

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE
COMMON PLEAS COURT
Letitia H. Verdin, Circuit Court Judge
H. Garrison Hill, Circuit Court Judge

Appellate Case No.: 2014-1718

RECEIVED
AUG 11 2014
SC Court of Appeals

K&S Food Services, Inc. d/b/a Hilee's Bar and Grill,..... Appellant,

v.

City of Mauldin and Mauldin City Council, John Gardner,
Brian Turner, and Callista, LLC,

Defendants,

Of whom City of Mauldin and Mauldin City Council, John Gardner
and Brian Turner are the,..... Respondents.

RECORD ON APPEAL

Daniel R. Hughes

John B. Duggan
DUGGAN & HUGHES, LLC
457-B Pennsylvania Avenue
Greer, SC 29650
(864) 879-0144
(864) 879-0149 facsimile

Attorney for Respondent

Robert Clyde Childs, III
The Childs Law Firm
2100 Poinsett Hwy., Ste. E
Greenville, SC 29609
(864) 242-9997
(864) 242-9914 facsimile

Attorney for Appellant

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
Counsel for Appellant

INDEX

ORDER of City Council - September 19, 2011.	1
ORDER denying TRO - September 19, 2011 - Verdin	2
FORM 4 ORDER denying Rule 59 Motion - September 23, 2011 - Verdin . . .	23
ORDER May 2, 2012 - partial dismissal - Hill	24
ORDER May 14, 2013 - Rule 56 Motion - Verdin	28
FORM 4 ORDER denying Rule 59 - July 10, 2013 - Verdin	34
ORDER May 8, 2013 - Verdin	36
FORM 4 ORDER May 14, 1013 - Denying Rule 59 - Verdin.....	41
Complaint - 2011-CP-23-4773	43
Complaint - 2011-CP-23-6290	54
Answer - 2011-CP-23-4773	62
Answer of Respondents - 2011-CP-23-6290	65
Notice of Motion Summary Judgment and Dismiss - 6290	68
Notice of Motion for Dismiss - 2011-CP-23-6290.....	70
Memorandum of Law in Support Motion Dismiss 1011-cp-23-4773/6290	71
Plaintiff's Motion for Summary Judgement Injunction Attorney Fees.	78
Memo in Support of Defendant's Motion to Dismiss - 4773-	80
Legal Memorandum of Defendants 2011-CP-23-6290	84
Amended Affidavit of Attorney's Fees and Costs for FOIA Violation.	87
Memorandum of Defendant Opposing Attorney Fee Request	91
Plaintiff's Motion to Alter/Amend or Reconsider	105
Reply to Plaintiff's Motion to Alter/Amend 2001-CP-23-4773	108
Transcript of Record - Hearing Sept. 17, 2012 2011-CP-23-4773; 6290	115

Transcript of Record - Hearing Feb. 7, 2013, 2011-CP-23-6290	147
Affidavit of Cindy Miller.	163
Affidavit of Raymond C. Eubanks, III.	166



COPY

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

City of Mauldin,)

Plaintiff,)

vs.)

K&S Food Services, Inc. d/b/a
Hailee's Bar and Grill,)

Defendant.)

BEFORE MAULDIN CITY COUNCIL

ORDER

On August 16, 2011, this matter came before Council for the City of Mauldin for a hearing concerning the request of the City to revoke the business license of K&S Food Services, Inc. d/b/a Hailee's Bar and Grill which is located in the City limits. Present at the hearing were Council members, Bob Cook, James Kennedy, Patricia Gettys, Michael Reynolds, and Dale Black. This constitutes a quorum of Council which is an elective body comprised of six Council members and the Mayor.

MOTIONS

At the commencement of the hearing, counsel for Hailee's, Robert C. Childs, III, made several motions which were denied. First, Mr. Childs moved to disqualify Council upon the basis that there had allegedly been ex parte communication with Council concerning the substance and merits of the City's action to revoke Hailee's business license. However, the Defendant submitted no evidence in support of this motion and Council denied the allegations. Therefore, this motion was denied.

Counsel for Hailee's then moved for a continuance upon the bases that §10-46 of the Mauldin City Code did not set out specific procedures for the hearing. The record shows that

Hailee's was notified of the revocation action by the City on February 15, 2011, but never requested clarification concerning the procedures to be followed at this hearing. Secondly, the Defendant waited to submit this motion until the commencement of the hearing after Council and all of the witnesses were present and ready to proceed. In addition, the attorneys for both parties were allowed to make opening and closing statements, submit evidence, call witnesses to testify, and fully cross examine witnesses for the opposing party. Council concludes that the Defendant had a fair hearing which fully comported with the requirements of procedural and substantive due process. In addition, Defendant showed no prejudice resulting from either the provisions of the City Code or the procedure followed during the hearing. Accordingly, this motion was denied.

The Defendant also moved to dismiss the action by the City because the letter of revocation was issued by Peter Nomikos, head of the Building, Zoning and Business License Department, rather than the business license clerk which violated the provisions of the City Code. Mr. Nomikos testified that he is head of the department, including the business license division, and was actively involved in business license matters for the City. As such, he testified he had the authority to issue the Revocation Notice to the Defendant. Council concludes that Mr. Nomikos had the authority as head of the department which included the business license personnel to issue the Notice of Revocation to Hailee's. Moreover, Hailee's showed no prejudice to it because the notice was issued by Mr. Nomikos. Therefore, this motion was denied.

Counsel for Hailee's also moved to dismiss this action because it was not properly served with the Notice of Revocation. Mr. Nomikos testified that he personally delivered the Revocation Notice to Hailee's on February 15, 2011. (Defendant's Exhibit #1). The owner of

Hailee's, Sonny Ninan, testified that he received the notice immediately after it was delivered to Hailee's and went to City Hall and discussed the matter with City officials. Shortly thereafter, he retained counsel to represent him in this matter. Council concludes that the Defendant had adequate notice of the revocation action taken by the City. Therefore, this motion was denied.

Mr. Childs also moved to dismiss this action because the City renewed Hailee's business license for the 2011-2012 business cycle. Counsel concludes that it was fair and appropriate that Hailee's be allowed to continue to operate until the matter could be heard on the merits. Council finds that this did not constitute a waiver of the right of the City to proceed with revocation of the business license, nor did it prejudice the rights of the Defendant. Accordingly, this motion was denied.

SUMMARY OF THE EVIDENCE

The parties submitted the following documents at the hearing:

Plaintiff's Exhibit #1

Affidavit of Police Chief Bryan Turner with Incident Reports and a summary of incidents;

Plaintiff's Exhibit #2

Disposition Sheets showing conviction of three Hailee's employees for alcohol offenses;

Plaintiff's Exhibit #3

CAD Report of the Police Department summarizing incidents at Hailee's;

Plaintiff's Exhibit #4

Summons issued by Peter Nomikos for building code violations at Hailee's;

Defendant's Exhibit #1

Letter issued by Peter Nomikos dated February 15, 2011, notifying Hailee's of the business license revocation action commenced by the City;

Defendant's Exhibit #2

Copy of the business license issued to Hailee's for 2011-2012; and,

Defendant's Exhibit #3

DAODAS Alcohol compliance forms issued by the Mauldin Police Department.

In addition to the documents described above, both parties called a number of witnesses to testify. The City of Mauldin called the following witnesses: Bryan Turner, Chief of Police. Chief Turner identified ninety-three (93) Incident Reports prepared by Police Officers of the City for incidents at Hailee's between June 25, 2010 and August 8, 2011. He stated that sixty-one (61) citations were issued and fifty-two (52) arrests were made. Further, Eight (8) employees of Hailee's were cited for various alcohol related offenses including: (1) Underage sales of alcoholic beverages; (2) Sales of liquor after 2:00 a.m.; and, (3) Sale of alcoholic beverages on Sunday morning after 2:00 a.m. Chief Turner also testified that three people were shot on the premises and there were other incidents involving fire arms. In addition, there were incidents involving assaults and batteries, and also drug offenses. According to Chief Turner, because of the volume and nature of the incidents occurring at Hailee's, the Police Department had to increase patrol of the premises and responded to 1,443 calls to the premises for incidents and premises checks during the period of time between June 25, 2010 and August 8, 2011. As a result, according to Chief Turner, an inordinate amount of policing was devoted to Hailee's resulting in a reduction in policing to the remainder of the City.

Jessica Thompson testified that she was a volunteer for the Alcohol Compliance Program of the Mauldin Police Department. She testified she was born on December 24, 1990. On February 17, 2011, she and her husband went to Hailee's. She ordered and was served an alcoholic beverage, but was never asked to show identification. She paid the bill and they left

Hailee's. The next evening, February 18, 2011, she went back to Hailee's with her husband and a friend. She again ordered and was served an alcoholic beverage and no one requested to see her identification. Subsequently, Hailee's employees Amanda Dykens and Rachel Drain were charged with Underage Sale. Council finds Ms. Thompson's testimony fully credible based upon the following: (1) observation of her demeanor during her testimony; (2) the fact that she had nothing at stake in the outcome of this proceeding; and, (3) her testimony was fully corroborated by the testimony of Officer George Miller, who was in charge of the Alcohol Compliance Program for the City Police Department, was present at Hailee's when these incidents occurred, and who subsequently issued the charges involving the two employees of Hailee's.

Kimberly Mitchell testified that she was born on December 7, 1992 and served as a volunteer for the Mauldin Police Department Alcohol Compliance Program. On March 16, 2011, she went to Hailee's accompanied by Ray McHone, an off duty police officer for the City. She ordered and was served an alcoholic beverage. She paid for her beverage and left Hailee's accompanied by Officer McHone. Subsequently, charges were placed against the server employed by Hailee's for Underage Sale of Alcohol to Ms. Mitchell. Council finds this testimony to be fully credible based upon its observation of the witnesses demeanor during the hearing, the fact that she had nothing at stake in the outcome of the proceedings, and the fact that her testimony was fully corroborated by the testimony of Officers McHone and Miller.

Three former employees of Hailee's, Rachel Drain, Hanna Cooley, and Phillip Bedell Metz, Jr. testified. All three testified that Hailee's sold alcohol to underage customers; sold liquor beverages after 2:00 a.m.; and, sold alcoholic beverages after 2:00 a.m. on Sunday morning. In addition, all three testified that employees of Hailee's and some customers smoked

marijuana in the cooler located on the premises. Furthermore, Mr. Metz testified that Sonny Ninan, owner of Hailee's, smoked marijuana with him at Hailee's. Council finds the testimony of these three witnesses to be fully credible based upon their demeanor at the hearing; the fact that they had nothing at stake in the outcome in this proceeding; the testimony of all three were consistent with one another; and, the testimony was also supported by that of Jessica Thompson and Kimberly Mitchell, as well as the officers that testified at the hearing.

Shague Roman testified that he was born on January 19, 1990. On December 10, 2010, he went to Hailee's accompanied by two friends. He ordered and was served a rum and coke. No one checked his identification. After he left the bar, he was stopped by Mauldin City Police and charged with Driving Under the Influence. At that time he informed officers that he had been at Hailee's Bar. Council finds this testimony to be fully credible based upon the demeanor of the witness at the hearing; the fact that he had nothing at stake in the outcome of this proceeding; and, because his testimony was consistent with that of Mrs. Thompson, Ms. Mitchell, the three employees of Hailee's who testified, as well as that of the Officers.

Peter Nomikos, who is head of the Building, Zoning, and Business License Department, testified that his duties include supervision of the business license clerks who work in his department. Mr. Nomikos testified that a premises inspection of Hailee's revealed three building code violations, including the following: (1) occupying a portion of the building without first obtaining a Certificate of Occupancy; (2) altering the structure without a building permit; and, (3) continuing construction after a Stop Work Order was issued. He identified these three summonses which were introduced into evidence as Plaintiff's Exhibit #4. He also testified that in his capacity as head of the Building, Zoning and Business License Department that he had the authority to issue the Revocation Notice to Hailee's. Council finds the testimony of Mr.

Nomikos to be fully credible based upon his observation of his demeanor during the hearing; the fact that he had no stake in the outcome of this proceeding; and, the testimony of other witnesses is consistent with that of Mr. Nomikos.

George Miller testified that he was a Police Officer for the City and was in charge of the Alcohol Compliance Program for the Police Department. He testified in detail concerning alcohol related charges placed against seven employees of Hailee's. He corroborated the testimony of Jessica Thompson and Kimberly Mitchell concerning their underage purchase of alcohol at Hailee's. Council finds the testimony of Officer Miller to be fully credible based upon his demeanor during the hearing; the consistency of his testimony with that of the other witnesses pertaining to alcohol violations; and, the fact that he had no stake in the outcome of this proceeding.

Ray McHone testified that he was a Police Officer for the City of Mauldin and accompanied Kimberly Mitchell to Hailee's on March 16, 2011 when she made an underage purchase of alcohol from an employee at Hailee's. He testified that he has responded to other calls at Hailee's for assaults, thefts, vandalism, narcotic sales, and disturbances involving intoxicated individuals. Council finds this testimony to be fully credible because it is consistent with the testimony of Ms. Mitchell; it is supported by the incident reports and other records introduced into evidence; and, because Officer McHone had no stake in the outcome of this proceeding.

Andy Hamilton, a Mauldin City Police Officer, testified that on January 30, 2011, he and several other officers went to Hailee's Bar and Grill after 2:00 a.m. At this time, he observed waitresses serving liquor, liquor beverages on tables throughout the bar, and customers drinking the liquor beverages. As a result, three (3) employees were charged with Sale of Liquor

Beverages after 2:00 a.m. These three employees admitted to Officer Hamilton that they were selling liquor beverages after 2:00 a.m. in violation of the alcohol laws and informed him that the owner of the bar made them continue to sale liquor drinks after 2:00 a.m. They further stated that the owner informed them that if they were charged with illegal sale of liquor beverages after 2:00 a.m., that he would pay their fines. Officer Hamilton and other officers who testified confirm that these three employees of Hailee's subsequently pled guilty and the owner of Hailee's, Sonny Ninan, paid their fines. Officer Hamilton's testimony was corroborated by a certified copy of the court disposition records which were introduced into evidence as Plaintiff's Exhibit #2. Officer Hamilton also testified that he investigated a shooting incident in the parking lot at Hailee's on July 30, 2011 when an individual shot the windows out of a van and shot into the trunk of a woman's vehicle. Council finds this testimony to be fully credible based on the demeanor of Officer Hamilton during his testimony; and the corroborating documents submitted into evidence, including the incident report of the shooting which occurred on July 30, 2011 and the disposition of the charges placed against the three employees of Hailee's; and, the testimony of other police officers.

Detective Derrick Pendergrass of the Mauldin Police Department testified that he investigated a March 18, 2011 incident in the parking lot at Hailee's in which a confidential informant arranged a purchase of prescription medications from an individual who was then charged with Possession with Intent to Distribute Prescribed Medications. The confidential informant made the arrangements for the purchase inside Hailee's Bar and Grill. This testimony was found to be fully credible.

Charles Osborne, a Mauldin Police Officer, testified to multiple incidents at Hailee's Bar. They are as follows: On January 30, 2011 at 3:00 a.m., he was dispatched with three other

officers to break up a fight occurring in the parking lot at Hailee's. He estimated that the crowd which had gathered was approximately 100 people. During that time other officers went in to Hailee's Bar and charged three employees with sale of liquor beverages after 2:00 a.m. On April 19, 2011, at 4:51 a.m., he was dispatched to Hailee's where three individuals had been wounded as a result of gunshot wounds which subsequently resulted in the arrest of two other individuals for these offenses. In addition, two other individuals involved in the incident were charged with Possession of Cocaine. The two defendants charged with shooting the three individuals subsequently confessed to the offenses. On July 2, 2011, at 4:55 a.m., he was dispatched to Hailee's due to a discharge of firearms in the parking lot. An individual had fired four shots into the air after being thrown out of Hailee's Bar. Finally, on July 25, 2011, Officer Osborne testified that he participated in an investigation of a complaint by a female who testified that a black man entered the bathroom and attempted to sodomize her. She complained to the employees at Hailee's who did nothing.

Officer Samuel Harrell testified that on February 7, 2011, at 4:00 a.m., he was dispatched to Hailee's Bar for an incident involving the discharge of a firearm. His investigation indicated that two customers at Hailee's were arguing and got in to a fight and one of them discharged a firearm. The individuals were charged with Disorderly Conduct and Possession of a Firearm. On March 6, 2011, Officer Harrell investigated an assault and battery of an individual by a Defendant named Jimmy Benson who was charged with Aggravated Assault and Battery arising out of the incident.

On January 23, 2011, Captain Tripp of the Mauldin Police Department, testified that he responded to a call at Hailee's because of a fight between two individuals which began inside Hailee's.

The Defendant also called several witnesses to testify. William Shayne Ninan is the son of Sonny Ninan, the owner of Hailee's. He testified that he oversaw the daily operations at Hailee's and paid the invoices and made payroll. He began managing Hailee's in November, 2009. He testified that Hailee's had a strict policy of compliance with alcohol laws and did not tolerate employees violating these policies. He also testified that if an underage individual was accompanied into the bar by a person older than twenty-one, that it was acceptable to serve an alcoholic beverage to the older customer even if the older customer gave that drink to the underage individual. Mr. Ninan also testified concerning the Building Code violations, which he contended resulted from confusion because the bar was annexed into the City of Mauldin while this construction was taking place, but after Hailee's personnel had been dealing with Greenville County Building Inspectors. He testified that this led to confusion and a misunderstanding concerning the requirements to alter the building. He further testified that Hailee's employees were instructed not to serve intoxicated individuals, and that security was provided inside and outside the bar. Council concludes that the testimony of Mr. Ninan was not fully credible because it is inconsistent with the testimony of the three former employees and the fact that seven (7) employees of the bar had been charged with alcohol related offenses. Furthermore, Council is concerned that Mr. Ninan testified that it was an acceptable practice to serve alcoholic beverages to a person of age who in turn gave it to an underage individual. Obviously, this resulted in underage individuals consuming alcoholic beverages on the premises which is inconsistent with the laws preventing the consumption of alcoholic beverages by underage individuals and contravenes the public policy of this State and the City.

Jared Hilderbrand also testified on behalf of Hailee's. He testified that he was currently employed at Hailee's. According to Mr. Hilderbrand, all customers' identification was checked

at the front door and underage individuals were stamped on their hand so that they would not be served alcoholic beverages. He testified that before he became employed at Hailee's he and two friends were shot as they were leaving Hailee's. He testified that thirteen or fourteen shots were fired, and that he was shot twice.

