City did not permit appellant's counsel to finish his thought, because the City Council determined that an Hispanic person on a public road must be involved with El Alamo.

This exchange is just one of many salient and representative examples of the manner in which the City relied upon putative evidence that had no connection to El Alamo to bolster its pre-ordained decision to run them out of town. The circuit court gave this lack of evidence and denial of due process no consideration and essentially rubber stamped the City Council's decision despite the lack of nexus between the evidence and El Alamo.

The circuit court ignored the uncomfortable but unavoidable evidence of bias and never questioned the lack of logical inference and likewise ignored how profoundly different this case is from the legislative decision challenged in *Richardson*. This record demonstrates that City Council not only denied appellant a reasonable opportunity to be prepared, but also denied the appellant the right to anything resembling a "hearing." For example, when appellant attempted to cross examine the City's witnesses, the City shut him down and told him he could call the City's witnesses in his case:

> MR. ROMEO: May I speak? May I also ask questions?
>
> MR. MCQUILLN: Why don't you do that during your case? You can—
>
> MR. ROMEO: I want a chance to –
>
> MR. MCQUILLIN: You can ask questions and cross-exam him and confront him, but we'll do it during your hour and a half.
>
> Record on Appeal page ____, line 21 [tr. page 86, line 21]

Of course, because Council was acting in the dual capacity[2] of prosecutor and judge, and because there is no neutral magistrate presiding over the "hearing," there is no one to whom appellant could turn to for a decision on these critical procedural issues. Denying the appellant the right to cross-examine the witness during his testimony prevented the appellant from having

[2] When the General Assembly set up the administrative appeal body known as the Board of Zoning Appeals, it created a neutral **appointed** body. § 6-29-800, S. C. Code. This case shows what happens when political figures act as quasi-judicial officers.

a meaningful opportunity to be heard, and it is no substitute to say: "You can recall the witness in your case."

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ."

Smith v. Illinois, 390 U.S. 129 (1968)

The City acted as both prosecutor and judge and made no effort to protect the appellant's rights. As a result, the "hearing" before City Council was so biased and so irrational that any discussion of procedural or substantive due process bleed over into one another, and it is impossible to say where one ends and the other begins:

MR. COX: Actually, we live here day in and day out. We listen to our citizens and hear what they have to say. Some of us have relatives who are police officers who have responded to El Alamo and what happens there; so we've been pretty much attuned to what's happened in our City.

Whether we receive this stuff an hour ago or two days ago, we're listening to what happens to our Citizens. Some of our Citizens are here today because they've been living with this nuisance.

I think we would all agree—when you say "we" that's including you—that the case is strong against El Alamo. I mean, you're the attorney representing them.

MR. COX: Well, we want a full picture. You're saying you don't have a full picture. I'm asking about tax returns that directly relate to our business license. Will you and your clients be willing to bring those to us and show those to us?

Record on Appeal, pages ____, _____, and _____ [transcript pages 18, line 22; 19, line 21; and 24, line 22]

The "Citizens here today," consisted of an absentee landlord who asserted that his unidentified tenants are bothered by El Alamo (whom he compared to a racoon and a possum fighting in a tree which should be shot—R.O.A. page ___[tr. page 99]) and a business neighbor who said a motorist damaged his business sign. Likewise, the Chief of Police's testimony about

alleged, but unproven, drug use or about shotguns in cars in the vicinity comprise almost all the evidence against El Alamo. The El Alamo "hearing" was nothing more than a Kafkaesque version of an anti-procedure that mocks the idea of due process. In essence, Hanahan harnessed a racial prejudice to its municipal power and did what the Supreme Court said it could not do:

> This Court held that a municipal corporation could not "make a business a nuisance merely by declaring it as such." The Court found that the ordinance would seriously impair, if not destroy, many lawful businesses. Further, the Court noted the ordinance seemed to be directly aimed at destroying Painter's business. Accordingly, the Court held the ordinance was so unreasonable as to be unlawful on its face. *Id.* at 61, 97 S.E.2d at 73.
>
> *Denene v. City of Charleston*, 359 S.C. 85, 596 S.E.2d 917

The manner in which the City marshalled its putative evidence, prevented appellant from having adequate time to prepare, denied him the right to cross-examine witnesses, considered anything as evidence, and operated under demonstrably incorrect legal standards, demonstrates that the City of Hanahan used the full array of its municipal powers to target a single minority business, owned and operated by Hispanics and serving an Hispanic clientele, for elimination. The statements of hostility in the record are numerous and unmistakable. The City imposed a close scrutiny on appellant, employed manufactured evidence to support a decision it reached in advance and denied even minimal due process protection to the appellant. What the City did to El Alamo is the one thing that the Supreme Court said it could not do in *Denene* and in the cases cited in *Richardson*; to wit, simply declare the appellant a nuisance and close it. "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Richardson v. Town of Eastover, ibid.* Throughout the putative "hearing," the City openly favored its own police department as infallible, gagged appellant's counsel, prevented cross examination, expressed clearly erroneous principles of law, obliterated traditional indicia of due process, and ignored all of defendant's

evidence, choosing to rely upon the voluminous, but manufactured, record of police incident reports, ignoring that almost all of them resulted from openly biased Hanahan Police Officers instituting "compliance checks." There was not a shred of evidence of a criminal conviction from the numerous incident reports allegedly tied to El Alamo. There was, however, much discussion about familiarity with federal court judges, El Alamo's tax returns, a putative search warrant, and numerous hostile statements directed at counsel, even inquiring about his marital status:

MR. COX: You have a wife, right?
MR. ROMEO: I have two kids. This is not about me personally. This is [about] two lawful businesses.
MR. COX: Do you practice in federal court?
MR. ROMEO: I do.
R.O.A. pages ___ and ____[tr. pages 111, line 1 and 117, line 3]

I think we would all agree—when you say "we" that's including you—that the case is strong against El Alamo. I mean, you're the attorney representing them. (R.O.A. page ____[tr. page 19, line 21])

MR. COX: Well, we want a full picture. You're saying you don't have a full picture. I'm asking about tax returns that directly relate to our business license. Will you and our clients be willing to bring those to us and show those to us? R.O.A. page ____[tr. page 24, line 22])

MR. COX: Do you practice in federal court?
MR. ROMEO: I do.
MR. COX: Well, then you'll know the answer. The search warrant was executed at El Alamo I was told.
MR. ROMEO: I don't know the answer to that.
MR. COX: So you represent Mr. Reyna, but you don't know that a federal search warrant was executed on his property?
MR. ROMEO: That's correct.
MR. COX: He didn't tell you that?
MR. ROMEO: That's not part of my representation.
MR. COX: Well, it's definitely relevant to us here.
MR. ROMEO: I don't see how that's relevant, actually.
MR. COX: To get a federal search warrant—correct me if I'm wrong—you've got to have a 51 percent probability.
MR. ROMEO: No, you don't.
MR. COX: You don't?
MR. ROMEO: No, you don't.
MR. COX: Educate me, please.
MR. ROMEO: Not necessarily.
MR. COX: So please educate me because Judge Hendricks is pretty good, and I think he said it's 51 percent. Go ahead.

MR. ROMEO: You're talking about probable cause.
MR. COX: Yes, sir.
MR. ROMEO: I'm not saying academically you don't have to have 51 percent. All I'm saying—
MR. COX: State—are you telling me one of the federal magistrate judges in Charleston, South Carolina would sign a warrant with less than probable cause?
MR. ROMEO: I'm not saying that at all. What I'm saying—
MR. COX: So—
MR. ROMEO: What you're saying is it must be 51 per cent probably. I'm saying that's not necessarily—
MR. COX: That's not the standard? You've got a law degree.
MR. ROMEO: It isn't academically—there's no reason to be condescending.
R.O.A pages ___, line 3 - ____, line 2 [tr. pages 117, line 3—119, line 2]

The discussion of a putative federal search warrant is irrelevant to the hearing before Council, as is appellant's immigration status, his tax returns, his absence from the hearing, *etc.*, but Councilmember Cox made all of it the centerpiece of his "argument," and he came back to it time and time again. His contempt for appellant and his counsel is palpable, and he is the poster child for the chaos that follows an uninformed politician pretending to be a judicial officer.