Sonny Ninan, owner of Hailee's, testified at length. He testified that he owned a number of bars and had never had a problem with his alcohol licenses or with the Sheriff's Department. He testified that for a period of time, off-duty Mauldin Police Officers provided security at Hailee's. He did not condone the sale of alcoholic beverages to minors and denied that Hailee's sold liquor drinks after 2:00 a.m. He testified that if an individual of sufficient age to purchase alcoholic beverages came to Hailee's accompanied by an underage individual, that it was acceptable to serve drinks to the person of age, and that if that customer gave one of the alcoholic beverages to the underage individual that this was not a problem or issue for Hailee's to deal with and that in doing so Hailee's had not violated any alcoholic beverage laws. Mr. Ninan testified that when three employees were charged with Sale of Alcoholic Beverages after 2:00 a.m., that he paid their fines and accompanied them to court when they pled guilty.

Council finds that the testimony of Mr. Ninan is not fully credible. First, his testimony concerning the sale of alcoholic beverages to underage individuals and the sale of liquor drinks after 2:00 a.m. is inconsistent with the actual offenses that occurred which are documented in the Incident Reports, testimony, and other documents introduced into evidence during the hearing. The fact that Mr. Ninan accompanied the three individuals to City court and paid their fines is inconsistent with his testimony that Hailee's had a strict rule of compliance with alcohol laws. In addition, the charges against employees and the testimony of a number of police officers clearly showed that Hailee's sold liquor drinks after 2:00 a.m. in violation of State alcohol laws.

Mr. Ninan also testified that the reason the City was seeking the revocation of the business license of Hailee's was because the Police Department had improperly targeted Hailee's and had singled out his business establishment without justification. Council finds that the documentary evidence and the testimony of numerous witnesses contradicts the testimony of Mr. Ninan, and therefore, is not credible. For these reasons Council also concludes that Mr. Ninan's testimony does not alleviate or address the well-documented problems at Hailee's.

FINDINGS AND CONCLUSIONS

After careful consideration of the exhibits and testimony, Council makes the following findings:

1. Hailee's Bar and Grill is located in a shopping center at the intersection of Woodruff Road and Miller Road in a commercial area of the City open to the public. There are seventeen businesses in the shopping center where Hailee's is located. The shopping center is surrounded by other commercial establishments open to the public. Woodruff Road is one of the busiest thoroughfares in the upstate.
2. The Police Department of the City of Mauldin has responded to more calls for assistance from Hailee's than any other similar establishment located in the City. The Police Department has had to devote an inordinate amount of police resources responding to calls and making premises checks at Hailee's resulting in less policing of the remainder of the City.
3. There have been a number of violent acts on the premises of Hailee's including three people having been shot; other incidents involving firearms; as well as assaults and batteries. There have been instances of illegal

sale or possession of illicit drugs or prescription medications on the premises at Hailee's.

4. A significant number of employees at Hailee's have been charged with various violations of alcohol laws including sale to underage customers; sale of liquor after 2:00 a.m.; and, sale of alcoholic beverages after 2:00 a.m. on Sunday morning.

5. Employees and customers of Hailee's have used marijuana on the premises of Hailee's.

6. Hailee's violated the building code of the City.

7. There has either been a lack of proper management or a policy of allowing or encouraging violations of alcohol laws at Hailee's.

CONCLUSIONS

The volume and type of incidents which have occurred on the premises at Hailee's includes a number of illegal acts by employees and customers of Hailee's. The violent acts which have taken place at Hailee's have posed a hazard to the safety of the public. The incidents at Hailee's are of a continuing nature in an area open to the public and located at a busy intersection in the City. The inordinate amount of time spent by police personnel policing Hailee's has had a deleterious effect upon the ability of the Police Department to provide appropriate policing in other areas of the City. The sale of alcoholic beverages to underage customers at Hailee's is a violation of State law and offends the public decency and morals the community and puts young persons at risk. Incidents which have occurred at Hailee's have resulted in property damage, including vehicles located in the shopping center. The acts which

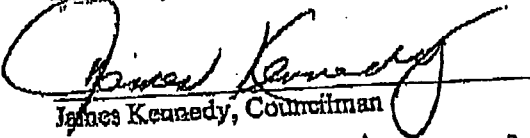
have taken place at Hailee's have interfered with the peace, safety, comfort, and convenience of the public. Therefore, Hailee's Bar and Grill constitutes a public nuisance.

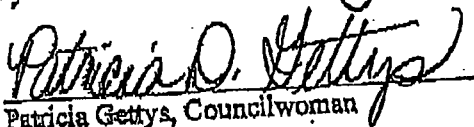
ORDER

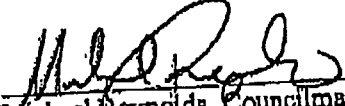
IT IS ORDERED that the business license of Hailee's Bar and Grill be revoked, and the business cease operation on or before midnight, September 30, 2011.

Dated: September 19, 2011


Bob Cook, Councilman


James Kennedy, Councilman


Patricia Gettys, Councilwoman


Michael Reynolds, Councilman

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff,

vs.

City of Mauldin, Mauldin City Council,
John Gardner, Brian Turner, Peter Nomikos,
and Callista, L.L.C.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2011-CP-23-4773

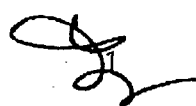
ORDER DENYING PLAINTIFF'S
MOTIONS FOR TEMPORARY
RESTRAINING ORDER AND
TEMPORARY INJUNCTION

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHIRE
2011 SEP 20 A 9:11

On August 29, 2011, this matter came before the Court to consider Plaintiff's Motion for a Temporary Injunction. Present before the court were Robert Childs, III, attorney for the Plaintiff, and John B. Duggan, attorney for the City of Mauldin, Mauldin City Council, John Gardner, Bryan Turner and Peter Nomikos.

On July 18, 2011, City Council for the City of Mauldin (hereinafter "Mauldin") adopted an Ordinance requiring all bars to close not later than 2:00 a.m. Plaintiff, (hereinafter "Hailee's") operates a bar within the city limits of Mauldin which presently stays open until 6:00 a.m. Hailee's seeks a temporary injunction enjoining Mauldin from enforcing the new Ordinance pending a trial on the merits concerning the validity and enforceability of this Ordinance.

It is well settled law that an ordinance is a legislative enactment and is presumed to be constitutional. *North Charleston Land Corp. v. City of North Charleston*, 281 S.C. 470, 316 S.E.2d 137 (1984), *Bibco Corp v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998). The burden of proving the invalidity of an ordinance is on the party attacking it, and it is necessary



that the attacking party show the arbitrary and capricious character of the ordinance through clear and convincing evidence. *Bibco* at 52, 504 S.E.2d 112, 116.

An injunction is a drastic remedy that should be cautiously considered. *LeFurgy v. Long Cove Club Owners' Ass'n*, 313 S.C. 555, 443 S.E.2d 577, 578 (Ct. App. 1994). The burden of proof lies with the moving party to show such facts and circumstances entitling it to an injunction. *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55, 59 (Ct. App. 1984). To obtain an injunction, a party must demonstrate: 1) irreparable harm, 2) lack of an adequate remedy at law and 3) likelihood of success on the merits. *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 551 S.E.2d 168, 170 (Ct. App. 1986).

DOCUMENTS SUBMITTED

Plaintiff submitted Affidavits of Sonny Ninan, owner of Hailee's, his son, William S. Ninan, and Hailee's employees, Elizabeth Henley, Jennifer Jones, Chelsea Gladen, Nickie Harget, and Kayla Tyre.

Defendant submitted a map showing the city limits of Mauldin in the vicinity of Hailee's, as well as Affidavits by city employee John Gardner and Chief of Police, Bryan Turner. Turner's Affidavit included Police Department Incident Reports concerning Hailee's, and a summary of these Incident Reports.

FINDING OF FACT AND CONCLUSIONS OF LAW

Plaintiff claims that the Ordinance violates the Equal Protection Clause of the United States Constitution because there is no rational relationship between the legitimate purpose of the ordinance and the classification produced by the ordinance. Specifically, Plaintiff claims that the enactment of the Ordinance is for no other purpose than to deprive Plaintiff of its protected property rights to the business. (Complaint of Plaintiff, p. 39).



The Equal Protection Clause is satisfied if 1) "the classification bears a reasonable relation to the legislative purpose sought to be effected; 2) the members of the class are treated alike under similar circumstances and conditions; and, 3) the classification rests on some reasonable basis." *Whaley v. Dorchester County Zoning Bd. Of Appeals*, 337 S.C. 568, 574, 524 S.E.2d 404, 408 (1999), citing *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 997 S.E.2d 662 (1990). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it. *Id.* The fact that the classification may result in some inequity does not render it unconstitutional. *Whaley* at 568, 524 S.E.2d 404, citing *Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

Plaintiff fails to establish that the Ordinance violates the Equal Protection Clause. The prohibition of alcohol sales from 2:00 a.m. to 6:00 a.m. is reasonably related to promoting public safety and the general welfare of citizens. Since the property where Plaintiff's business is located was annexed into the City, there have been numerous incidents and arrests originating from illegal activity and other problems occurring at its business. (See Affidavit of Chief Turner). While the Plaintiff alleges that the City has "commenced a pattern of aggressive enforcement" on its premises "with the intent to close the operation of Hailee's business," it appears from the incident reports submitted to the court that the aggressive enforcement has been necessary and reasonable in order to protect the City's citizens and enforce its laws. The Ordinance applies to all businesses to prevent the problems arising from Plaintiff's business and any other business in the City that may wish to sell alcohol between 2 a.m. and 6 a.m. Whether or not Plaintiff is the only business to sell alcohol between 2 a.m. and 6 a.m. is of no



consequence to the analysis. The ordinance applies equally to all businesses. The ordinance satisfies the Equal Protection Clause.

Plaintiff further claims that the enforcement of the Ordinance constitutes a taking of its Property without just compensation in violation of the Fifth Amendment of the United States Constitution and applied to the states through the Fourteenth Amendment to the United States Constitution (Motion of Plaintiff for Temporary Restraining Order, p. 3).

Plaintiff seems to be alleging that the Ordinance constitutes a taking by way of inverse condemnation. Inverse condemnation is a cause of action by a property owner against a governmental entity to recover the value of property that has been effectively "taken" by the governmental entity, although not through the process of eminent domain. *Kiriakides v. School District of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009).

Here, the Plaintiff is merely a tenant of the property owned by Defendant Callista, L.L.C., and therefore, Plaintiff cannot claim that a taking has occurred of someone else's property. Furthermore, Plaintiff may continue to operate during the hours allowed by the Ordinance.

In *Denene, Inc. v. The City of Charleston*, 352 S.C. 209, 574 S.E.2d 196 (2002), our State Supreme Court reviewed the validity of an ordinance by the City of Charleston prohibiting commercial establishments from allowing on-premises consumption of beer and wine between the hours of 2:00 a.m. and 6:00 a.m. which was vertically identical to the Ordinance adopted by Mauldin.

The Supreme Court relied upon S.C. Code Ann. Sect. 5-7-30 (1976, as amended), which provides, in relevant part, that a municipality has the police power to enact ordinances in relation to "...order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving



health, peace, order, and good government in it.” The *Denene* Court held that because Charleston’s ordinance was “neither inconsistent nor irreconcilable” with the State statute, it was a proper and valid exercise of the city’s police power. 352 S.C. at 215, 574 S.E.2d at 199.¹

Plaintiff fails to allege any facts or raise any issues that distinguish this case from *Denene* as it pertains to the issue of the validity of the ordinance. Furthermore, the problems experienced by the City at Hailee’s demonstrate the rational basis for the Ordinance. The Court find that Plaintiff has failed to meet its burden to show that the Ordinance is arbitrary and capricious and is without a rational basis.

Plaintiff asserts that Mauldin should be enjoined from enforcing the Ordinance because, prior to the annexation into Mauldin of the shopping center in which Hailee’s is a tenant, a city employee advised someone from Hailee’s that in the event City Council subsequently changed the hours of operation for bars that it would not apply to Hailee’s because it “would be grandfathered in.” Although the Affidavits of Sonny Ninan and William Ninan include a vague statement that unnamed city officials had assured Hailee’s that its hours of operation would never be limited and it would be “grandfathered in” if the hours of operation for bars were subsequently changed, neither Affidavit identified the specific employee who allegedly made these representations, nor does it identify the representative of Hailee’s to whom it was made. The complaint alleges that Mauldin employee John Gardner made this representation. However, in his Affidavit, Mr. Gardner specifically denies having ever made such a representation to anyone from Hailee’s. The evidence submitted by Hailee’s is insufficient for Plaintiff to meet its burden in support of this allegation. Further, the court finds that it is unlikely that such a

¹ In *Foothills Brewing Concern, Inc., v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008), the State Supreme Court upheld the City of Greenville’s smoking ordinance based upon the same two-step analysis and reasoning in *Denene*.



discussion would have taken place prior to the annexation of the shopping center into the City of Mauldin which was not owned by Hailee's at the time of annexation. Furthermore, The City is a body politic governed by the Mayor and Council form of government. Therefore, all decisions binding upon the City are voted on and approved by the Mayor and Council. *See S.C. Code Ann. 5-9-10 et seq.* (1976, as amended). It is settled law that an individual may not bind a governmental entity to an agreement unless that individual is duly authorized to do so. *Carolina Power & Light Co. v. Darlington County*, 315 S.C. 5, 431 S.E.2d 580 (1993). In *Carolina*, the Court held that a municipal corporation was not bound by contract made in its name by officer or agent if the officer or agent had no such authority to enter into a contract on behalf of the municipal corporation. Furthermore, in *City of North Charleston v. North Charleston Dist.*, 289 S.C. 438, 346 S.E.2d 712 (1986), the Supreme Court held that a person who contracts with a municipality is charged with the knowledge of its limitations and restrictions in making contracts.

Even if Defendant Gardner made the alleged representations, Plaintiff cannot show that it could have legally relied upon them because any representations of Gardner were *ultra vires*, and non-binding upon the City. Furthermore, our law charges the Plaintiff with the knowledge of the City's limitations to enter contracts. The Court concludes that Mauldin should not be enjoined from enforcing its Ordinance based upon Plaintiff's allegation concerning the representations by a city employee. In addition, Plaintiff does not own the property in question was therefore not a party to the annexation.

The Plaintiff also contends that it is entitled to a temporary injunction because the annexation on June 21, 2010, of the shopping center where Hailee's is a tenant, is invalid. First, Plaintiff lacks standing to challenge the annexation. As a general rule, to have standing one must



demonstrate a personal stake in the subject matter or lawsuit or, in other words, be a real party in interest. *Townsend v. Townsend* 323 S.C. 309, 474 S.E.2d 424 (1996). Furthermore, in order for Plaintiff to have standing to challenge the annexation, it must allege an infringement of its own proprietary interests or statutory rights. Mere interest in the outcome without a showing of adverse affect on the governmental entity's rights is not sufficient to invoke standing. *Beaufort County v. Trask*, 349 S.C. 522, 563 S.E.2d 660 (Ct. App. 2002). Plaintiff is merely a lessee of the property owned by Defendant Callista, L.L.C., and therefore, it fails to have a personal stake in the annexation or the ability to allege an infringement of its proprietary interests or statutory rights. This annexation was completed by the 100% (percent) annexation method. The only entity whose signature is required is Callista, LLC, by and through its authorized corporate members.

Second, Plaintiff's annexation challenge fails because it is too late to challenge the annexation. *S.C. Code Ann. Sect. 5-3-270* provides that a party may not contest the adoption of an annexation ordinance unless two prerequisites are met: 1) that the interested person file a notice of intention to contest the annexation within sixty (60) days after the annexation became final; and 2) file a summons and complaint within ninety (90) days after the annexation is finalized. Our Court of Appeals held that both of these requirements must be followed before a party may contest an annexation. *See Moon v. City of Greer*, 348 S.C. 184, 558 S.E.2d 527 (Ct. App. 2002). Having failed to do either, the court concludes that it is too late to challenge the annexation.

The Plaintiff also claims that the annexation was invalid because, at the time it took place, the shopping center in which Hailee's is located was not contiguous to the city limits of Mauldin where the annexation took place. At the hearing, Mauldin provided a map of the city



limits including the shopping center in which Hailee's is located and the surrounding area. This map shows that the subject shopping center was contiguous to the city limits of Mauldin at the time of annexation. Plaintiff proffered no evidence in support of its allegation of a lack of contiguity. The Court finds that this allegation is unsupported by the evidence.

Hailee's claims that it has no adequate remedy at law. The third cause of action in the complaint seeks monetary damages from Mauldin. If it is subsequently shown at a trial on the merits that the Defendant acted improperly, then Plaintiff can pursue its claim for monetary damages. Plaintiff has not shown that it is without an adequate remedy at law.

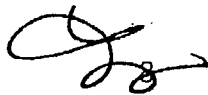
The court concludes that the Plaintiff failed to meet its burden to show that the challenged Ordinance is arbitrary and capricious and without rational reason and is therefore invalid. The court also concludes that the allegation of the Plaintiff that Mauldin should be enjoined from enforcing the Ordinance because of an alleged representation by a city employee lacks merit. Finally, the court concludes that Plaintiff has failed to meet its burden to show irreparable harm, lack of inadequate remedy at law, or a likelihood of success on the merits.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the motion of the Plaintiff for a Temporary Restraining Order and Temporary Injunction be, and hereby are denied.

Date: September 19, 2011



Letitia Verdin, Judge
Thirteenth Judicial Circuit



A Certified Copy
Paul B. Wilkerson
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 9/20/11

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2304773

SEP 26 PM 3:00

K&S Food Services Inc vs. Mauldin City Of

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
SEP 26 2011

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

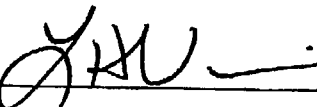
IT IS ORDERED AND ADJUDGED:

- ☐ See attached order; ☒ Statement of Judgment by the Court:

This matter comes before the Court on Plaintiff's Motion to Reconsider Findings of Fact and to Alter or Amend to the Judgment (Order of Judge Letitia H. Verdin). Plaintiff's motion is DENIED.

Dated at Greenville, South Carolina, this September 23, 2011.

Court Reporter:



PRESIDING JUDGE - LETITIA H. VERDIN

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Robert Clyde Childs III Attorney At Law 2100 Poinsett
Hwy, Suite D Greenville, SC 29609

ATTORNEY(S) FOR THE PLAINTIFF(S)

John B. Duggan Love, Thornton, Arnold & Thomason, P.A.
P.O. Box 449 Greer, SC 296520449

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA 2012 MAY 29 IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE FILED-CLERK OF COURT THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's Bar and Grill,)
Plaintiff-Appellant,)
vs.) ORDER
City of Mauldin, and Mauldin City Council,)
Defendants-Respondent.)