One of the clearest examples of prejudice and fundamental denial of due process is the manner in which the City decided his case, in part, without appellant's participation, which, since it is a statutory violation, deserves separate treatment.

F.O.I.A. Violation

Part of the Vth, VIth, and XIVth Amendment due process violations includes another example of a statutory procedural due process violation by the fact that the City Council decided the case in a blatantly unlawful executive session. Repeatedly, the Supreme Court has instructed local governments what is necessary to invoke properly an executive session. See *Donohue v. City of North Augusta*, 412 S.C. 526, 773 S.E.2d 140 (2015):

Appellant contends that the circuit court erred in finding that between January and September 2013 respondents complied with the FOIA's requirement that "the specific purpose of the executive session be announced in open session." The circuit court held an announcement that the purpose of the executive session was the discussion of a "proposed contractual matter" satisfied the specific purpose requirement. We agree with appellant that the FOIA was violated.

Section 30–4–70(a) (2007) allows a public body to hold a closed meeting for any one of five reasons. If such a closed executive session is to be held, its "specific purpose" must be announced in the open session. "Specific purpose" is defined by statute as: a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30–4–70(a)(1) or 30–4–70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. § 30–4–70(b). [412 S.C. 532]

Subsection (a)(1) covers employment matters while (a)(5) covers " Discussion of matters related to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other business [773 S.E.2d 143] in the area served by the public body." Here, respondents did not invoke either (a)(1) or (a)(5), but rather, in each of the eleven executive sessions challenged by appellant, the minutes reflect respondents invoked only § 30–4–70(a)(2), and merely stated that the specific purpose of the meeting was to be a "contractual matter."

Here, as in *Donohue*, the City's invocation of executive session violates F.O.I.A. in every possible way, including that the request came from the lawyer, not a member of Council:

MAYOR NEWMAN: Thank you, Mac. If there is no other—

MR. MCQUILLIAN: I think now y'all need to decide whether you want to go into executive session.

MR. COX: I make a motion we go into executive session to discuss a legal issue.

MR. MCQULLIAN: You've got to state a specific purpose—or threaten litigation.

MAYOR NEWMAN: Our Council needs to go into executive session to discuss pending new threatened litigation related to a business license revocation. Council may take action following the executive session on the matters that we discussed in executive session, but there will be no action taken in executive session.

So, now, do I have a motion to go into executive session and discuss the matter?

R.O.A. page ___, lines 18—page ____, line 10 [tr. pages 155-156]

The City willfully ignored the notice requirements of the *Freedom of Information Act* and used the pretext of unidentified and unknown "threaten litigation" [*sic.*] to retire to executive session to give them an opportunity to decide appellant's case without his participation. At the time of the executive session, not only did the City fail to provide specific notice on its agenda as required by law—we have no idea what alleged litigation required closing the meeting—but also

did not specify in the open meeting what proposed "threatened litigation" required Council to go into executive session to receive legal advice. The pretext is obvious because the record shows that upon their return, in less than ten seconds, Councilmember Owens made a motion to terminate the license with no discussion. The transcript shows he was reading a script prepared in executive session, after which Council voted immediately and unanimously to vacate appellant's license with no discussion:

> MR. OWENS: Since there's no further discussion, Mayor, after careful consideration of all the facts presented by both sides at this hearing—and thank you both—I move that we revoke the license of El Alamo/Benjamin Reyna—and I'm going to murder the name. I apologize—license Number 9692 pursuant to the Hanahan City Ordinance Section 10-9.
>
> The public welfare makes this revocation necessary due to the fact that the operation of El Alamo's business creates a nuisance, attributes to the frequent and persistent **suspected** criminal activity associated with the operation of the business including repeated acts of unlawful possession or sale of controlled substances, multiple intoxication, [*sic.*] and alcohol incidents, and continuous breach of the peace.
>
> R.O.A. page ___, [tr. Page 157, line 15—158, line 6] (emphasis added)

The above quoted statement is the entire "discussion" of the case. Councilmember Owens is obviously reading from a script, which he obviously prepared during executive session without the applicant's participation. While the City Council perhaps had some unspecified "threatened litigation" to discuss, such "threatened litigation" had no bearing on the question before the Council. In short, it illegally convened an executive session, so it could decide appellant's case without his participation.

Neither the announcement for executive session, nor the published agenda (R.O.A. page ____) give any indication what "threatened litigation" the City was concerned about thereby rendering the decision unlawful under § 30-4-80, S. C. Code and *Donohoe v. City of North Augusta*, 412 S.C. 85, 596 S.E.2d 917 (2004) In short, the City was so motivated to deny the appellant anything remotely providing minimal due process that it was willing to flout the

mandatory requirements of South Carolina law to do it. Actions taken in an illegal executive session are void as a matter of law, and here it denied to appellant his fundamental procedural and substantive due process rights under the Vth, Vth, and XIVth Amendments and their state counterparts, Article I, §§ 22, .

The use of an illegal executive session to decide appellant's case is just as perplexing as the Council's refusal to allow appellant's counsel to cross examine the City's witnesses. After Chief Turner testified, the appellant attempted to cross-examine him, but the City prevented him from doing so, informing him that he could recall the witness in his case:

> MR. ROMEO: May I speak? May I also ask questions?
>
> MR. MCQUILLN: Why don't' you do that during your case? You can—
>
> MR. ROMEO: I want a chance to –
>
> MR. MCQUILLIN: You can ask questions and cross-examine him and confront him, but we'll do it during your hour and a half.
>
> R.O.A. page ___, line 21 [tr. Page 86, line 21]

As the Supreme Court held in *Sloan v. S. C. Board of Physical Therapy Examiners*, 370 S.C. 452, 636 S.E.2d 598 (2006):

> The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *In re Vora, 354 S.C. 590,* 595, 582 S.E.2d 413, 416 (2003); *S.C. Dept. of Soc. Servs. V. Wilson*, 352 S.C. 445, 452-53, 574 S.E.2d 730, 733-34 (2002); *Cameron Barkley Co. v. S. C. Procurement Review Panel*, 317 S.C. 437,440, 454 S.E.2d 892, 894 (1995); *Brown,* 301 S.C. at 328-29, 391 S.E.2d at 867. Procedural due process requirements are not technical; no particular form of procedure is necessary. *In re Vora,* 354 S.C. at 595, 582 S.E.2d at 416. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Wilson,* 352 S.C. at 452, 574 S.E.2d at 733 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). The requirements in a particular case depend on the importance of the interest involved

and the circumstances under which the deprivation may occur. *S. C. Dept. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

This record demonstrates that the City deprived the appellant of all due process rights. As the Fourth Circuit said in *Richardson*: ". . . the case for due process protection grows stronger as the identity of the person affected by a government choice becomes clearer, and the case becomes stronger still as the precise nature of the effect on each individual comes more determinedly within the decisionmaker's purview." *Richardson v. Town of Eastover*, citing *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980). The circuit court failed to apply these principles of law to the openly biased conduct by the City of Hanahan.

B. The Council deprived appellant of substantive due process.

B. SUBSTANTIVE DUE PROCESS

Appellants argue that Section 40-45-110(A)(1) violates the substantive due process rights of physical therapists who wish to be employed by physicians who refer patients to them. Appellants, relying on South Carolina Code Ann. § 40-1-10 (2001), assert the Legislature improperly exercised its police power by enacting this statute because it is not necessary for the preservation of the health, safety, and welfare of the public. We disagree.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; S.C. Const. art. I, 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sunset Cay,* 357 S.C. at 430, 593 S.E.2d at 470; *Worsley Companies, Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000); A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. and Amusement Co.,* 338 S.C. at 640, 528 S.E.2d at 650.