On January 5, 2012, this matter came before the Court for a hearing pursuant to several Motions filed by Defendants, including a Motion to Dismiss.

STATEMENT OF FACTS

On February 15, 2011, the City of Mauldin notified Plaintiff of its intention to revoke Hailee's Business License. A revocation hearing was held before City Council on August 16, 2011. On September 19, 2011, City Council issued its Order revoking Plaintiff's Business License. Thereafter, Plaintiff appealed seeking judicial review of the revocation of its Business License by Mauldin City Council.

In its appeal, Plaintiff asserts three causes of action for relief. First, Plaintiff claims the revocation was erroneous for various reasons set out in the Complaint. Secondly, Plaintiff alleges that Defendant violated the Freedom of Information Act (FOIA) in several particulars during the business license revocation process. Finally, Plaintiff alleges that the Business License Ordinance of the City of Mauldin is invalid.

On November 5, 2011, Plaintiff voluntarily closed its business and moved out of the city limits of Mauldin.¹

Defendants assert that because Plaintiff is no longer operating its business within the city limits that there is no justiciable controversy and the case is moot. In addition, Defendants claim

¹ See Affidavit of Mauldin Police Officer Misti Leigh Ross dated December 7, 2011.

1
HIL

that the alleged violations of FOIA were not preserved for appeal because it was not asserted at the hearing.

LAW

"A threshold inquiry for any Court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002), quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906 (Ct. App. 1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id. quoting Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. Id. quoting Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997).

"A case becomes moot when judgment, if rendered, *will have no practical effect* upon [an] existing controversy." Id. quoting Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (emphasis added). "The Appellate Courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Linda Mc Co. v. Shore, 703 S.E.2d 499, 506 (2010). Mootness will result when "some event occurs making it impossible for the reviewing Court to grant effectual relief." Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996).

Our Courts applied the mootness doctrine to a landlord tenant controversy when the tenant left the premises after filing the action as well as an action by a retail liquor dealer against the S.C. Tax Commission when the dealer went out of business during the appeal. *See* Berry v. Zahler, 220 S.C. 86, 66 S.E.2d 459 (1951) and Fabian's Uptown Charleston, Inc. v. SC Tax Comm'n, 247 S.C. 164, 146 S.E.2d 608 (1966). In Berry, a tenant appealed to the Circuit Court from a Magistrate Court Order for eviction. After the Appeal, the tenant vacated the premises and delivered possession to the landlord. The Court held that it could not hear and determine the merits since only speculative questions were involved. Id. at 88, 66 S.E.2d at 460.

There are three exceptions to the mootness doctrine: (1) if the issue raised is capable of repetition that generally will evade review; (2) an Appellate Court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest; and, (3) if a decision by the Trial Court may affect future events or have

collateral consequences for the parties, an appeal from that decision is not moot, even though the Appellate Court cannot give effective relief in the present case. Holden, at 138, 561 S.E.2d at 637-638.

FINDINGS AND CONCLUSION

Because Plaintiff no longer does business in the City of Mauldin the determination of the validity of the City's actions in revoking Plaintiff's business license would have no practical effect upon the parties. Therefore, the Court finds and concludes that the issues raised by Plaintiff as the first basis of its appeal are moot, and that no exceptions to the mootness doctrine apply.

The second basis of the appeal by the Plaintiff is that Defendants violated the Freedom of Information Act by: (1) failing to provide proper notice of the August 16, 2011 City Council meeting concerning the revocation of Plaintiff's business license; (2) failing to produce minutes from the August 16, 2011 meeting; and, (3) improperly acting on a matter in executive session by executing its September 19, 2011 decision to revoke Plaintiff's business license without an "open meeting and without minutes of that meeting."

The Court finds that although Plaintiff has since moved from Mauldin city limits, it has standing to maintain a claim for violation of FOIA. See S.C. Code Ann. §30-40-100(a) ("*Any citizen of the State* may apply to the Circuit Court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter . . .") (emphasis added). The City Council constitutes a "public agency" under FOIA and its meetings, minutes, and records must be open to the public. However, to prevail on its claim, Plaintiff must demonstrate that a FOIA violation occurred, and the Court may then "order equitable relief as it considers appropriate."

Finally, Plaintiff claims the City's Business License Ordinance is invalid as a basis of its appeal. This assertion was also raised in the companion legal action designated as Civil Action No. 2011-CP-23-4773. Because Plaintiff no longer conducts business within the city limits of Mauldin, a determination of the validity of the Business License Ordinance would have no practical effect upon the parties to this case. See Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). Therefore, this issue is moot.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's first and third causes of action claiming that the revocation of its business license was improper and invalid, and that the Business License Ordinance of the City of Mauldin is invalid are dismissed.

IT IS ALSO ORDERED that Plaintiff may pursue the claim that the City of Mauldin violated the Freedom of Information Act.

IT IS SO ORDERED.

D. Garrison Hill

The Honorable D. Garrison Hill
Thirteen Judicial Circuit

Dated: May 2, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

K & S Food Services, Inc. d/b/a Hailee's
Bar and Grill,)

Plaintiff)

v.)

City of Mauldin, Mauldin City Council,
John Gardner, Brian Turner, Peter Nomikos,
And Callista, L.L.C.)

Defendants)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
C.A. NO.: 2011-CP-23-6290; 2011 CP-23-
4773

ORDER

2013 MAY 14 A 4:04

FILED
CLERK OF COURT
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SOUTH CAROLINA

This matter comes before the Court on Defendant's motion to strike and in the alternative motion for summary judgment pursuant to S.C.R.C.P. Rule 56 and Plaintiff's motion for summary judgment, permanent injunction, and attorney's fees. Plaintiff has alleged both violation of the Freedom of Information Act (hereinafter FOIA, S.C. Code Ann. § 30-40-10) and negligence against Defendants. Defendants' motion for summary judgment as to Plaintiff's cause of action for Negligence rests on the basis that it is barred by the South Carolina Tort Claims Act, (hereinafter SCTCA) S.C. Code Ann. § 15-78-60. A hearing was held on September 17, 2012 before this Court during which both parties were able to argue and respond fully. Defendant's motion for summary judgment is denied in part and granted in part. Upon review of the arguments of counsel, the pleadings, and the evidence presented, the Court issues this order granting summary judgment for Plaintiff's claim of violation of S.C. Code Ann. § 30-40-10 and granting Defendant's motion for summary judgment for the claim of negligence pursuant to S.C. Code Ann. § 15-78-10.

[Handwritten signature]

ENTERED COMPUTER

ROA PAGE 28

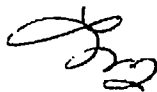
BACKGROUND

I. Plaintiff's FOIA Violation Claim

The Plaintiff alleges that Defendant City Council of Mauldin violated the FOIA by 1) failing to provide proper notice of the August 16, 2011 City Council meeting concerning the revocation of Plaintiff's business license; 2) failing to produce minutes from the August 16, 2011 meeting; and 3) improperly acting on a matter in executive session by executing its September 19, 2011 decision to revoke Plaintiff's business license without an "open meeting and without minutes of that meeting." At the September 17th hearing, Mr. Duggan, counsel for Defendants, presented the affidavit of Mauldin City Councilman Bob Cook. Mr. Cook's affidavit attests that the Council's meeting regarding the revocation of Hailee's business license commenced at 6:00 pm and continued until after midnight. At that time, the Council recessed. Mr. Cook then solicited a proposed order revoking the business license from Mr. Duggan. Mr. Cook disseminated the proposed order to the other Council members. No further meeting or hearing was held to discuss the matter. Instead, four city council members signed the order on their own without "any discussion among the Council Members about the merits of the case or the Order." Defendants contend that because no further discussion occurred and that the record of the vote and minutes of the meeting prior to adjournment were made available, they did not violate FOIA and are entitled to summary judgment on the claim.

II. Plaintiff's Negligence Claim

In its Complaint, Plaintiff alleges that the Defendants were "willful, wanton, reckless, negligent, and grossly negligent" in "harassing" and "intentionally harming" Plaintiff, in failing to supervise and train its employees and/or agents in proper enforcement of Ordinances and



Laws, and in making statements to the public that Plaintiff's Business license had been revoked. Defendants contend that they are entitled to summary judgment on that claim because Plaintiff's negligence cause of action is barred by the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-60.

STANDARD

Summary judgment is appropriate where "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 judgment as a matter of law." Rule 56(c), S.C.R.C.P. When plain, palpable and indisputable facts exist upon which reasonable minds cannot differ, summary judgment should be granted. *See* Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). In considering a motion for summary judgment, this Court "must view the facts in the light most favorable to the non-moving party. Nonetheless a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *See* Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (internal citations omitted). Further, "[i]n order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial. *See* NationsBank v. Scott Farm, 320 S.C. 299, 303, 565 S.E.2d 98, 100 (S.C. Ct. App. 1995).

CONCLUSIONS OF LAW

I. Plaintiffs are entitled to Summary Judgment and Attorney's Fees as to the FOIA claim

Defendants argue that no FOIA violation occurred because the Council did not reconvene or hold further discussion. However, this is precisely where the alleged violation lies. The

FOIA requires that public bodies conduct their business in public. See S.C. Code Ann. § 30-4-15. While the FOIA provides for certain matters to be deliberated upon in a private "executive session," revoking a business license is not one of those matters. See S.C. Code Ann. § 30-4-70. Further, the FOIA prohibits any public body from committing to a course of action by a "polling of members in executive session." See S.C. Code Ann. § 30-4-70(b). A public body may not avoid the requirements of FOIA through any "chance meeting, social meeting, or electronic communication." See S.C. Code Ann. § 30-4-70(c). If a public body acts in executive session, it must ratify that action in a public session prior to such action becoming effective. See S.C. Code Ann. § 30-4-70(a)(5). It appears from Mr. Cook's affidavit that the activities of the Council constitute a private polling of the members outside of a public meeting which were not later ratified in a public session. Though the Council did not conduct a *formal* vote in executive session, the activities of the Council still violated the statute. As no genuine issue of material fact exists as to the violation of the statute, this Court finds that summary judgment in favor of the Plaintiff is appropriate on this claim.

Plaintiff is entitled to reasonable attorney's fees and to the costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b). A hearing shall be set to determine the appropriate amount of attorney's fees.

II. Defendants are entitled to Summary Judgment as to Plaintiff's claim of negligence

Plaintiff claims that Defendants were "willful, wanton, reckless, negligent, and grossly negligent" in "harassing" and "intentionally harming" Plaintiff, in failing to supervise and train its employees and/or agents in proper enforcement of Ordinances and Laws and in making

24

statements to the public that Plaintiff's Business license had been revoked. Defendants argue in their motion that Plaintiff's claim is barred by S.C. Code § 15-78-60(4) and (12). These sections retain governmental immunity in the enforcement of laws, absent gross negligence, and ordinances and in the licensing activities of public bodies.

Plaintiff argues that because Defendants failed to include the affirmative defense of immunity in its original pleadings, that Defendants are barred from asserting the defense at present. Plaintiff accurately states that immunity is an affirmative defense which must be plead. *See Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct.App. 1988). Further, Rule 8(c), SCRPC requires parties to include affirmative defenses in their pleadings. However, as this State's Supreme Court has noted, the aim of rule 8(c) is to "avoid surprise defenses" and many courts allow the assertion of affirmative defenses "despite a technical failure to comply with the initial pleading requirement when the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party." *See Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (S.C. 2007).

In *Plyler*, the Horry County Probate Court had failed to plead the affirmative defense of common law judicial immunity but later raised the defense in a memorandum in support of its motion to dismiss. *See id.*, at 649, 647 S.E.2d at 195. The Court held that the defendant's inclusion of the defense in the supporting memorandum was sufficient to comply with the intent of rule 8(c), SCRPC, because the plaintiff could not demonstrate that she had suffered "prejudice or unfair surprise in anyway." *Id.*, at 649, 647 S.E.2d at 195. In this case, Plaintiff has similarly not demonstrated any prejudice or unfair surprise due to Defendant's assertion of immunity as an affirmative defense. As early as May of this year, Defendant asserted immunity pursuant to the South Carolina Tort Claims Act and has continued to assert the defense since that time. As such,



this Court finds that Plaintiff suffered no prejudice or unfair surprise as a result of the Defendants assertion of the affirmative defense and Defendants are permitted to assert immunity.

Defendants are entitled to immunity for a negligence cause of action pursuant to S.C. Code Ann. § 15-78-60(4) and (12). No genuine issue of material fact exists as to this claim and Defendant is entitled to summary judgment.

CONCLUSION

Based upon the foregoing, this Court concludes that the defendants have failed to provide any evidence which would create a genuine issue of material fact for trial and that Plaintiff is entitled to summary judgment and attorney's fees (in an amount to be determined at a later hearing) on Plaintiff's claim of violation of the FOIA. The Court does not find that the requested equitable remedy is appropriate. This Court also concludes that the plaintiff has failed to provide any evidence which would create a genuine issue of material fact for trial and that the Defendants are entitled to summary judgment on Plaintiff's negligence cause of action. THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the defendants for summary judgment as to the Plaintiff's claim of negligence be, and it is hereby, granted and the plaintiff's complaint is hereby dismissed with prejudice and henceforth *res judicata*. Further, IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Plaintiff, K & S Food Services for summary judgment as to Plaintiff's claim of violation of the FOIA be, and hereby is, granted and that Plaintiff is entitled to reasonable attorney's fees and costs. Further, IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Plaintiff for injunctive relief is denied.

IT IS SO ORDERED.



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

U. S. DISTRICT COURT
GREENVILLE, S. C.
JUL 10 1964
WICKENS

2013 JUL 15 P 2:47

Submitted by: _____ Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried, and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:
This matter is before the Court on Plaintiff's Motion to Reconsider. Plaintiff argues that this Court erred in not finding the existence of a genuine issue of material fact as to the Defendants' gross negligence and in granting Summary Judgment for the Defendants. Plaintiff claims that the Court erred in granting Summary Judgment because Defendants failed to comply with discovery. Plaintiff also argues that this Court's award of attorney's fees was insufficient and in error.

The Court respectfully denies Plaintiff's motions for reconsideration. The Court again finds that Plaintiff has failed to present evidence that would create a genuine issue of material fact as to the Defendants' gross negligence beyond the allegations in the complaint and that Summary Judgment was appropriate. Further, the Court finds that Defendants adequately responded to discovery. Finally, this Court finds that in light of the reasons set forth in its former order, the award of attorney's fees is appropriate and not in error.

CPFORM4M
SCCA SCRC Form 4C (Revised 12/2011)

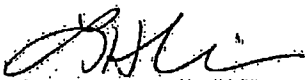
This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2162

Judge Code

7/10/13
Date

For Clerk of Court Office Use Only

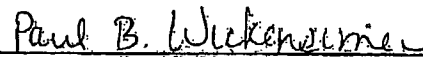
7-15-13
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Robert Clyde Childs III 2100 Poinsett Hwy., Ste. E
Greenville, SC 29609

John B. Duggan PO Box 449 Greer, SC 29652
Edward Zachary Horton PO Box 2464 Greenville, SC
29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Paul B. Wickensmier

Paul B. Wickensmier Greenville County Clerk Of

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKHAM

STATE OF SOUTH CAROLINA) MAY 14) A 402
COUNTY OF GREENVILLE))
K&S Food Services, Inc. d/b/a Hailee's)
Bar and Grill,)
Plaintiff-Appellant,)
vs.)
City of Mauldin, and Mauldin City)
Council,)
Defendants-Respondent.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C/A No. 2011-CP-23-6290

ORDER

On February 7, 2013 this matter came before the Court upon Motion filed by counsel for the Plaintiff for recovery of attorney fees and costs from the Defendant for a violation of the Freedom of Information Act by the City of Mauldin. Plaintiff seeks recovery of attorney's fees in the amount of \$19,670.00 and costs of \$271.87.

STATEMENT OF FACTS

After Hailee's Bar and Grill was annexed into the City of Mauldin, the Mauldin City Police Officers responded to an inordinate number of calls to Hailee's. A high percentage of these calls were after 2:00 a.m.

In July, 2011, City Council passed an Ordinance requiring that all bars in the City close at 2:00 a.m. Hailee's sued the City raising five causes of action and seeking an injunction to prohibit the City from applying its Ordinance to Hailee's (2011-CP-23-4773). The Court denied the injunction and dismissed all five causes of action.



On August 16, 2011, Mauldin City Council held a hearing to determine if Hailee's business license should be revoked. On September 19, 2011, just prior to the start of a Council meeting, Council signed an Order in which it revoked Hailee's business license. Hailee's then initiated a second case against the City in which it raised three causes of action including a FOIA claim. Subsequently, the Court dismissed two causes of action but found that Council violated the Freedom of Information Act by signing the Order before the Council meeting rather than during the Council meeting.

FINDINGS

There are six factors to be considered when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and, (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) and Glasscock v. Glasscock, 304 S.C. 158, 161 403 S.E.2d 313, 315 (S.C. 1991) cites:

(1) The nature, extent, and difficulty of the case:

The Freedom of Information Act ("FOIA") issue in this case involved an uncomplicated, straight forward matter, that is, whether or not Council should have executed the Order revoking the business license of Plaintiff during a public meeting. The Court finds that the FOIA issue presented was not complicated and did not require sophisticated legal services or extensive work by Plaintiff's counsel.



(2) The time necessarily devoted to the case

Plaintiff's counsel submitted an Affidavit to the Court itemizing the time he allegedly devoted to the FOIA claim which listed a total of 56.5 hours. The Court finds that this amount of time was excessive in light of the simple, straight forward nature of the issue in controversy. For example, counsel listed 7.55 hours to prepare the FOIA cause of action in the Complaint which was only two pages in length in which a substantial portion was verbatim quotes of provisions of the Act. Counsel has previous experience handling FOIA cases. The amount of time expended by counsel for preparing the FOIA cause of action was excessive. In addition, counsel included a number of time entries for work that was largely clerical in nature and required little or no time by counsel. Further, counsel listed time preparing for and appearing at Court hearings. Those hearings, however, were primarily devoted to issues concerning the separate legal action (2011-CP-23-4773) and other issues in the instant case which were unrelated to the FOIA claim. The time listed for those services was excessive. The Court concludes that the time listed by counsel related to the FOIA issue was excessive.