We have held that the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government. *Sunset Cay,* 357 S.C. at 430, 593 S.E.2d at 470; *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 388 S.C. 475, 477, 527 S.E.2d 763, 765 (2000). "The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (internal quotes omitted).

"The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause [of the Fourteenth Amendment]. The liberty interest at

stake is the individual's freedom to practice his or her Page 615 chosen profession; the property interest is the specific employment." *Brown v. S.C. State Bd. Of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69, 79 (1999) (recognizing same principle); *Ezell v. Ritholz*, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938) (discussing same principle). "It cannot be doubted that a man's trade or profession is his property." *Byrne's Adminstrs. v. Stewart's Adminstrs.*, 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812). Likewise, the practices of medicine and physical therapy by properly licensed individuals undoubtedly are cognizable property interests rooted in state law. *Dantzler v. Callison*, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956) (stating "[t]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection").

Sloan v. S. C. Board of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006)

In reviewing this case, almost any page of the record of the appellant's appearance before the City Council demonstrates the Council's unrestrained animus for the appellant and the utilization of arbitrary and capricious standards to justify doing what Council decided in advance to do. Every time the Court of Appeals, the Supreme Court of South Carolina, and the United States Supreme Court has addressed cases in which property owners are stripped of their rights for pretext reasons, the Courts have never failed to protect the rights of the individual against the capricious exercise of unrestrained governmental power.

In 2015, this Court decided *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015), in which property owners attempted to shut down a lawful business on similar allegations of "nuisance." Yielding to political pressure, the Horry County Board of Zoning Appeals voted 4-3 to overturn the Zoning Administrator's decision to permit the business, and the County demanded the business owner immediately shut down his business because of complaints of neighbors. The circuit court reversed, and this Court affirmed the circuit court holding:

This court is prohibited from writing into an ordinance language restricting property rights to a greater degree than intended by the legislative body. It is a well-founded principle of law that

> Statutes or ordinances 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 not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

Purdy v. Moise, 223 S.C. 298, 75 S.E.2d 605 (1953) (citations omitted); see also *Keane/Sheratt P'ship by Keane v. Hodge*, 292 S.C. 459, 357 S.E.2d 193, 196 (Ct. App. 1987)

This Court reached the same conclusion in *Wyndham Enterprises v. City of North Augusta*, 401 S. C. 144, 735 S.E.2d 659 (2012), holding that neighbors asserting various objections about a fireworks operation without evidence cannot sustain a decision to deny the right to operate a business. Likewise, the record in this case, like both cases, is full of self-generated, self-serving, manufactured evidence consisting of nothing but hearsay, double hearsay, and triple hearsay, which did nothing but impute vicarious liability on appellant for the acts of third parties. The record demonstrates not a single judicial finding of any serious crime. Rather the evidence shows that the Hanahan Police Department needed the reports to justify the Town's decision to run off a minority business, and the Police Department responded by paying repeated visits to El Alamo to create the necessary record. The Town Council gave no weight to the undisputable fact that there are very few calls for police service to the location—the vast majority of them are self-generated "compliance checks." In reviewing this evidence, the circuit court merely accepted it without question. The order under review gives no analysis of the weight of the evidence produced at the May 26th revocation hearing; instead, the circuit court grounded its entire reasoning on its erroneous reading of *Town of Eastover.* The legal error is that the circuit court expanded *Eastover's* holding that appellant was not entitled to a "full blown evidentiary hearing" into a concept that the Hanahan can do whatever it wants for any reason it wants.

The South Carolina Supreme Court dealt with the same issue *in Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999). There, when residents of Columbia rose up against a proposal to construct a halfway-house in their neighborhood, the City responded by convincing the "Zoning Board of Adjustments" (now known as the Board of Zoning Appeals) to declare the halfway house a non-permitted use. The Zoning Board, like City Council in the present case, like *Helicopter*, and like *Wyndham*, yielded to prejudice against the application After reviewing the record, the Supreme Court concluded:

> After reading the entire record in this case, it is inescapable to us that the ZBA's decision was based, not on the requirements of the "special exception" ordinance, but upon the fears of neighboring residents who did not want "those type of people" in their neighborhood. Although we are sympathetic to the concerns of neighboring individuals, the ordinance simply does not provide such a basis for denial of the permit. Accordingly, the circuit court's order affirming the denial of Bannum's special exception permit is reversed.