(3) Professional standing of counsel

The Court finds that counsel for the Plaintiff has been in private practice for twenty-eight years, has substantial prior experience in government litigation, and enjoys a good professional reputation.

(4) Contingency of compensation

Counsel for the Plaintiff did not represent to the Court that he was representing the Plaintiff on a contingency. Therefore, the Court concludes that this is not a factor for consideration.



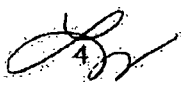
(5) Beneficial results obtained

Counsel for the Plaintiff initiated two separate lawsuits against the Defendant captioned as 2011-CP-23-4773 and 2011-CP-23-6290. In the first lawsuit, all five causes of action were dismissed by the Court. In the instant case, the Court dismissed the two substantive causes of action leaving only the FOIA claim. The Court therefore concludes that the results obtained were not particularly beneficial to the Plaintiff.

(6) Customary legal fees for similar services

Counsel asserts that he should be awarded fees at an hourly rate of \$350.00. Considering the uncomplicated nature of the issue, market rates for similar services in this area and fees in similar cases, the Court concludes that the fee rate sought by the Plaintiff is excessive.

In assessing a reasonable fee the Court is mindful of the fact that the revenues of the City of Mauldin are used to provide services to its citizens. The award of attorney's fees impacts the municipal services it provides to its citizens. Accordingly, the Court must find a balance between competing interests. In addition, the Court notes that while City Council violated the FOIA by not executing the Order of Revocation during a public meeting, it did not attempt to conceal its action from the public because the Order of Revocation was disseminated to the media which subsequently reported the action taken by Council. Therefore, although Council did not comply with the FOIA, the violation was not egregious.



CONCLUSION

Considering all of these factors, the Court finds that the Plaintiff should be awarded attorney's fees and costs in the amount of \$1,500.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant pay to the Plaintiff the sum of \$1,500.00.

IT IS SO ORDERED!

March 8, 2013

May



Letitia Verdin,
Judge, Thirteenth Judicial Circuit.



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2306290
2011CP2304773

IN THE COURT OF COMMON PLEAS

2013 MAY 14 A 11:02

K&S Food Services Inc. Hailees Bar And Grill Mauldin City Of City Council Mauldin

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:
This matter is before the Court on Plaintiff's motion to reconsider this Court's award of \$1,500.00 in attorney's fees. This Court has signed Mr. Duggan's proposed order which it believes sufficiently analyzes all necessary factors for such an award and in doing so, denies Mr. Childs' motion to reconsider.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

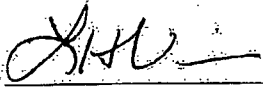
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
K & S Food Services, Inc. & Hailee's Bar and Grill	City of Mauldin	\$1,500.00 in attorney's fees & costs

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2162

Judge Code

5/7/2013

Date

For Clerk of Court Office Use Only

This judgment was entered on 5/14/13 and a copy mailed first class or placed in the appropriate attorney's box on 5/14/13 to attorneys of record or to parties (when appearing pro se) as follows:

Robert Clyde Childs III 2100 Poinsett Hwy., Ste. E
Greenville, SC 29609

John B. Duggan PO Box 449 Greer, SC 29652

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

City of Mauldin, Mauldin City Council,
John Gardner, Brian Turner,
Peter Nomikos and Callista L.L.C.
Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No.: ' 2011-CP-23- 4773

COMPLAINT
(Verified/Jury Trial Requested)
(Declaratory Judgment)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
2011 JUL 19 A 9

The Plaintiff, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. Plaintiff K&S Food Services Inc. (hereinafter referred to as "Hailee's") is a corporation organized under the laws of the State of South Carolina and doing business in the County of Greenville, State of South Carolina as Hailee's Bar and Grill located at 1178 Woodruff Road Suite 8 & 9, Greenville, SC 29607.
2. Defendant Callista L.L.C., (hereinafter referred to as "Callista") is a corporation organized under the laws of the State of South Carolina and is the owner of a certain shopping center located at 1178 Woodruff Road, in the County of Greenville, State of South Carolina, which is more accurately identified in the Greenville County Deed Office, Book 2229, Page 786 and Greenville County Tax Map Number 054703013705 (hereinafter referred to as the "premises").
3. The Defendant City of Mauldin, (hereinafter referred to as "City" and as part of "City Defendants") is a municipality and political subdivision of the State of South Carolina located within the County of Greenville, State of South Carolina.

4. The Defendant Mauldin City Council, (hereinafter referred to as "Council" and as part of "City Defendants") is a political and governing body over the City.
5. The Defendant John Gardner, (hereinafter referred to as "Gardner") upon information and belief is a citizen and resident of the County of Greenville, State of South Carolina and at all times alleged herein was acting under the color of his position with the City as Director of Planning and Economic Development.
6. The Defendant Brian Turner, (hereinafter referred to as "Turner" and as part of "City Defendants") upon information and belief is a citizen and resident of the County of Greenville, State of South Carolina and at all times alleged herein was acting under the color of his position with the City as the Chief of Police.
7. The Defendant Peter Nomikos, (hereinafter referred to as "Nomikos" and as part of "City Defendants") upon information and belief is a citizen and resident of the County of Greenville, State of South Carolina and at all times alleged herein was acting under the color of his position with the City as Building Director.
8. On or about July 27, 2009 and October 5, 2009 Hailee's entered into a lease agreement with Callista to lease a certain portion of the premises to operate a restaurant bar, which was licensed to sell alcoholic beverages for on-site liquor and beer and wine for on-site and off-site.
9. On or about January 2010 Gardner approached Hailee's about annexation into the City proposing that annexation into the City would enable Hailee's to sell liquor and beer and wine on Sundays.
10. Hailee's informed Callista of the City's proposal, however, Callista was more inclined to have the property annexed into the City of Greenville.

11. Hailee's informed Gardner that Callista was inclined to be annexed into the City of Greenville but Gardner informed Hailee's that it could operate past 2:00 a.m. and without a smoking ordinance.
12. Hailee's inquired with Gardner whether or not the City might ever change the hours of operation and it's position on a smoking ordinance since Hailee's derives a majority of its revenue after the hours of 2 a.m. Gardner informed Hailee's that any further changes would not affect Hailee's and that they would be "grandfathered in".
13. Hailee's informed Callista of this information.
14. Based upon the representations of the City and Gardner, Hailee's encouraged, and Callista requested, annexation into the City.
15. The Plaintiff relied upon the representations of Gardner and other City representations in making value backed investments about the premises and in the decision to be annexed.
16. Before the annexation, Hailee's was contacted by representatives of the City and Turner pertaining to providing off-duty City Police Officers for security at Hailee's.
17. Hailee's agreed to pay off-duty City Police Officers for security at Hailee's along with another private security company.
18. On or about June 21, 2010 the premises were annexed into the City pursuant to Ordinance 706-2010.
19. Hailee's employed the off-duty City Police Officers assigned by the representatives of the City and Turner to work at Hailee's. Representatives of the City and Turner required that the officers be paid in cash on each closing night.
20. Hailee's requested information from the representatives of the City and Turner concerning the names, addresses and social security numbers of the Officers assigned to

Hailee's so that they could accurately report the cash payments to the Internal Revenue Service.

21. Despite repeated requests for that information it was never provided.
22. Representatives of the City and Turner then requested that Hailee's terminate the private security company so their off-duty officers could provide all the security and earn additional monies from Hailee's.
23. Hailee's refused to terminate the private security company.
24. On or about December of 2010 the City, Turner and others directed that off-duty police officers could no longer provide security for Hailee's and Turner and the City commenced a pattern of aggressive enforcement within the parking lot of the premises and areas adjacent thereto along with frequent inspections and undercover operations upon the premises all with the intent to close the operation of Hailee's business.
25. Despite the fact that the parking lot was never ceded to police jurisdiction the police occupied those premises on a near nightly basis.
26. Hailee's is informed and believes that Turner and other representatives of the City requested that Nomikos cite Hailee's for all possible violations and revoke Hailee's business license.
27. Nomikos lacked the legal authority to take such action.
28. On or about February 15, 2011 Nomikos notified Callista that Hailee's business license was "suspended pending a hearing before council" scheduled for February 21, 2011. The action was done without a predeprivation hearing and without due process.
29. The hearing before Council has been continued on numerous occasions and has still not been scheduled.

30. Hailee's is informed and believes that Council has been communicated with by the Defendants about the merits of Hailee's business license revocation and that no reasonable and fair hearing can be provided by the Council.
31. On or about March 19, 2011 Turner and the City arrested four employees of Hailee's under false charges for violations of alcohol sales.
32. On or about April 15, 2011 Turner and the City arrested an officer and majority owner of Hailee's, who was in a parked vehicle in the parking lot of the premises, for Driving under the Influence. No one had seen him operating a motor vehicle and Turner and the City lacked probable cause to arrest him.
33. On or about June 20, 2011 City Council introduced an Alcohol Sales Ordinance to restrict alcohol sales in the City to no later than 2:00 a.m. Hailee's is the only Mauldin business affected by this Ordinance.
34. The Alcohol Sales Ordinance has no provision for existing businesses to be allowed to continue operation after 2 a.m. nor does it establish an effective date.
35. On or about July 18, 2011 that Ordinance was passed by the Council.
36. Representatives of the City have vowed immediate enforcement.
37. The Plaintiff relied upon the prior representations of the City Defendants concerning alcohol sales being "grand-fathered" to their detriment.

FOR A FIRST CAUSE OF ACTION BY HAILEE'S
AGAINST THE CITY AND CITY COUNCIL
(Validity of Alcohol Sales Ordinance)

38. The Plaintiff reiterates and incorporates the proceeding allegations into this cause of action.

39. The Alcohol Sales Ordinance is invalid, improper, unconstitutional and has no rational and reasonable basis for enactment other than to the accomplishment of the unlawful objective of the Defendants to deprive Hailee's of its protected property right to its business.
40. The Alcohol Sales Ordinance is discriminatory, a denial of equal protection and constitutes an unlawful taking of Hailee's protected property rights.
41. The enforcement of the Alcohol Sales Ordinance will constitute a taking of Hailee's property without compensation in violation of the constitutions of the State of South Carolina and the United States.
42. The Alcohol Sales Ordinance is purportedly effective immediately and the City has stated they will enforce it immediately although City Ordinances, as a matter of law, may not be effective until the next Council meeting following their enactment.
43. The City Defendants should be estopped from the enforcement of the Alcohol Sales Ordinance based upon the prior representations of the City Defendants and Hailee's detrimental reliance thereon.
44. If the Alcohol Sales Ordinance is immediately enforced Hailee's has and will suffer irreparable, immeasurable and incalculable harm that will be impossible to fully ascertain.
45. As a further direct and proximate result thereof, Hailee's has and will suffer the loss of income, patrons and goodwill in the community.
46. Hailee's is informed and believes that it is entitled to a temporary restraining order, temporary injunction and a writ of mandamus staying the enforcement of the Alcohol

Sales Ordinance pending a resolution of the issues concerning the validity of this ordinance and the annexation of the premises into the City.

47. A justiciable controversy exists between the parties pursuant to the South Carolina Declaratory Judgment Act.
48. Hailee's is informed and believes that it is entitled to judgment against the City Defendants invalidating the ordinance and for actual damages that are ascertained from the enactment of this ordinance in an amount to be determined by a jury.

FOR A SECOND CAUSE OF ACTION BY HAILEE'S
AGAINST THE CITY AND COUNCIL
(BUSINESS LICENSE ORDINANCES)

49. The Plaintiff reiterates and incorporates the proceeding allegations into this cause of action.
50. Hailee's is informed and believes that the Ordinances affecting business license revocation are vague, overly broad, contrary to State law, unconstitutional and vests excessive authority in administrative officials.
51. The notice of revocation proceedings is improper and contrary to requirements of due process.
52. Hailee's reiterates that City Council is irrevocably biased and prejudiced by ex parte communications concerning the merits of the business license revocation.
53. Hailee's has and will suffer irreparable, immeasurable and incalculable harm that will be impossible to ascertain.
54. The Defendants have advised the press and public that Hailee's license has been revoked causing members of the public to believe the business is no longer open.

55. Nevertheless, since being notified of their revocation, Hailee's sought and received a new business license from the City.
56. Therefore, the revocation proceeding before Council is now moot since the license the City sought to revoke has expired and a new license has been issued.
57. A justiciable controversy exists between the parties pursuant to the South Carolina Declaratory Judgment Act.
58. Hailee's is informed and believes that it is entitled to a temporary restraining order, temporary injunction and a writ of mandamus staying the business license revocation proceedings pending this court's determination concerning the validity of the business license ordinances and the proceeding before Council.
59. Hailee's is informed and believes that it is entitled to judgment against the City Defendants invalidating the business license ordinances and for actual damages that are ascertained from the enforcement proceedings related to this ordinance in an amount to be determined by a jury.

FOR A THIRD CAUSE OF ACTION BY HAILEE'S
AGAINST ALL THE DEFENDANTS
(NEGLIGENCE)

60. The Plaintiff reiterates and incorporates the proceeding allegations into this cause of action.
61. The City Defendants were willful, wanton, reckless, negligent and grossly negligent and intentional in the following and other particulars;
1. In doing the acts specified above.
 2. In harassing Hailee's.

3. By retaliating against Hailee's for the exercise of the right to free association and freedom to do business.
 4. In intentionally harming Hailee's for no legitimate reason.
 5. In failing to supervise their employees and/or agents.
 6. In failing to train their employees and/or agents in properly enforcing ordinances and laws.
 7. In making statements to the public that Hailee's license had been revoked.
 8. In doing such other and further things that a reasonably prudent municipality would not have done under the circumstances then and there existing.
62. As a direct and proximate result thereof, Hailee's has and will suffer damages in the nature of lost revenue, patrons and goodwill in the community.
63. Hailee's is informed and believes that it is entitled to a temporary restraining order, temporary injunction and a writ of mandamus prohibiting the Defendants from further threats and harassment.
64. Hailee's is informed and believes that it is entitled to judgment against the Defendants for actual damages and attorneys fees and costs in an amount to be determined by a jury.

FOR A FOURTH CAUSE OF ACTION BY HAILEE'S
AGAINST THE CITY AND CITY COUNCIL.
(VALIDITY OF ANNEXATION)

65. The Plaintiff reiterates and incorporates the proceeding allegations into this cause of action.
66. The Ordinance annexing the premises into the City is unlawful, unconstitutional and contrary to state law and among other things attempts to accomplish an annexation of

premises that are not contiguous and uses publicly owned property to establish contiguity to the City limits of the City of Mauldin.

67. A justiciable controversy exists between the parties pursuant to the South Carolina Declaratory Judgment Act.
68. The Plaintiff is informed and believes it is entitled to an order of this court invalidating the annexation into the City of Mauldin.
69. Furthermore, since the water supply to the premises are now supplied by the City of Mauldin and that it has been connected at great expense of Callista, Plaintiff is informed and believes that it is entitled a continuation of the water supply to be supplied by the City following invalidation of the annexation.

FOR A FIFTH CAUSE OF ACTION BY HAILEE'S
AGAINST THE CITY AND CITY COUNCIL.
(INVERSE CONDEMNATION)

70. The Plaintiff reiterates and incorporates the proceeding allegations into this cause of action.
71. The City Defendants committed positive, affirmative, and aggressive acts in harassing Hailee's, attempting to revoke their business license and restricting their hours of operation.
72. As a direct and proximate result thereof, Hailee's vested property rights have been taken as set forth above in violation of the Hailee's protected property rights under the South Carolina Constitution.
73. Wherefore, Hailee's is informed and believes it is entitled to judgment against the City Defendants for actual damages in an amount to be determined by a jury.

WHEREFORE, having fully plead the Hailee's prays as follows;

1. For a temporary restraining order, temporary injunction and writ of mandamus prohibiting the enforcement of the Alcohol Sales Ordinance, Business License Ordinances and further harassment or interference by the Defendants
2. For an order invalidating the Alcohol Sales Ordinances, Business License Ordinances and Annexation Ordinance.
3. For an order invalidating the Annexation Ordinance and requiring the City to continue providing the water supply to the premises.
4. For Actual damages plus attorneys fees and costs
5. A jury trial.
6. Such other and further relief as the court deems just and proper



Robert C. Childs, III, #1218
Attorney for Plaintiff
2100 Poinsett Hwy, Suite E
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

Greenville, South Carolina

Date: 1/19/11

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

K&S Food Services Inc. d/b/a Hailee's
Bar and Grill and Callista Inc.

Plaintiff,

v.

City of Mauldin and Mauldin City Council
Defendants.

) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT
)
)
)

C. A. No.: 2011-CP-23-6290

COMPLAINT
(Jury Trial Requested)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2011 SEP 22 P 4:30

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. Plaintiff K&S Food Services Inc. (hereinafter referred to as "Hailee's") is a corporation organized under the laws of the State of South Carolina and doing business in the County of Greenville, State of South Carolina as Hailee's Bar and Grill located at 1178 Woodruff Road Suite 8 & 9, Greenville, SC 29607.
2. The Defendant City of Mauldin, (hereinafter referred to as "City") is a municipality and political subdivision of the State of South Carolina located within the County of Greenville, State of South Carolina.
3. The Defendant Mauldin City Council, (hereinafter referred to as "Council") is a political and governing body over the City.
4. On or about July 27, 2009 and October 5, 2009 Hailee's entered into a lease agreement with Callista to lease a certain portion of the premises to operate a restaurant bar, which was licensed to sell alcoholic beverages for on-site liquor and beer and wine for on-site and off-site.

FOR A FIRST CAUSE OF ACTION
(Appeal from decision of City Council)

5. On or about February 15, 2011 the City notified Callista that Hailee's business license was "suspended pending a hearing before council" scheduled for February 21, 2011. The action was done without a predeprivation hearing and without due process.
6. On August 16, 2011 Council for the City of Mauldin held a hearing concerning the request of the City to revoke the business license of the Plaintiff.
7. The August 16, 2011 hearing was conducted without public notice in accordance with the South Carolina Freedom of Information Act.
8. Said meeting was not called in accordance with the Rules of City Council
9. On or about September 19, 2011 four of the five City Council Members present for the August 16, 2011 hearing executed the attached and herein incorporated Order, hereinafter referred to as "alleged decision", revoking the business license of "Hailee's Bar and Grill".
10. That alleged decision was not made in a public session and the signatures affixed lacked those of the Mayor and two other members of City Council.
11. City Council may not act officially without the signature of the Mayor and Clerk of Council.
12. The alleged decision, if in fact that of City Council, was made in violation of the South Carolina Freedom of Information Act.
13. The alleged decision is invalid, unlawful, arbitrary, capricious, controlled by an error of law and is unsupported by the weight of evidence as set forth above and in the following and other manners:
 - a. By failing to comply with the South Carolina Freedom of Information Act.

- b. By failing to disclose ex parte communications with Council about the merits of the issue.
- c. By allowing the attorney for the City prosecuting the claim of the City to act as the legal advisor of the Council in these proceedings.
- d. By having the attorney for the City prosecuting the claim of the City secretly prepare the Order of City Council.
- e. By failing to continue the hearing based upon the failure of Council to adopt specific rules, procedures and burdens of proof for the conduct of the hearing.
- f. By failing to remand the matter to the business license clerk for proper notice of revocation to the Plaintiff rather than the property owner of the premises.
- g. By failing to dismiss the proceeding based upon the issuance of a new license to the Plaintiff in April of 2011.
- h. By considering hearsay testimony and police reports containing hearsay evidence in violation of the Plaintiff's right to confront and cross-examine witnesses.
- i. By erroneously finding that three people were shot on the premises of the Plaintiff.
- j. By failing to consider that Hailee's employee Amanda Dykens charge was dismissed.
- k. By failing to consider that Hailee's former employee Rachel Druin's charge was dismissed.
- l. By failing to consider that Hailee's former employee Jennifer Mahan was found not guilty of her offense.

- m. By failing to consider that Hailee's former employee Mary Metz's charge had been adjudicated.
- n. By finding that customers smoked marijuana in a cooler on the premises when there was no such evidence.
- o. By finding that the testimony of Rachel Druin, Hanna Cooley and Phillip Bedell Metz, Jr. were credible and "had nothing at stake in the outcome in this proceeding" when the evidence conclusively showed they were disgruntled ex-employees who had been fired for misconduct.
- p. By find that the testimony of Shegue Roman was credible when the evidence conclusively showed his testimony was not credible and believable.
- q. By considering adjudicated criminal charges as a basis for revocation of a business license.
- r. By finding the testimony of Peter Nomikos credible and believable when the evidence conclusively show that the lacked the authority to issue the revocation notice and that his allegations of Code violations were baseless and adjudicated.
- s. By finding the City Police Officer George Miller had no stake in the outcome.
- t. By finding the City Police Officer Ray McHone had no stake in the outcome.
- u. By failing to consider that virtually all the alleged criminal activity occurred outside the premises of the Plaintiff which is surrounded by other bars, restaurants and a head shop.

- v. By finding that Sonny Ninan testified that it is acceptable to serve an alcoholic beverage to an older customer even if the older customer gave that drink to the underage individual.
- w. By failing to find the testimony of Sonny Ninan, a former drug task force agent and Mauldin Police Officer to be fully credible.
- x. By finding that the Police responded to more calls for assistance "from Hailee's than any other similar establishment located in the City" when the evidence was clear and uncontroverted that very few calls for assistance were actually "from Hailee's"
- y. By finding that the Police Department had devoted an inordinate amount of time responding to calls and making premises at Hailee's when there was no basis of evidence presented establishing the overall number of calls to the City on a nightly basis, the amount of police hours involved in patrolling the City nor the amount of hours involved in responding to the vicinity of Hailee's.
- z. By finding that there were a number of violent acts on the premises of Hailee's when such finding was unsupported by probative or admissible evidence.
- aa. By finding that there were instances of illegal drug sales or possession on the premises of Hailee's when in fact there were none.
- bb. In finding that a significant number of employees at Hailee's have been charged with various violations of alcohol laws when only three of the eight had been convicted of any offense.
- cc. In finding that Hailee's violated the building code of the City.

- dd. In finding that Hailee's lacked proper management or had a policy of allowing or encouraging violations of alcohol laws at Hailee's.
 - ee. In making erroneous findings of law unsupported by the evidence.
 - ff. By failing to make any conclusions of law upon which they applied their facts to.
 - gg. In finding the acts attributed to Hailee's constituted a public nuisance.
 - hh. In failing to consider the unlawful acts and retaliatory conduct of the Mauldin Police Department.
 - ii. In acting arbitrary, capricious and without sufficient legal basis.
 - jj. In acting illegally and without the authority of Council.
14. Wherefore, Plaintiff is informed and believes that he is entitled to a reversal of the alleged decision or in the alternative the remand of that decision back to the City Council for an appropriate hearing and finding.
15. The City is without sufficient cause to enforce these proceedings and the Plaintiff is entitled to attorneys fees and costs of this action.

FOR A SECOND CAUSE OF ACTION
(Violation of the South Carolina Freedom of Information Act)

16. The Plaintiff reiterates and incorporates the preceding allegations into this cause of action.
17. South Carolina Code Ann. § 30-4-80 provides:

(a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the

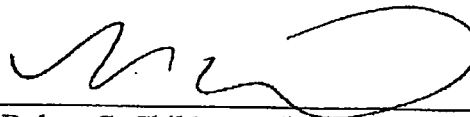
meeting. The notice must include the agenda, date, time, and place of the meeting.

18. South Carolina Code Ann. § 30-4-90 provides:
 - (a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:
 - (1) The date, time and place of the meeting.
 - (2) The members of the public body recorded as either present or absent.
 - (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.
 - (4) Any other information that any member of the public body requests be included or reflected in the minutes.
 - (b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosures would be inconsistent with Section 30-4-70 of this chapter
19. Plaintiff is informed and believes that the August 16, 2011 meeting of City Council was not properly noticed nor were minutes taken pursuant to the South Carolina Freedom of Information Act.
20. South Carolina Code Ann. § 30-4-20(d) provides that a “ ‘Meeting’ means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.”
21. South Carolina Code Ann. § 30-4-60 provides that “Every meeting of all public bodies shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter.”
22. In order to execute the alleged decision the City Council had to act upon the matter in a meeting open to the public.
23. By executing the alleged decision the City Council acted on a matter in executive session without notice of the meeting, without an open meeting and without minutes of that meeting.

31. The City's Business License Ordinance lacks appropriate procedural safeguards, vests excessive discretion in enforcement officials, deprives business owners of the right to due process and a pre-deprivation hearing and is vague and ambiguous.
32. A justiciable controversy exists between the parties pursuant to the South Carolina Declaratory Judgment Act.
33. Plaintiff is informed and believes it is entitled to an order of this court invalidating the City's Business License Ordinance.

WHEREFORE, having fully pled Plaintiff prays as follows;

1. For an order invalidating, reversing or remanding the alleged decision of City Council.
2. Injunctive relief against future violations of the South Carolina Freedom of Information Act.
3. Invalidation of the City's Business License Ordinance.
4. Attorneys Fees and Costs of this action.
5. For a Jury Trial on all issue so triable
6. Such other and further relief as the court deems just and proper.



Robert C. Childs, III, #1218
Attorney for Plaintiffs
2100 Poinsett Hwy, Suite E
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

Greenville, South Carolina

Date: 4/22/11

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's Bar)
and Grill,)

C.A. NO.: 2011-CP-23-4773

Plaintiff,)

vs.)

ANSWER

City of Mauldin, Mauldin City Council,)
John Gardner, Brian Turner, Peter Nomikos,)
and Callista, L.L.C.,)

Defendants.)

Defendants, City of Mauldin, Mauldin City Council, John Gardner, Brian Turner and
Peter Nomikos (hereinafter referred to as "Defendants"), answering the Complaint, allege that:

FOR A FIRST DEFENSE

I.

All allegations of the Complaint expressly admitted herein are hereby denied.

II.

Defendants admit the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 17, 18, 34 and 35.

III.

Defendants lack sufficient information to admit the veracity of Paragraphs 10, 13, 14 and
23 and therefore deny them and demand strict proof thereof.

IV.

Defendants deny the allegations of Paragraph 19 of the Complaint, except that it is
admitted that off-duty Mauldin Police Officers worked at Hailee's for a limited period of time.

V.

Defendants deny the allegations of Paragraph 24 of the Complaint except that it is admitted that Chief Turner terminated the off-duty officers services for Hailee's.

VI.

Defendants deny the allegations of Paragraph 28 of the Complaint except that it is admitted that Mr. Nomikos notified Hailee's that its business license was suspended pending a hearing before council which was subsequently held on August 16, 2011.

VII.

Defendants deny the allegation of Paragraph 32 except that it is admitted that Sonny Ninan was charged with DUI on that date.

VIII.

Defendants deny the allegations of Paragraph 33 of the Complaint except that it is admitted that City Council passed an ordinance on July 18, 2011, restricting the sale of alcohol in bars to no later than 2:00 a.m.

IX.

Defendants deny the allegations of Paragraph 54 except that it is admitted that officials of the City have responded to inquiries from the media of the action taken by the City.

FOR A SECOND DEFENSE

X.

The allegations of the First Defense are incorporated herein and made a part hereof.

XI.

Plaintiff lacks standing to challenge the annexation of the property owned by Callista, L.L.C. into the City of Mauldin because it did not own the property or have a legal basis to challenge same.

FOR A THIRD DEFENSE
(Statute of Repose)

XII.

The allegations of the First and Second Defenses are incorporated herein and made a part hereof.

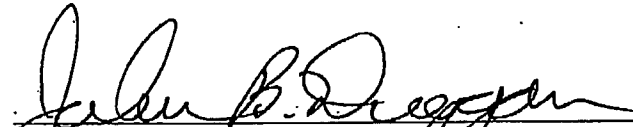
XIII.

The annexation of the property where Hailee's is located has become final as a matter of law and not subject to legal challenge because no interested party challenged the annexation in accordance with the provision of Section 5-3-270 of the S.C. Code of Laws, as amended.

WHEREFORE, having fully answered the Complaint, Defendants pray for dismissal thereof with prejudice.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P. A.



JOHN B. DUGGAN (S.C. Bar # 1780)
457-B Pennsylvania Avenue (29650)
P.O. Box 449
Greer, SC 29652-0449
Telephone (864) 879-0144
Facsimile (864) 879-0149

ATTORNEYS FOR DEFENDANTS CITY OF MAULDIN,
MAULDIN CITY COUNCIL, JOHN GARDNER, BRYAN
TURNER AND PETER NOMIKOS

Dated: August 19, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff-Appellant,

vs.

City of Mauldin and Mauldin City
Council,

Defendants.-Respondents.)

C.A. NO.: 2011-CP-23-6290

ANSWER OF RESPONDENTS

The Defendants-Respondents, answering the Amended Complaint and reserving their rights pursuant to the motions filed herewith, hereby allege that:

FOR A FIRST DEFENSE

1. Respondents deny each and every allegation contained in the Plaintiff's Amended Complaint not specifically admitted, modified, controverted or explained.
2. Respondents admit the allegations of paragraphs 1, 2, 3, 6, and 9.
3. As to the allegations of paragraphs 17, 18, 20, 21 and 24, said allegations call for legal conclusion for which no response is required. To the extent a response is required, said allegations are denied.
4. Respondents deny the allegations of paragraphs 5, 7, 8, 11, 12, 13, including its subparts (a) through (jj), 14, 15, 16, 19, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, and 33.

5. Respondents lack sufficient information to admit or deny the allegations of paragraph 4 of the Amended Complaint and, therefore, deny same and demand strict proof thereof.
6. With respect to the allegations of paragraph 10 of the Amended Complaint, the Respondents admit that the Mayor and two members of Council did not sign the Order revoking the business license of the Appellant, but denies the remaining allegations of said paragraph.
7. Respondents deny the allegations of paragraph 25 of the Amended Complaint except that it is admitted that the purpose of the Freedom of Information Act is to have some activity of government conducted in public as provided for in said Act.

FOR A SECOND DEFENSE

8. Respondents incorporate the allegations in the First Defense and make them a part hereof.
9. The first cause of action of the Amended Complaint is an appeal of the decision of Mauldin City Council to revoke the business license of the Appellant. Therefore, the court will hear the appeal in its capacity and as an appellate tribunal. The second and third causes seek relief from the court in its capacity as a trial court. Furthermore, the second and third causes of action raise new issues not raised at the hearing before city council concerning the revocation of the business license of the appellant. This constitutes an

improper joining of an appeal with separate matters which were not at issue in the hearing before Mauldin City Council.

FOR A THIRD DEFENSE

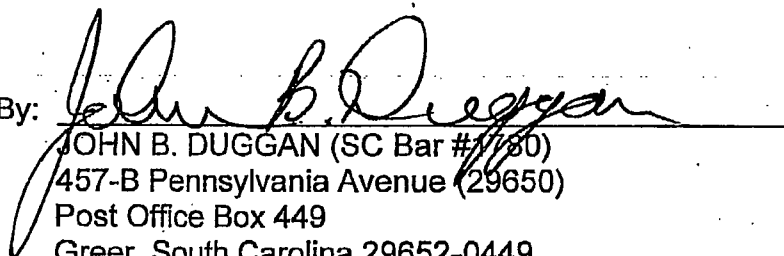
10. Respondents incorporate the allegations of the First and Second Defenses herein and make them a part hereof.

11. The Second and Third causes of action failed to state a proper cause of action and should be dismissed pursuant to SCRPC, 12(b)(6).

WHEREFORE, having fully answered, the Respondents pray for an Order affirming the decision of Mauldin City Council to revoke the business license of the Appellant and dismissing the Second and Third Causes of Action and deny all other relief sought by the Appellant.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By: 

JOHN B. DUGGAN (SC Bar #11780)
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: (864) 879-0144
Fax: (864) 879-0149

ATTORNEY FOR THE DEFENDANTS-RESPONDENTS

Dated: November 7, 2011
Greer, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's)
Bar and Grill,)

C.A. NO.: 2011-CP-23-6290

Plaintiff-Appellant;)

vs.)

NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
OR TO DISMISS BY RESPONDENTS

City of Mauldin and Mauldin City)
Council,)

Defendants.-Respondents.)

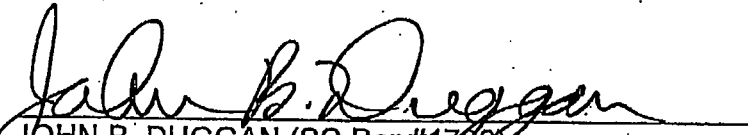
PLEASE TAKE NOTICE that Defendants-Respondents City of Mauldin and Mauldin City Council, by and through its undersigned counsel, will move before the Court of Common Pleas in Greenville County, at a time and place to be designated by the Court, but no sooner than ten (10) days after the service hereof, for an Order granting Summary Judgment or to Dismiss the Second and Third causes of action to Defendants-Respondents City of Mauldin and Mauldin City Council, pursuant to Rule 56, of the South Carolina Rules of Civil Procedure, because there is no genuine material issue of fact concerning the Second and Third causes of action in that the City of Mauldin did post notice of the Revocation Hearing as provided for in the Freedom of Information Act and the Mauldin City Ordinances providing for the revocation of a business license are, on their face, valid and enforceable. Therefore, Defendants-Respondent City of Mauldin and Mauldin City Council are entitled to Summary Judgment or to a Dismissal of the Second and Third causes of action as a matter of law. This Motion will be supported by the pleadings, depositions, legal memoranda and other Affidavits or other documentary evidence as may be timely filed and served, as well as the entire record herein.

I hereby certify that this Motion is meritorious and not intended merely for delay.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By:



JOHN B. DUGGAN (SC Bar #1780)
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: (864) 879-0144
Fax: (864) 879-0149

ATTORNEY FOR THE DEFENDANTS-RESPONDENTS

Dated: November 7, 2011
Greer, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff-Appellant,

vs.

City of Mauldin and Mauldin City
Council,

Defendants-Respondents.

C.A. NO.: 2011-CP-23-6290

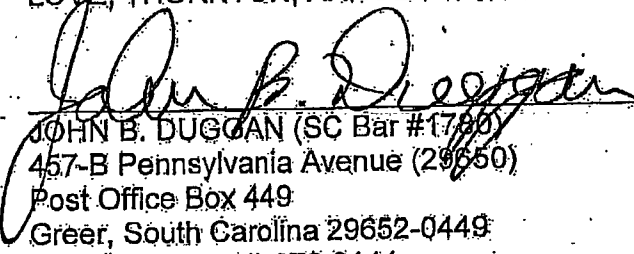
NOTICE OF MOTION AND
MOTION TO DISMISS BY
DEFENDANTS-RESPONDENTS

PLEASE TAKE NOTICE that Defendants-Respondents, City of Mauldin and Mauldin City Council by and through its undersigned counsel, will move before the Court of Common Pleas in Greenville County, at a time and place to be designated by the Court, but no sooner than ten (10) days after the service hereof, for an Order Dismissing this action in its entirety because Hailee's Bar & Grill has closed and the issues in this action are now moot. Therefore, Defendants-Respondents City of Mauldin and Mauldin City Council are entitled to a Dismissal of this action in its entirety as a matter of law. I hereby certify that this Motion is meritorious and not intended merely for delay.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.

By:


JOHN B. DUGGAN (SC Bar #1780)
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: (864) 879-0144
Fax: (864) 879-0149

Attorney for Defendants City of Mauldin and Mauldin
City Council

Dated: November 15, 2011
Greer, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff,

vs.

City of Mauldin, Mauldin City Council,
John Gardner, Brian Turner, Peter
Nomikos, and Callista, L.L.C.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No(s): 2011-CP-23-4773
2011-CP-23-6290

Memorandum of Law in Support of
Defendants' Motion to Dismiss

THIS MATTER came before the Court on January 5, 2012 for a hearing on several motions, one of which was the Defendants' (City of Mauldin, Mauldin City Council, John Gardner, Brian Turner, and Peter Nomikos) motion to dismiss because all causes of action raised by Plaintiff are now moot. Pursuant to the Court's request, the following is a brief in support of Defendants' motion to dismiss.

Issue

The issue before the Court is whether the mootness doctrine bars Plaintiff from relief when, subsequent to filing these actions, the Plaintiff voluntarily closed its business in the City of Mauldin.

Factual Background

As set forth in oral arguments and in the document entitled "Timeline of Events" that Defendants submitted at the January 5, 2012 hearing, this case involves two separate civil

actions. The first civil action known as 2011-CP-23-4773 is Plaintiff's action challenging the City of Mauldin's ordinance requiring all bars to close at 2:00 a.m. (hereinafter "Ordinance"), as well as seeking a temporary or permanent injunction. At the time of the filing, Plaintiff leased property from the Defendant Callista, Inc. located within the city limits of Mauldin. On August 16, 2011, the Mauldin City Council held a business license revocation hearing, and on September 19, 2011, the City Council issued an Order revoking Hailee's business license. On September 22, 2011, the Plaintiff appealed the revocation of the business license by filing a second civil action known as 2011-CP-23-6290. On November 5, 2011, Plaintiff closed its business in the City and vacated the premises. It is undisputed that Plaintiff no longer has a physical presence within the city limits of Mauldin. Defendants' position is that this fact bars Plaintiff from relief in both civil actions.