Here, the City Council's decision is not based on any relevant, admissible evidence, but rather, it is based on open prejudice as established by self-generated police visits and as expressed by the openly hostile and "condescending" treatment of the City Council, especially through comments on appellant's immigration status. Despite having a sizable Hispanic and African-American population, Hanahan does not have a single minority representative on City Council or in the City's administration. Since Council was acting in an adjudicative fashion, this deficit is significant in light of the Supreme Court's warning in *Denene*.

Coincidentally, this precise issue—the rough treatment by quasi-judicial arbiters—received a well-publicized and recent analysis. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018), the Supreme Court, 7-2, determined to overturn the Commission's decision, not because of its view of the merits of the case, but rather because the Civil Rights Commission conducted its hearing with open hostility to the appellant:

When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires. (Opinion at page 3)

When comparing the record in *Masterpiece Cakeshop* with this case, the expression of impermissible hostility and prejudice here is glaring. At least in *Masterpiece*, the Commission members couched their comments in a sincere desire to protect against discrimination whereas here, the City Council members were not only openly hostile, but also openly contemptuous of appellant, mocking his counsel, and holding firmly to legal convictions that do not comport with a minimal understanding of how justice works. When faced with this identical issue in *Masterpiece*, the U. S. Supreme Court identified the factors courts are required to weigh in deciding when government hostility crosses the threshold and enters the realm of a due process violation:

> Factors relevant to the assessment of government neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." . . . In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Philipps' religious beliefs.

The circuit court ignored all of these factors and the failure to address them requires reversal of the decision here. First, appellant's right to be left alone and use his property "to its highest utility" is a fundamental right deserving no less protection that Philips' religious beliefs. *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) Moreover, like *Masterpiece Cakeshop*, the decision-making body here controlled every aspect of the case. First, at the same time it started its business license revocation, it amended its consumption ordinance, twice, which it specifically adopted to target a single business: the appellant. Then, once it amended its ordinance, it controlled the Police Department, which then repeatedly initiated visits to the appellant's operation under the guise of a "compliance check" and began building its record. Third, the record the Police Department compiled involves almost entirely allegations

against third persons whose only connection to El Alamo was that they had been there earlier or were in the neighborhood. In evaluating the evidence against the appellant, the City Council made much of the fact that the number of visits to El Alamo are greater than the number of visits to other bars, but completely ignored that the Police Department controls this disproportionate number by choosing when and where to go and then documenting when and where it goes. In other words, the Police Department can create hundreds of "incident" reports by the simple expedient of turning on its computer. The allegation against El Alamo is "nuisance," and the City produced no evidence of nuisance other than self-serving allegations. When appellant's lawyer attempted to make this point, the members of City Council shut him down and hounded him about irrelevant legal principles, which they are discernibly unqualified to comprehend. There is no denying the hostility established on this record, and as Justice Gorsuch said in his concurring opinion in *Masterpiece*: "The problem here is that the Commission failed to act neutrally by applying a consistent legal rule."

In short, the entire appearance before City Council is characterized by the arbitrariness and hostility rejected by this Court in *Helicopter* and *Wyndham*, the Supreme Court in *Bannum,* and the U.S. Supreme Court in *Masterpiece.* A business owner's right to utilize his or her property to its "highest utility" is a fundamental right under both the South Carolina and the U. S. Constitutions. While City Councilmembers may not be expected to officiate at the same level as a highly trained judge, by assuming the duties that come with the position, they are expected to conduct themselves in a manner that is fundamentally, minimally fair. Here, the record demonstrates the appellant received nothing close to the minimum standards of due process. The City's entire claim is premised on the appellant being a nuisance, but other than a single adjoining property owner who testified someone leaving El Alamo struck his sign, the record is devoid of evidence of nuisance other than the Police Department's self-serving and inadmissible

incident reports. Moreover, it is settled law in South Carolina that a landlord cannot be held responsible for a tenant's nuisance, and thus the City's involvement of the landlord is compelling evidence of animus.