A review of both actions shows that the gravamen of both Complaints is for the Court to declare the new city ordinance and the business license revocation invalid. Moreover, a review of the Complaints reveal that there is no viable money damages claim presented by the Plaintiff for the Court to consider.

Plaintiff filed five causes of action in 2011-CP-23-4773. They are as follows: 1) "Validity of Alcohol Sales Ordinance;" 2) "Business License Ordinances;" 3) "Negligence;" 4) "Validity of Annexation;" and, 5) "Inverse Condemnation." The last three causes of action are "secondary" causes of action that are barred on other grounds beside mootness. Any allegations against Council or employees of the City, including Plaintiff's negligence cause of action are clearly barred by the South Carolina Tort Claims Act. See S.C. Code Ann. 15-78-60 (1976, as amended). In addition, as addressed in the Order issued by Judge Verdin filed September 20, 2011, Plaintiff clearly has no standing to raise an inverse condemnation claim or to challenge the

annexation because it was never a property owner or stakeholder in the City. See Order of Judge Verdin's, p. 4. Further, Plaintiff is barred from challenging the annexation because it lacks standing and is barred by the statute of limitations. See Order of Judge Verdin, p. 7. Therefore, even without having to address these causes of action as moot, they should be dismissed as a matter of law.

Plaintiff filed three causes of action in 2011-CP-23-6290. They are as follows: 1) "Appeal from decision of City Council;" 2) "Violation of the South Carolina Freedom of Information Act;" and 3) "Validity of City's Business License Ordinance." The last two "secondary" causes of action raise issues that were not raised at the revocation hearing and were not preserved for appeal, and therefore, should be dismissed on that ground as well as that they are now moot.

Clearly, under both complaints there only remains before the Court a challenge to the City's ordinance and the business license revocation. Because Plaintiff voluntarily moved from the City of Mauldin, there is insufficient life in either Complaint to justify this Court in entering any type of declaratory judgment, injunction, or other form of relief. It is now impossible for there to be a present or future impact upon the Plaintiff if the Court awarded it injunctive relief; declared the ordinance invalid; determined that the business was improperly revoked; or, some other form of relief. Therefore, the doctrine of mootness requires this Court to dismiss both cases.

LAW

"A threshold inquiry for any Court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561

S.E.2d 634, 637 (Ct. App. 2002), quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Id., quoting Byrd v. Irmo High Sch., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. Id., quoting Jackson v. State, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997).

"A case becomes moot when judgment, if rendered, *will have no practical effect* upon [an] existing controversy." Id. quoting Seabrook v. City of Folly Beach, 337 S.C. 304 S.C. 306, 523 S.E.2d 462, 463 (1999) (emphasis added). "The appellate courts will not pass on moot and academic questions or make an adjudication whether there remains no actual controversy." Linda Mc Co. v. Shore, 703 S.E.2d 499, 506 (2010). Mootness will result when "some event occurs making it impossible for the reviewing Court to grant effectual relief." Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S. E. 2d 861,864 (1996).

Our Courts applied the mootness doctrine to a landlord tenant controversy when the tenant left the premises after filing the action as well as an action by a retail liquor dealer against the S.C. Tax Commission when the dealer went out of business during the appeal. See Berry v. Zahler, 220 S.C 86, 66 S.E.2d 459 (1951) and Fabian's Uptown Charleston, Inc. v. SC Tax Comm'n, 247 S.C. 164, 146 S.E.2d 608 (1966). In Berry, a tenant appealed to the Circuit Court a Magistrate's Court Order for eviction. After the Appeal, the tenant vacated the premises and delivered possession to the landlord. The Court held that it could not hear and determine the merits since only speculative questions were involved. Id. at 88, 66 S.E. 2d at 460.

If the Court declared the Ordinance invalid it will have no practical effect upon the Plaintiff. If the Court found that Plaintiff's business license was improperly revoked it will have no practical effect upon the Plaintiff. If the Court issued an injunction it will have no practical effect upon the Plaintiff. Likewise, even if City Council violated the Freedom of Information Act it will not have a practical effect upon the Plaintiff.

It is clear that there is no longer any active case or controversy for the Court to consider since the Plaintiff moved from the City of Mauldin. Therefore, the analysis turns to whether any exceptions to the mootness doctrine apply.

There are three exceptions to the mootness doctrine: (1) if the issue raised is capable of repetition that generally will evade review; (2) an Appellate Court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest; and (3) if a decision by the Trial Court may affect future events or have collateral consequences for the parties, an appeal from that decision is not moot, even though the Appellate Court cannot give effective relief in the present case. Holden at 138, 561 S.E.2d at 637-638.

The first exception does not apply. The "capable of repetition, yet evading review exception" must combine two elements: 1) the challenged action is too short in duration to be fully litigated prior to its expiration or cessation and 2) there is a reasonable expectation that the complaining party would be subjected to the same action again. Our Courts have previously applied this exception to a short-term student suspension. See Byrd, supra. However, because Plaintiff voluntarily moved from the City of Mauldin, neither of these two elements are present for this exception to apply.

The second exception also does not apply. Application of the public interest exception to the doctrine of mootness requires the question at issue to be decided is "of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." Holden at 138, 561 S.E.2d 638. The conduct complained of, the validity of the City's ordinance and the revocation of a business license, is not the type of "conduct" that falls under this exception. This conduct involves legislative functions, which already has procedural and constitutional safeguards in place to protect the interests of all business owners in the City. This Court has no basis here to establish guidelines or rulings for future conduct to address whether an ordinance is constitutional or whether a business revocation hearing provided the Plaintiff with due process.

Moreover, this is not a situation where there is a manifest or imperative public interest for the Court to issue a ruling or judgment. This dispute between the Plaintiff and the City turns upon the particular facts of the case, which has no precedential value in possible future cases involving a business license dispute with different facts. This exception clearly does not apply.

Finally, the third exception does not apply. There can be no collateral consequences to the Plaintiff since it is no longer located in the City of Mauldin.

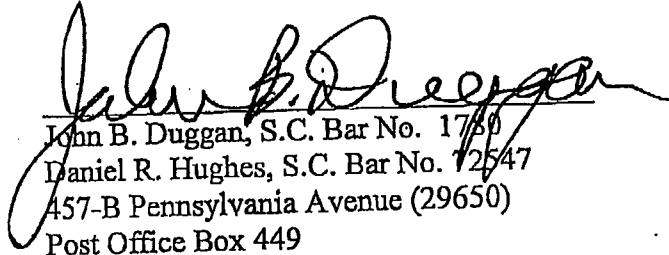
CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court dismiss Plaintiff's Complaints in Civil Action No. 2011-CP-23-4773 and 2011-CP-23-6290 because they

are moot and/or barred by the S.C. Tort Claims Act, the doctrine of standing, and the statute of limitations.

Respectfully submitted,

LOVE, THORNTON, ARNOLD & THOMASON, P.A.



John B. Duggan, S.C. Bar No. 1780
Daniel R. Hughes, S.C. Bar No. 72547
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: 864.879.0144
Fax: 864.879.0149

ATTORNEYS FOR DEFENDANTS CITY
OF MAULDIN, MAULDIN CITY COUNCIL,
JOHN GARDNER, BRIAN TURNER, AND
PETER NOMIKOS

Dated: January 19, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

K&S Food Services Inc. d/b/a Hailees Bar
And Grill,)

Plaintiff,)

v.)

City of Mauldin and Mauldin City Council,)
Defendant.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No.: 2011-CP-23-6290

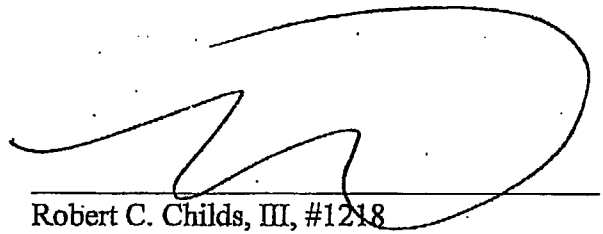
**MOTION FOR SUMMARY
JUDGMENT, INJUNCTIVE RELIEF
AND ATTORNEYS FEES AND COSTS**

Please take notice that the Plaintiff hereby moves for summary judgment, injunctive relief and attorney's fees and costs as follows;

1. This motion is based upon the Plaintiff's second cause of action under the South Carolina Freedom of Information Act ("FOIA").
2. There is no genuine issue of material fact that the Defendant Mauldin City Council is a "public body" as defined by S.C. Code Ann. §30-4-20(a).
3. When adopting the FOIA, the legislature stated "it is vital in a democratic society that public business be performed in an open and public manner." S.C. Code Ann. §30-4-15. (Supp. 2000)
4. The FOIA prohibits any formal action to be taken in an executive session.
5. The decision on September 19, 2011 to revoke the business license of the Plaintiff was a formal action by City Council.
6. There is no genuine issue of material fact that the decision of City Council to revoke Plaintiff's business license was done outside of a public hearing, in private and thus in executive session.

7. The purpose of the Act "is to protect the public from secret government activity" Bellamy v. Brown, 305 S.C. 291, 408 S.E. 2d 219 (1991). Subjecting the vote to revoke Plaintiff's business license to the bright light of public scrutiny helps ensure that the issue was fully debated and more carefully considered. See, Piedmont Pub. Serv. Dist. V. Cowart, 319 S.C. 124, 459 S.E. 2d 876 (S.C. App. 1995)
8. There is no genuine issue of material fact that the City violated the South Carolina Freedom of Information Act by reaching its decision to revoke Plaintiff's business license secretly, outside a public meeting and thus taking official action in executive session.

Wherefore, the Plaintiff is entitled to summary judgment against the Defendant City of Mauldin for this violation of the South Carolina Freedom of Information Act. The Plaintiff requests that this court issue a permanent injunction prohibiting the City of Mauldin from voting and/or deciding business license appeals outside of a duly called and published public meeting pursuant to S.C. Code Ann. § 30-4-100(a). The Plaintiff requests reasonable attorney's fees and other costs of litigation as will be set forth in advance of the hearing on this matter pursuant to S.C. Code Ann. § 30-4-100 (b).



Robert C. Childs, III, #1218
Attorney for Defendant
2100 Poinsett Hwy, Suite D
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

Greenville, South Carolina

Date: 5/22/12

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff,

vs.

City of Mauldin, Mauldin City Council,
John Gardner, Brian Turner, Peter
Nomikos, and Callista, L.L.C.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT

) C.A. No(s): 2011-CP-23-4773

) Memorandum in Support of Defendants'
) Motion to Dismiss Plaintiff's Cause of Action
) for Negligence pursuant to Rule 12(b)(6) and
) the SC Tort Claims Act (S.C. Code Ann. §15-
) 78-10 *et seq.*)

Plaintiff's cause of action for Negligence fails because 1) it does not state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCP and 2) is barred by the South Carolina Tort Claims Act. See S.C. Code Ann. §15-78-10 *et seq* (hereinafter "Act").

In its Complaint, the Plaintiff alleges that the Defendants were "willful, wanton, reckless, negligent and grossly negligent" in "harassing" and "intentionally harming" Plaintiff, in failing to supervise and train its employees and/or agents in "properly enforcing the Ordinances and Laws," and in making statements to the public that Plaintiffs' Business License had been revoked. See Pl's Complaint, pgh. 61. These allegations do not support a cause of action for Negligence.

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). The

question to be considered on a motion to dismiss on the pleadings is whether, in light most favorable to the plaintiff, the pleadings articulate any valid claim for relief. Williams v. Condon, 347 S.C. 227, 353 S.E.2d 496 (Ct. App. 2001).

Plaintiff's allegations fail to exhibit how Defendants breached a duty of care that resulted in damages that were proximately caused from the breach of duty. Plaintiff's allegations are too general in nature and fail to state with specificity facts sufficient to constitute a cause of action for negligence. The record from the business revocation hearing is replete with incident reports which are in the record as well as testimony from officers that detail the criminal activities and incidents requiring police responses to Plaintiff's business. There is no evidence of harassment or intentional harm. The Mauldin Police Department was merely responding to calls for assistance as they are trained to do and according to City policy. Plaintiff's allegations are void of demonstrating how the alleged harassment and intentional harm deviated from the standard of care and proximately caused any damage.

Furthermore, Plaintiff's complaint fails to show how Defendant failed to properly train its employees in "properly enforcing the laws." If this allegation is to survive, Plaintiff must show how the Mauldin Police Department did not meet the standard of care in its enforcement or application of the law in its dealings with Plaintiff's business. Moreover, even if these allegations past muster to establish the element of a breach of a duty, Plaintiff fails to present any evidence of damages of "lost revenue, patrons or goodwill in the community." See Plaintiff's Complaint, pgh. 62. At this stage in litigation, Plaintiff must be able to present through affidavits

or its business accounting that it lost revenue or patrons as a proximate result of the alleged negligence.¹

Plaintiff's negligence cause of action also fails pursuant to the S.C. Tort Claims Act. According to the Act, it is the public policy of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of the Act and in accordance with the principles established therein. See S.C. Code Ann. § 15-78-20(a) (Supp. 2002). The Act removes the common law bar of the sovereign community in limited circumstances, but only to the extent permitted by the act itself. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E. 2d 18 (2000). The South Carolina Tort Claims Act does not create causes of action. Rather it removes the common law bar of the sovereign community in certain circumstances, but only to extent mandated by the act. The legislature has indicated that liability under the act is based upon "traditional tort concepts of duty and the reasonably prudent person's standard of care and the performance of that duty." Section 15-78-20(a). Further the provisions relating to limitations on and exemptions to liability are to be liberally construed in favor of limiting the liability of the State. Section 15-78-20(f).

The waiver of immunity contained in the Act is the subject of thirty-seven (37) express exceptions. See S.C. Code Ann. § 15-78-60 (Supp. 2002). Subsections (4) and (12) of § 15-78-60 provide two exceptions that bar Plaintiff's cause of action for negligence.

Subsection (4) provides an exception to the waiver of immunity for losses occurring due to the "adoption, enforcement, or compliance with any law or failure to adopt or enforce any

¹ Defendants request that the Court review this matter as a Motion for Summary Judgment in the event that Court goes outside the face of the complaint to rule on the motion. See Brazell v. Windsor, 376 S.C. 83, 655 S.E.2d 736 (Ct. App. 2007).

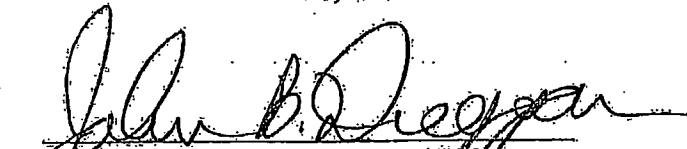
law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." Subsection (12) provides an exception to the waiver of immunity for losses occurring due to the "licensing powers or functions including, but not limited 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."

As contemplated by the Act, Defendant is charged with the duty to make and enforce laws as well as issue and revoke licenses for the welfare of the citizens of Mauldin. The intent is clear. Simply because the Plaintiff does not like or agree with the law or licensing decision does not entitle it to sue the City. The City must protect and provide for its citizens, and the Act protects the City even if a plaintiff suffers loss.²

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff cause of action for Negligence.

Respectfully submitted,

DUGGAN & HUGHES, LLC


John B. Duggan, S.C. Bar No. 1789
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: 864.879.0144
Fax: 864.879.0149

Sept. 14, 2012

² As discussed above, Plaintiff has failed to present any evidence of actual loss in the form of lost business, patrons, or good will.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
K&S Food Services, Inc. d/b/a Hallee's)
Bar and Grill,)
Plaintiff-Appellant,)
vs.)
City of Mauldin and Mauldin City)
Council,)
Defendants.-Respondents.)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2011-CP-23-6290

LEGAL MEMORANDUM
OF DEFENDANTS

The Plaintiff initiated this action asserting three causes of action. By Order dated May 2, 2012, Judge Gary Hill dismissed two causes of action leaving only the cause of action claiming that the Defendant violated the Freedom of Information Act ("FOIA") in several particulars.

First, Plaintiff claims that the City failed to give public notice of the business license revocation hearing which occurred on August 16, 2011. The Affidavit signed by the City Clerk, Cindy Miller, attached hereto as "Exhibit 1" clearly shows that proper notice of the hearing was given in compliance with the Freedom of Information Act.

Secondly, Plaintiff asserts that the City failed to keep Minutes of the public hearing. The Affidavit of City Administrator, Raymond C. Eubanks, marked as "Exhibit 2" shows that Council approved Minutes of the public hearing in compliance with the requirements of the Freedom of Information Act.

The Plaintiff next asserts that City Council held an executive session to discuss revocation of the business license of the Plaintiff in violation of the Freedom of Information Act. The Affidavit of Council Member Bob Cook and attached hereto as

"Exhibit 3" confirms that no meeting was held by Council after the public hearing nor did Council deliberate among themselves. There was no such violation of the Freedom of Information Act.

Finally, Plaintiff contends that the Freedom of Information Act required that Council sign the Order revoking the business license of the Plaintiff during a Council meeting. Plaintiff asserts that the reason the FOIA required Council to sign the Order during a public meeting was so that the Public would understand the reasons why Council revoked the business license. The Order includes detailed findings and reasoning upon which Council based its Order. (See Order attached hereto marked as "Exhibit 4"). The Order issued by City Council is a public document.

In summary Council did not violate the requirements or the spirit of the Freedom of Information Act.

The Plaintiff relies upon Piedmont Public Service District vs. Cowart, 459 S.E.2d 876, 319 S.C. 124 (S.C. App. 1995) to support its assertion that Council violated the Freedom of Information Act by failing to sign the Order revoking the Plaintiff's business license during a public Council meeting. For the following reasons, Plaintiff's reliance upon Piedmont Service District is misplaced. FOIA issues depend upon the particular facts of each case.

The facts in Piedmont Public Service District are significantly different from this case. In Piedmont Public Service District the Commissioners of the service district voted in executive session to terminate Cowart's employment contract in clear violation of the FOIA.

In this case, the hearing to revoke Plaintiff's business license was held in public session with members of the media present. Because the hearing concluded after

midnight and several hundred pages of documents were introduced into evidence during the hearing, Council took the matter under advisement in order to allow members ample opportunity to review the exhibits before taking action. No subsequent meeting of Council or discussion between Council Members took place before they signed the Order just before a Council meeting took place on September 19, 2011. The Order fully set out the reasoning, findings, and basis of Council's decision to revoke Plaintiff's business license. That Order is a matter of public record.