"The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land." *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct.App.2001). Nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his land. *Id.* "Nuisance law is based on the premise that '[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.'" *Clark v. Greenville County*, 313 S.C. 205, 209, 437 S.E.2d 117, 119 (1993) (citations omitted).

FOC Lawshe, Ltd v. International Paper Co., 352 S.C. 408, 574 S.E.2d 298 (Ct. App. 2002)

This record demonstrates the chaos that flows when untrained political figures serve as judicial officers deciding matters of grave concern to the persons affected. Untrained in the law, and with no neutral judicial officer in place to reign in unbridled prejudice or provide rulings on evidence, the "hearing" quickly degenerated into something arbitrary, capricious, and biased, or as the Supreme Court said in *Sloan*: "The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002)" The appellant received neither procedural nor substantive fairness and fell victim to undisguised prejudice, and the circuit court ignored these violations by erroneously relying upon a misreading of *Town of Eastover*.

Argument 3.

The City produced no competent evidence that El Alamo is a nuisance.

The argument here is indistinguishable from the previous argument under substantive due process discussed above, especially at pages 28-33. There is no need to burden the Court with a repetition of those arguments, but it is important to recall that the City revoked the appellant's

business license, and municipalities power over business licenses is by grant of statutory authority only, and local governments must adhere to the limitations in that grant. See § 5-7-30, S. C. Code, ann. The circuit court gave no attention to the lack of admissible evidence and ignored the application of South Carolina law. The General Assembly has proscribed the method to abate a nuisance, which is set forth in 15-43-10, *et. seq.* As quoted above on page 33 *FOC Lawshee Limited Partnership v. International Paper*, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002) states the heavy presumption against enjoining a property owner from the use of his or her property. As the record in this case demonstrates, there is no evidence that the appellant "unreasonably interfered with his ownership or possession of the land." *Silvester v. Spring Valle Country Club,* 344 SC 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001)." This case is also important for the proposition that a landlord cannot be held liable for a tenant's negligence, which makes the City's interference with the appellant's landlord more shocking. See R.O.A. page ___[appellants Exhibit 2, Mike Cochran February 2, 2015, e-mail to landlord] Almost all of the City's incident reports relate to alleged bad acts of third parties whose actions are attributed vicariously to the appellant.

Here, the City failed to adhere to the procedure required by the Abatement of Nuisances Act and presented no evidence that the appellant "prevented others from enjoying the use of their property." Instead, as argued above, all of the City's evidence was manufactured and self-serving, which, when combined with the absence of substantive or procedural due process created a toxic brew of racially motivated hostility:

MR. COX. . . . Look, here's the problem. They [Latino Mix and El Alamo] have a relationship. They subleased the place to them. We have the circumstantial evidence from 2:00 to 5:00 with the raining issue. Whether we agree or disagree I'm thinking Michael Duffy is a pretty smart judge.

MR. ROMEO: Agreed.

MR. COX: Okay. That's his exact word-for-word description of circumstantial evidence. So I have circumstantial evidence they're [Latino Mix] selling beer to the people legally. You're right, totally, I'm glad they're not in a car. Then they go over there [El Alamo] and get really tanked up and go drive off, shoot the place up, box a police officer in the face. That's a nuisance. If that's not a nuisance then take the family there and have dinner.

R.O.A. pages ___-___[tr. page 153, line 14-154, line 5]

There are two conclusions this Court can draw from this representative statement: (1) Councilmember Cox has no understanding of evidence, and (2) his racial animosity is on full display. This colloquy is also important because the Order under review gives no analysis to any of this, drawing all of its conclusions from its conclusion that appellant is not entitled to a "full blown" evidentiary hearing. That may be so, but no fair minded person reviewing the appearance before City Council can conclude that Council provided a meaningful hearing at any level. The circuit court turned a blind eye to the lack of evidence and this is legal error.