In summary, the facts in Piedmont Public Service District are entirely distinguishable from the instant case. It does not support Plaintiff's assertion that Defendant violated FOIA.

Respectfully submitted,

DUGGAN & HUGHES, LLC

By:


JOHN B. DUGGAN (SC Bar #1780)
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: (864) 879-0144
Fax: (864) 879-0149
Attorney for Defendants

Dated: September 14, 2012
Greer, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services Inc. d/b/a Hailee's Bar)
And Grill,)

Plaintiff,)

v.)

City of Mauldin and Mauldin City Council,)
Defendant.)

C. A. No.: 2011-CP-23-6290

**AMENDED AFFIDAVIT OF
ATTORNEY'S FEES AND COSTS FOR
FOIA VIOLATION**

I, Robert C. Childs, III, Esquire, being duly sworn, do swear and affirm as follows:

1. I am the attorney representing the Plaintiff in the above-captioned case. I have been practicing law for 28 years. I significant portion of my practice has been governmental litigation and in particular Freedom of Information Litigation. I am the former Greenville County Attorney and actively represent municipalities and political subdivisions of the State which involve issues concerning the South Carolina Freedom of Information Act. I have over 20 reported cases by the South Carolina Appellate Courts.
2. My most significant South Carolina Freedom of Information Act cases reported is that of Quality Towing, Inc. v. City of Myrtle Beach, 547 S.E.2d 862, 345 S.C. 156 (S.C. 2001) which is cited as controlling authority relative to the South Carolina Freedom of Information Act in 5 subsequently reported cases which are Evening Post Pub. Co. v. Berkeley County School Dist., 708 S.E.2d 745, 392 S.C. 76 (SC 2011); New York Times Co. v. Spartanburg County School Dist. No. 7, 649 S.E.2d 28, 374 S.C. 307 (SC 2007); Evening Post Pub. Co. v. City of North Charleston, 611 S.E.2d 496, 363 S.C. 452 (SC 2005); Burton v. York County Sheriff's Office, 594 S.E.2d 888, 358 S.C. 339 (SC

App. 2004); and, Campbell v. Marion County Hosp. Dist. 580 S.E.2d 163, 354 S.C. 274 (SC App. 2003).

3. In Quality Towing, Inc., Respondent, v. City of Myrtle Beach and William D. Stephens, Appellants. SC 2004-MO-055 the South Carolina Supreme Court affirmed the award of \$46,000.00 in attorneys' fees and costs in the original Quality Towing, supra, case.
4. The following is an itemized list of attorney's fees and costs regarding the above-referenced matter. In my opinion within a reasonable degree of legal certainty based upon the nature, extent, and difficulty of this case, the time necessarily devoted to the case; the professional standing of counsel, the results obtained and the customary legal fees for similar services the following are fair and reasonable fees and costs.

<u>DATE</u>	<u>DESCRIPTION</u>	<u>HOURS</u>
09/20/11	Prepared of Freedom of Information Cause of Action for Complaint	2.90
09/22/11	Review September 19, 2011 decision and applicable minutes and Notices by Mauldin, along with FOIA applicability	3.15
09/22/11	Finalize FOIA Cause of Action	.95
09/22/11	Revise FOIA c/a and file Amended Complaint. Letter to Clerk of Court	.55
09/26/11	Prepared Civil Action Cover Sheet, Summons, Complaint and Letter to Clerk of Court	1.00
09/27/11	Fax to Process Server	.20
09/27/11	Letter to Clerk of Court regarding Affidavit of Service	.20
10/20/11	Fax to Process Server	.20
10/26/11	Letter to Client regarding Invoice	
10/26/11	Prepared Affidavit of Default, Certificate of Service and Letter to Clerk of Court and Letter to City of Mauldin	1.00
11/03/11	Prepared Motion Cover Sheet, Motion for Default Judgment, Certificate of Service and Letter to Clerk of Court	.85
11/09/11	Prepared Notice of Hearing for Default Judgment, Certificate of Service Letter to Clerk of Court and Letter to Duggan	.75
11/11/11	Review Defendant's Motion to Set Aside Default and Reply to Motion For Entry of Default	.65
11/11/11	Letter to Clerk of Court with Certificate of Service	.20
11/16/11	Review Defendant's Motion to Dismiss, Motion to Quash	.55
11/21/11	Review letter from John Duggan on FOIA Hearing	.20
11/22/11	Letter to Client regarding Hearing	.20
12/08/11	Review submission of Defendant's numerous exhibits for Hearing	3.75

01/03/12	Preparation for January 5, 2012 Hearing	3.10
01/04/12	Further prep for Hearing	2.25
01/05/12	Prepared for and Attended Hearing	1.75
01/12/12	Review Order of Court	.50
01/17/12	Letter to Client regarding Copy of Judgment in a Civil Case	.20
01/22/12	Review Motion to Dismiss by Defendant's	1.95
03/07/12	Prepared Motion Cover Sheet, Motion to Compel, Certificate of Service, Letter to Clerk of Court and Letter to Duggan	1.15
03/13/12	Prepared Memorandum in Opposition to Defendant's Motion For Summary Judgment	3.75
05/02/12	Review Letter from Duggan	.20
05/22/12	Prepared Motion Cover Sheet, Motion for Summary Judgment, Certificate of Service, Letter to Clerk of Court and Letter to Duggan	2.65
05/29/12	Review Order of Judge Hill	.75
06/14/12	Review Affidavit of Bob Cook	.50
06/18/12	Review Defendant's Motion to Continue Hearing	.25
06/29/12	Review Order of Continuance Signed by Judge Welmaker	.25
08/06/12	Meeting with Client	.75
08/07/12	Prepared for and Attended Mediation	4.75
09/14/12	Preparation for FOIA issues on Summary Judgment.	5.10
09/17/12	Prepare for and attend Summary Judgment Hearing on FOIA	3.75
12/19/12	E-mails to and from Lopez on setting Attorneys fees hearing.	.30
01/07/13	E-mails from Duggan's Office and Clerk on scheduling.	.45
01/30/13	Revised Affidavit of Attorneys Fees and preparation for hearing.	2.10
02/07/13	(est.) Prepare for and attend hearing.	2.25

Total Hours

Total Attorney's Fees (56.50 Hours @ \$350.00 per hour)

\$ 19,670.00

<u>DATE</u>	<u>DESCRIPTION</u>	<u>COST</u>
09/22/11	Greenville County Clerk of Court – Filing Fee	150.00
09/27/11	Service of Process Fee	35.00
10/17/11	Postage	.88
10/17/11	Copies	.60
10/26/11	Postage	1.32
10/26/11	Copies	1.20
11/03/11	Postage	1.76
11/03/11	Copies	1.60
11/04/11	Greenville County Clerk of Court – Motion Fee	25.00
11/09/11	Postage	.84
11/09/11	Copies	2.00
11/11/11	Postage	.88
11/11/11	Copies	1.60
11/22/11	Postage	.44
11/22/11	Copies	.20

03/07/12	Postage	4.25
03/07/12	Copies	7.60
05/23/12	Postage	5.70
05/23/12	Copies	6.00
05/23/12	Greenville County Clerk of Court – Motion Fee	25.00

Total costs and advances
TOTAL FEES AND COSTS

\$ 271.87
\$ 19,941.87

Further affiant sayeth not.



Robert C. Childs, III, #1218
 Attorney for Plaintiff
 2100 Poinsett Hwy, Suite D
 Greenville, SC 29609
 (864) 242-9997
 Fax (864) 242-9914

SWORN to before me this
30th Day of January 2013.



Notary Public for South Carolina
 My Commission Expires: 12/19/19

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's)
Bar and Grill,)
Plaintiff,)

C.A. NO.: 2011-CP-23-6290

vs.

City of Mauldin and Mauldin City)
Council,)
Defendants.)

MEMORANDUM OF DEFENDANT
OPPOSING PLAINTIFF'S
ATTORNEY FEE REQUEST

FILED
CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKINS
2013
8-5
D

Plaintiff seeks an attorney's fee of \$19,670.00. For the following reasons, the fee sought is excessive.

STATEMENT OF FACTS

After Hailee's Bar and Grill was annexed into the City of Mauldin, the Mauldin City Police Officers responded to an inordinate number of calls to Hailee's. A high percentage of these calls were after 2:00 a.m.

In July, 2011, City Council passed an Ordinance requiring that all bars in the City close at 2:00 a.m. Hailee's sued the City raising five causes of action and seeking an injunction to prohibit the City from applying its Ordinance to Hailee's. The Court denied the injunction and dismissed all five causes of action.

On August 16, 2011, Mauldin City Council held a hearing to determine if Hailee's business license should be revoked. On September 19, 2011, just prior to the start of a Council meeting, Council signed an Order in which it revoked Hailee's business license. Hailee's then initiated a second case against the City in which it raised three causes of

action including a FOIA claim. Subsequently, the Court dismissed two causes of action but found that Council violated the Freedom of Information Act by signing the Order before the Council meeting rather than during the Council meeting.

I.

ARGUMENT

The amount of an attorney's fee awarded in a Freedom of Information Act case is within the discretion of the Court.

The following assessment of the factors to be considered in determining the amount of the fee demonstrates that the fee sought by Hailee's is excessive.

Conduct by Council

The conduct of Council was not willful or egregious. There is no indication Council was willfully attempting to violate the Freedom of Information Act to conceal its action to revoke Hailee's business license from the public. In fact, shortly after the Order revoking the business license was signed, copies were provided to the media which subsequently reported that Hailee's business license had been revoked.

Secondly, it is important to remember that local governments are strapped for money and have struggled due to the recession for the past few years. Any monies spent for attorney's fees reduce the City's ability to provide services to its citizens.

It is also important to remember that if Council had received public input during the Council meeting on September 19, 2011, before it signed the Order, it very well could have resulted in the violation of Hailee's due process rights to a fair proceeding by considering outside information which was not received during the public hearing on August 16, 2011. Furthermore, when Council signed the Order, it was unable to obtain the advice of its City Attorney because he had represented the City in the revocation hearing and could not, therefore, advise the City concerning this matter.

In summary, these factors gravitate against the award of substantial fees.

II.

Issue Not Complicated

The FOIA issue in this case is not complicated. Simply put, it was whether or not Council violated the Act when it signed the Order to revoke Hailee's business license while not in a public hearing. This is not a complicated issue requiring sophisticated expertise by Counsel.

III.

Hourly Rate

Plaintiff seeks fees at an hourly rate of \$350.00. This rate is excessive and does not comport with market rates in this jurisdiction.

IV.

Time Allegedly Expended by Counsel is Excessive

The time the Plaintiff asserts that was expended by Counsel is excessive. The following is a discussion of the itemized time included in the Affidavit of Counsel for the Plaintiff.

A. September 20, 2011 Entry

Plaintiff lists 2.9 hours on September 20, 2011 to prepare the Freedom of Information Act cause of action included in the Complaint (See **Exhibit 1**). That cause of action begins at paragraph 16 and encompasses two pages of the Complaint. Almost half of those two pages are direct quotes of statutes in the Act. It should not take experienced Counsel familiar with the terms of the FOIA 2.9 hours to prepare this two page cause of action. This time is excessive.

B. September 22, 2011 Entries

Counsel lists 3.15 hours on September 22nd to "Review September 19, 2011 decision and applicable minutes and notices by Counsel, along with FOIA applicability." The Order of City Council was 14 pages in length. (See **Exhibit 2**). There were no minutes prepared of the City Council meeting which took place on the evening of September 19, 2011, when this entry was made. The notice of the September 19, 2011,

Council meeting was less than one page in length. The assertion that it took 3.15 hours by experienced counsel to do this work is not reasonable. In addition, counsel lists .95 hours on September 22, 2011 to "Finalize FOIA cause of action" and an additional .55 hours to "Revise FOIA c/a and file Amended Complaint, Letter to Clerk of Court."

In other words, Counsel has asserted that it spent 7.55 hours preparing the two page FOIA cause of action. This is clearly excessive.

C. September 26, 2011 Entry

Counsel lists 1.0 hour for "Prepared Civil Action Coversheet, Summons, Complaint, and letter to Clerk." (See Exhibit 1) Most of this work is clerical ordinarily done by a paralegal, not Counsel. The time listed for this function is excessive.

D. September 27, 2011 Entry

Counsel lists .4 hours to "Fax to process server" and "Letter to Clerk of Court regarding Affidavit of Service." These are largely clerical in nature done by secretaries and paralegals and do not require this amount of time by Counsel.

E. October 20, 2011 Entry

Counsel lists .2 hours to "Fax to process server." This is a clerical task performed by a secretary, not an attorney.

F. October 26, 2011

Counsel lists .2 hours for a "Letter to client regarding invoice." First, a letter to the client about counsel's bill for his services is not a reasonable charge because it is not legal work by the attorney concerning the Freedom of Information Act claim. Secondly, the letter infers that Counsel was not representing Plaintiff on a contingency bases, but by the hour. Counsel, however, has not disclosed either the hourly rate charged to the client or whether or not he represented Plaintiff on a contingency. Nevertheless, this is not a charge for which the Defendant should be assessed.

G. October 26, 2011 Entry

Counsel lists 1.0 hour spent for "Prepared Affidavit of Default, Certificate of Service and letter to Clerk of Court and Letter to City of Mauldin." (See Exhibit 3). Most of this work is clerical in nature performed by secretaries and/or paralegals and should not have taken experienced counsel 1.0 hour to either prepare or review.

H. November 3, 2011 Entry

Counsel lists .85 hours for "Prepare Motion Coversheet, Motion for Default Judgment, Certificate of Service and Letter to Clerk." (See Exhibit 4). Preparation of the Motion Coversheet, Certificate of Service, and Letter to Clerk of Court are largely secretarial functions requiring little time by Counsel. A Motion for Default Judgment is a

standard form that requires very little time from Counsel to prepare. The amount of time listed for these services by Counsel is excessive.

I. November 9, 2011 Entry

Counsel lists .75 hours for "Prepared Notice of Hearing for Default Judgment, Certificate of Service, Letter to Clerk of Court and Letter to Duggan." (See Exhibit 5). These services are also largely clerical and routine tasks taking little time by Counsel. The time listed is excessive.

J. November 11, 2011 Entry

Counsel lists .65 hours to "Review Defendant's Motion to Set Aside Default and reply to Motion for Entry of Default." The documents in question comprise less than two pages (See Exhibit 6). It does not take .65 hours to read these two short documents. Counsel also lists .2 hours for "Letter to Clerk of Court with Certificate of Service." These are also largely clerical in nature requiring little time by Counsel.

K. November 16, 2011 Entry

On November 16, 2011, Counsel stated that he expended .55 hours to "Review Defendant's Motion to Dismiss, Motion to Quash." A review of these documents

attached hereto as **Exhibit 7** reveals that they are short, standard forms that should not require experienced Counsel .55 hours to review.

L. December 8, 2011 Entry

Counsel lists 3.75 hours to "Review submission of Defendant's numerous exhibits for hearing." The exhibits in question were police Incident Reports and other documents concerning the other two causes of action which were subsequently dismissed by the Court. These exhibits did not pertain to the FOIA cause of action. This time should not be considered in determining a reasonable fee for counsel's services pertaining to the Freedom of Information Act cause of action.

M. January 3, 2012, January 3, 2012 and January 5, 2012 Entries

During these three days, Counsel lists a total of 7.1 hours preparing for a hearing or attending a hearing before Judge Hill which took place on January 5, 2012. To begin with, this hearing addressed primarily the first lawsuit and the two causes of action in the Complaint in this action which were subsequently dismissed by Order of Judge Hill, and had nothing to do with the Freedom of Information Act cause of action. Defendant did move to dismiss the FOIA cause of action which required little or no preparation for the hearing and took up almost no time during the hearing before Judge Hill. In addition, this hearing and the preparation for it involved a Motion filed by the Defendant to dismiss the first lawsuit which involved five causes of action. Most of the time spent in preparation

for and attending the hearing was addressing the first lawsuit which ultimately was dismissed by the Court and addressing the two causes of action in the second lawsuit which were also subsequently dismissed by the Court. Precious little of this time was spent preparing to argue the simple issue of whether or not Council violated FOIA by signing the Order while not in a public hearing. Therefore, most of the time listed by Counsel for these entries should be disregarded because they had nothing to do with the FOIA claim.

N. January 12, 2012 Entry

Counsel lists .5 hours to "Review Order of Court." The Order of the Court is 2 pages in length. It should not take Counsel 30 minutes to read this Order (See Exhibit 8).

O. January 22, 2012 Entry

Counsel lists 1.95 hours to "Review Motion to Dismiss by Defendant's." The documents in question, attached hereto as **Exhibit 9**, should not require almost 2 hours to read by experienced Counsel.

P. March 7, 2012 Entry

Counsel lists 1.15 hours to "Prepare Motion Coversheet, Motion to Compel, Certificate of Service, Letter to Clerk of Court and Letter to Duggan." (See Exhibit 10). This work has to do with the first lawsuit initiated by Hailee's and has nothing to do with the FOIA claim subsequently initiated in Plaintiff's second lawsuit. And, this is largely clerical. This time should be disregarded by the Court.

Q. May 22, 2012 Entry

Counsel lists 2.65 hours for "Prepared Motion Coversheet, Motion for Summary Judgment, Certificate of Service, Letter to Clerk of Court and Letter to Duggan." (See Exhibit 11). To begin with, preparation of the Motion Coversheet, Certificate of Service, and cover letter to the Clerk of Court and opposing Counsel is largely clerical in nature and should require little time by Counsel. And, the Motion for Summary Judgment should not take much time as it is a routine Motion often filed by Counsel. The amount of time listed for this service is excessive.

R. May 29, 2012 Entry

Counsel listed .75 hours to "Review Order of Judge Hill." To begin with, almost all of the Order of Judge Hill pertained to the five causes of action in the first lawsuit and the two causes of action in the second lawsuit which were dismissed by the Court and had

nothing to do with the Freedom of Information Act issue. In fact, the only portion of the Order of Judge Hill that addressed the Freedom of Information Act was one paragraph (See Exhibit 12). Most of the time listed by Counsel was for service he rendered unrelated to the FOIA claim. Clearly, it is excessive.

S. June 14, 2012 Entry

Counsel lists one-half hour to "Review Affidavit of Bob Cook." Mr. Cook was the presiding City Council Member at the business license revocation hearing. His Affidavit is one page. It is attached hereto marked as Exhibit 13. It should not require Counsel one-half hour to read this Affidavit.