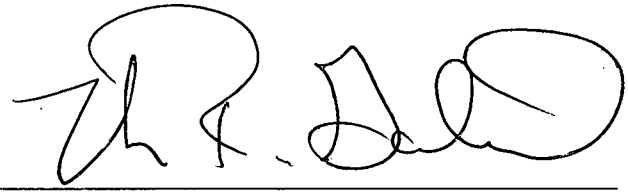
Conclusion

A license is a property interest, an important one. Without a license, appellant cannot operate a business. The City has a legitimate interest in promoting a safe municipality for its citizens, and the appellant has just as much right to own and operate a business. This record demonstrates that the City Council did not follow the statutory procedure to establish a nuisance or afford him either a meaningful opportunity to be heard or a fair evaluation of the evidence against him. The circuit court gave little or no analysis to the actions of the City, including its failure to produce admissible or reliable evidence and essentially rubber stamped Council's decision with no meaningful evaluation of what evidence the City produced or how it denied

appellant a meaningful opportunity to be heard. The legal error below is the circuit court's expansion of the holding of *Town of Eastover* reduces the circuit court to *pro forma* insignificance. While there may be no possibility that the appellant will ever receive a fair hearing by the City Council, the appellant at least deserves the right to cross-examine the City's witnesses and have his case decided in open session in order to make a meaningful record. And if the City is going to declare the appellant's operation a nuisance, then it should present reliable, probative evidence of criminal convictions or evidence of verifiable damages. It provided neither. It is, therefore, proper either to vacate the City Council's decision, or, in the alternative, to remand the case to the City Council with instructions to afford the appellant minimal due process, including the right to cross examine witnesses, object to evidence, and have the case heard in open session. At least with a proper record, the circuit court can then determine whether appellant had a meaningful hearing and whether the putative evidence produced by the City is sufficient as a matter of law to revoke a business license. If this case is not reversed, then the case should be either remanded to the City Council for a *de novo* hearing with allowance for the appellant to have cross examination, *etc.*, or, in the alternative, with instructions to the circuit court to make findings of fact and conclusions of law as to whether appellant received due process and whether the evidence produced by the City is or is not admissible and sufficient to justify the drastic remedy of revoking a business license.

Respectfully submitted,

December 19, 2018



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THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM BERKLEY COUNTY
COURT OF COMMON PLEAS
Dale Van Slambrook, Circuit Court Judge

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SC Court of Appeals

Case No.: 2018-CP-08-01261
Appellate Tracking No.: 2017-000796

Benjamin Reyna, d/b/a El Alamo Restaurant,.....Appellant,

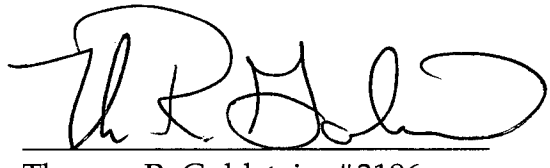
vs.

The Town of Hanahan, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Contents of Record on Appeal on the Respondent, City of Hanahan, by depositing a copy of it in the United States Mail, postage prepaid, on December 20, 2018, addressed to its attorney of record, M. McQuillin, Haynsworth Sinkler Boyd, P.A., P. O. Box 340, Charleston, S. C. 29402.

December 20, 2018



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December 20, 2018

Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Benjamin Reyna vs. Town of Hanahan; Case No.: 2016-CP-08-1261
Appellate Case No.: 2017-000796

Dear Ms. Kitchings,

I enclose the appellant's initial brief, designation of contents of record on appeal along with a proof of service. Would you be so kind as to file this with the Court? By copy of this letter, I am sending a copy to opposing counsel. Please let me know if you require anything further to consider this request. I thank you for your attention to this request. With kind regards, I am

Very truly yours,

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/
enclosure: initial brief, designation of contents of record on appeal, proof of service

cc: (with enclosure)
Mac McQuillin, Esq.

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Hon. Jenny A. Kitchings,
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