T. September 14, 2012 and September 17, 2012 Entries

On September 14, 2012, Counsel lists 5.1 hours for "Preparation for FOIA issues on Summary Judgment" and also lists 3.75 hours on September 17, 2012 for "Prepare for and attend Summary Judgment hearing on FOIA." Counsel did not prepare a Legal Memorandum to submit to the Court including research or discussion of the FOIA issue. The FOIA issue was a simple factual question, that is, whether or not Council violated FOIA when it signed the Order outside a public meeting. This did not require any preparation time to argue. Furthermore, most of the time expended during the hearing before the Court involved the Motion to Dismiss the one remaining cause of action from the first lawsuit which was wholly unrelated to the FOIA claim. Little time was spent

arguing the FOIA motion. Claiming 8.85 hours preparing for and arguing the FOIA issue before the Court is very excessive.

U. January 7, 2013 Entry

Counsel lists .45 hours to review emails from opposing Counsel and the Clerk of Court scheduling the hearing to determine attorney's fees. A review of these short emails attached hereto as **Exhibit 14** reveals that they do not take .45 hours to read. And, this is clerical in nature and not true legal services rendered by Counsel pertaining to the issue before the Court.

V. January 30, 2013 Entry

Counsel listed 2.10 hours to "Revised Affidavit of Attorney's Fees and preparation for hearing." Counsel is not entitled to charge fees for time he expends pursuing his fee. This time should be disregarded by the Court.

W. February 7, 2013 Entry

The revised Affidavit executed by Counsel is dated January 30, 2013. The final entry dated February 7, 2013 lists 2.25 hours to "Prepare for and attend hearing." This time is acknowledged to be estimated. The Court will know how much time it expended for this hearing and can act accordingly.

Beneficial Results Obtained

The final factor to be considered by the Court is the beneficial results obtained by Counsel. The first lawsuit initiated by Counsel was dismissed in its entirety. The second lawsuit, which included the FOIA claim, involved three causes of action. The Court dismissed the other two causes of action. Therefore, the Plaintiff lost all of its substantive claims because they were dismissed by the Court. The only issue on which the Plaintiff prevailed is the procedural issue pertaining to the FOIA claim. Thus, little in the way of beneficial results were obtained for the Plaintiff.

COSTS

In its list of costs the Plaintiff lists a filing fee of \$150.00 and a service of process fee of \$35.00. As noted earlier, this lawsuit involved three causes of action of which the FOIA claim was only one. The Defendant asserts that it should not bare all the costs for these charges when only a minor portion of this case pertained to the FOIA.

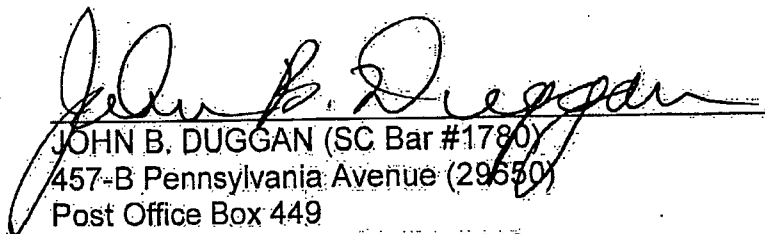
CONCLUSION

In conclusion, for the reasons set forth herein the fees and costs sought by the Plaintiff in the amount of \$19,941.87 are excessive. Defendant requests that the Court award a reasonable fee.

Respectfully submitted,

DUGGAN & HUGHES, LLC

By:


JOHN B. DUGGAN (SC Bar #1780)
457-B Pennsylvania Avenue (29650)
Post Office Box 449
Greer, South Carolina 29652-0449
Telephone: (864) 879-0144
Fax: (864) 879-0149

Attorney for the Defendant

Dated: February 5th, 2013
Greer, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

K & S Food Services, Inc. d/b/a Hailee's
Bar and Grill,

Plaintiff/Appellants,

v.

City of Mauldin and Mauldin City
Counsel,

Defendant/Respondents.)

IN THE COURT COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No.: 2011-CP-23-06290

PLAINTIFF'S MOTION
TO ALTER/AMEND OR
RECONSIDER

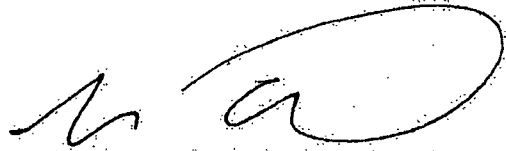
TO: The Honorable Letita Verdin and John B. Duggan, Attorney for Defendants

YOU WILL PLEASE NOTICE that Pursuant to Rule 59(e) and 60(b) SCRPC the Plaintiff moves to alter or amend, or reconsider the courts order filed May 14, 2013 and received May 16, 2013 on the following and other grinds;

1. Plaintiffs believes the trial court committed a scrivener's error in awarding \$1,500.00 in attorney's fees and costs of the \$19,941.87 requested and intended to award \$15,000.00.
2. The trial court erred finding the FOIA issue was not complicated when the Defendant set forth detailed, lengthy and complicated motions, defenses and arguments in opposition to the same.
3. The trial court erred in finding the FOIA issue presented did not require sophisticated legal services or extensive work by Plaintiff's counsel when the record and affidavits of attorney fees shows exactly the opposite.
4. The trial court erred in finding the time devoted to the matter to be excessive when there was no evidence to support that conclusion.
5. The trial court erred in failing to find what specific amount of time devoted to the matter was fair and reasonable.

6. The trial court erred in applying a beneficial results standard to attorney fees issues under the FOIA when the standard is whether or not the Plaintiff established an FOIA violation.
7. The trial court erred in finding the results not particularly beneficial to the Plaintiff since the result in the absence of other circumstances would have resulted in a voiding of Plaintiff's revocation of its business license.
8. The trial court erred in finding Plaintiff's counsel's hourly rate of \$350.00 per hour excessive when there was no evidence to support that conclusion.
9. The trial court erred in failing to find what reasonable rate should have been applied to the time expended.
10. The trial court erred in applying a balancing of factors approach to a determination of reasonableness of attorney fees.
11. The trial court erred in finding that Defendant's failure to comply with the FOIA was not egregious while on the other hand finding the violation was straight forward, not complicated and easily ascertained.
12. The trial court erred in awarding \$1,500.00 in attorney's fees and costs without setting forth specifically how such figure was arrived at.
13. The trial court erred in awarding the amount of attorney's fees and costs that were for less than the amount the Defendant contended were due to the Plaintiff.
14. The trial court's order is clearly erroneous, governed by a mistake of law, unsupported by the evidence, arbitrary, capricious and lacks sufficient finding of fact relative to the specific amounts excluded by the court and the amounts determined by the court to be reasonable.

Wherefore the Plaintiff moves that this order be alter, amended and reconsidered to properly award reasonable attorney fees and costs to Plaintiff.



Robert C. Childs, III, #1218
Attorney for Plaintiff/Appellant's
2100 Poinsett Hwy, Suite D
Greenville, SC 29609
(864) 242-9997
Fax (864) 242-9914

Greenville, South Carolina

Date: 5-11-17

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

K&S Food Services, Inc. d/b/a Hailee's
Bar and Grill,)

C.A. NO.: 2011-CP-23-4773

Plaintiff,)

vs.)

REPLY TO PLAINTIFF'S
MOTION TO ALTER/AMEND OR
RECONSIDER

City of Mauldin, Mauldin City Council,)
John Gardner, Brian Turner, Peter)
Nomikos, and Callista, L.L.C.,)

Defendants.)

Defendants, City of Mauldin, Mauldin City Council, John Gardner, Brian Turner, and Peter Nomikos, by and through their counsel, object to Plaintiff's Motion to Alter/Amend or Reconsider pursuant to Rule 59(e) and 60(b), SCRCP.

Plaintiff's first ground for reconsideration that the trial Court erred in granting Defendant Summary Judgment because there was a genuine issue of material fact of gross negligence based upon the transcript of the business license revocation hearing should be denied based upon the following:

First, in its Complaint, filed July 19, 2011, the Plaintiff alleges that the Defendants were "willful, wanton, reckless, negligent and grossly negligent" in "harassing" and "intentionally harming" Plaintiff, in failing to supervise and train its employees and/or agents in "properly enforcing the Ordinances and Laws," and in making statements to the public that Plaintiffs' Business License had been revoked. See Pl's Complaint, pgh. 61. This allegation is a conclusory statement for which there are no supporting facts provided. Conclusory statements contained in a Complaint without any additional evidence is insufficient to show a genuine issue of material fact.

Second, this suit was filed prior to the business license revocation hearing. Present at the revocation hearing was a certified court reporter. Plaintiff never requested a copy of the transcript from the court reporter. Defendant is also not in possession of the transcript. Therefore, it is impossible for the Plaintiff to assert that the transcript presents a genuine issue of material fact of gross negligence.

Third, while the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60 (12), which provides immunity for "licensing powers or functions" contains an exception for immunity for licensing powers and functions exercised in a grossly negligent manner, Plaintiff fails to cite any facts that presents a genuine issue of material fact of gross negligence that would fall within this exception. Gross Negligence is the "intentional conscious failure to do something which it is incumbent upon one to do or the doing of the thing intentionally that one ought to do." *Clark v. South Carolina Department of Public Safety*, 362 S.C. 377, 382, 608 S.E.2d 573, 576 (2005), citing *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). Rather, the record is replete with incident reports that detail the criminal activities and incidents requiring police responses to Plaintiff's business. The record is clear that the Mauldin Police Department responded to calls for assistance at the Plaintiff's business as they are trained to do according to City policy. Plaintiff's allegations are void of demonstrating how the transcript, which has never been produced, supports a finding that the Defendants made an intentional conscious failure to act or that it failed to exercise slight care. In short, Plaintiff fails to present a genuine issue of material fact of gross negligence that would survive an action under S.C. Code Ann. §15-78-60 (12).

Fourth, while this case has been pending for nearly two (2) years, Plaintiff never deposed any witnesses or parties to establish a genuine issue of material fact to support an allegation of gross negligence.

Fifth, Plaintiff never previously raised the issue that the transcript from the business license revocations hearing presented a genuine issue of material fact of gross negligence. Therefore, Plaintiff's motion should be denied because a party cannot use Rule 59(e) motion to present a new issue to the Court that could have been raised and ruled upon by the trial court. See *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009).

Sixth, Plaintiff's Complaint fails to make a separate cause of action for gross negligence alleging specific facts that would support a cause of action for gross negligence. Since negligence and gross negligence are separate legal theories in that negligence is the failure to exercise due care and gross negligence is the failure to exercise slight care, Plaintiff must present gross negligence as a separate cause of action for the Court to consider it as a basis for relief.

Plaintiff's second ground for reconsideration that the trial court erred in granting Defendant Summary Judgment when the Defendant failed to comply with discovery should be denied based upon the following:

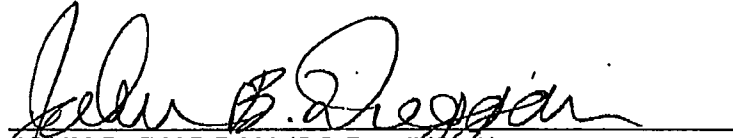
On September 12, 2012, Defendants formally responded to Plaintiff's Interrogatories and Requests for Production. Defendants provided all discoverable information in its possession to the Plaintiff. Discovery is complete, and has been complete since September, 2012.

Finally, Plaintiff fails to present any evidence that would entitle it to relief from judgment under any of the provisions provided under Rule 60(b).

Therefore, based on the foregoing, Defendants respectfully request this Court to deny Plaintiff's motion to alter/amend or reconsider.

Respectfully submitted,

DUGGAN & HUGHES, LLC



JOHN B. DUGGAN (SC Bar #1780)

DANIEL R. HUGHES (SC Bar #72547)

457-B Pennsylvania Avenue (29650)

Post Office Box 449

Greer, South Carolina 29652-0449

Telephone: (864) 879-0144

Fax: (864) 879-0149

Attorney for Defendants City of Mauldin, Mauldin City Council, John Gardner, Brian Turner, and Peter Nomikos

Dated: June ²²22, 2013
Greer, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2011CP2304773,
	)	2011CP2306290
K&S Food Services, Inc. d/b/a	)	
Hailee's Bar and Grill,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
City of Mauldin and Mauldin	)	
City Council	)	
	)	
Defendant.	)	
	)	

September 17, 2012
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

A P P E A R A N C E S:

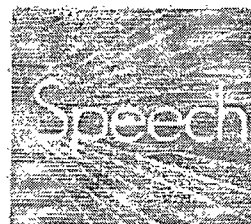
ROBERT C. CHILDS, III, Esquire
Attorney for Plaintiff Hailee's Bar and Grill

JOHN B. DUGGAN, Esquire
Attorney for Defendant City of Mauldin

E. ZACHARY HORTON, Esquire
Attorney for Callista, LLC

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are
taken and
produced via



CAT 7

I N D E X

DIRECT CROSS REDIRECT RECROSS

Motions	4
Certificate of Reporter	34

EXHIBITS PAGE

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
------------	--------------------	-----------	-----------

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 17th day of September, 2012 at approximately 3:13 p.m.)

THE COURT: We've got a number of defendant's motions. Then we've got one plaintiff's motion. Is that correct?

MR. CHILDS: Actually, we have two.

THE COURT: Okay.

MR. CHILDS: Let me kind of clarify a little bit.

THE COURT: Okay.

MR. CHILDS: I think what we have left is a motion to compel by the plaintiff. Let me state for the record the -- uh, I filed that motion in March of this year. The defendants, last week actually, answered my discovery.

THE COURT: Okay.

MR. CHILDS: With the exception of one request for production that we had, -- and they've assured me that they will get that to me in two weeks -- I'm happy with that.

THE COURT: Okay.

MR. CHILDS: I understand they are pretty lengthy requests. The second issue is the defendant's motion for summary judgement on the

1 freedom -- I mean, the plaintiff's motion for
2 summary judgement on the Freedom of Information
3 violation of the City of Mauldin. And the
4 defendant has also moved for summary judgement on
5 the Freedom of Information violation allegations by
6 the plaintiff. That's in case number -- these are
7 kind of consolidated, but that's in case number
8 6290. Now, we both have agreed that the real issue
9 on the motions versus the countering motions for
10 summary judgement is whether or not the City
11 violated the Freedom of Information Act by issuing
12 an order revoking the plaintiff's business license,
13 uh, outside of a public hearing.

14 We've raised issues in our pleadings about,
15 uh, proper notice of the, uh, revocation hearing.
16 I'm satisfied based on the affidavit submitted by
17 the defendant that they properly notified the media
18 pursuant to the Freedom of Information Act about,
19 uh, that hearing, uh, that was held. Uh, and also
20 that, uh, there were not minutes, uh, maintained by
21 the counsel of that hearing. They've provided me
22 with those minutes. So those are not issues. If
23 they are issues, the defendant's entitled to
24 summary judgement on those issues.

25 **THE COURT:** Okay.

1 **MR. CHILDS:** We are not contesting those
2 issues. So that one issue remaining is the method
3 by which counsel reached its decision and issued
4 this order revoking the business license. We
5 contend it is violation of Freedom of Information
6 Act and the defense contend that it is not.

7 **THE COURT:** All right.

8 **MR. CHILDS:** In addition to that, the
9 defense has several, uh, 12(b)(6) motions slash
10 summary judgement motions on the pleadings on, uh,
11 4773, uh, and, uh, basically under the Torts Claim
12 Act, uh, issues, uh, relative to that.

13 **THE COURT:** Okay.

14 **MR. CHILDS:** Mr. Zach Horton is present also
15 for Callista LLC, Inc. Uh, Callista was joined as
16 a party for the sole purpose of being an interested
17 party in the allegations we raised about the
18 annexation of property in the city of Mauldin.

19 **THE COURT:** Okay.

20 **MR. CHILDS:** They were the property owner.
21 The court has dealt with that issue ---

22 **THE COURT:** Okay.

23 **MR. CHILDS:** --- and has dismissed that
24 issue based on lack of standing. And, uh, I don't
25 see any purpose for Mr. Horton to have to remain,

1 uh, appearing in these proceedings.

2 **THE COURT:** All right.

3 **MR. HORTON:** Your Honor, the only issue is
4 that I do have a counterclaim for, uh, -- we were
5 made a party because we were the landlord. We have
6 a counterclaim basically saying that if we are made
7 a party to any suit, the lease says that our
8 attorney fees will be covered. We do have that as
9 a counterclaim. That is the only issue remaining
10 as to me.

11 **THE COURT:** All right.

12 **MR. HORTON:** I don't think that is being
13 addressed here at all.

14 **THE COURT:** That's not coming up at all
15 today?

16 **MR. CHILDS:** No, Your Honor.

17 **THE COURT:** All right. All right. Well, it
18 sounds like, Mr. Duggan, you got the bulk of the
19 motions today. Do you want to go and then when we
20 get to the FOIA, uh, then we'll just kind of -- I
21 guess we'll -- I'll hear your argument on that.
22 And then, after that, I'll hear Mr. Childs'
23 argument on it. All right.

24 **MR. DUGGAN:** Your Honor, do I win because I
25 have the bulk of the motions? Volume should count

1 for something in this world. Uh, Your Honor, uh,
2 the Freedom of Information Act issue is very
3 straightforward, I believe.

4 **THE COURT:** Okay.

5 **MR. DUGGAN:** And is, I think, ready for you
6 to just call it like it is.

7 **THE COURT:** Okay.

8 **MR. DUGGAN:** But Your Honor, let me step
9 back so you know sort of what has happened and
10 gives you a context.

11 **THE COURT:** Okay.

12 **MR. DUGGAN:** The City of Mauldin served a
13 notice on Hailee's Bar on April 15th last year that
14 they intended to take action or revoke the business
15 license because of repeated violence at this site
16 of Hailee's.

17 **THE COURT:** Okay.

18 **MR. DUGGAN:** The next thing that happened is
19 counsel adopted an ordinance requiring all bars in
20 the city to close at 2:00 in the morning in July.

21 **THE COURT:** Okay.

22 **MR. DUGGAN:** The first lawsuit that ends in
23 4773 was initiated the next day by Mr. Childs. He
24 could hardly wait to sue us. So the very next day,
25 Robbie filed his first lawsuit and in it asked for

1 a temporary restraining order to preclude the city
2 from enforcing the new ordinance to close at 2:00
3 a.m., which you heard and issued an order on
4 September the 19th.

5 **THE COURT:** I vaguely remember that.

6 **MR. CHILDS:** You denied our request.

7 **THE COURT:** Okay.

8 **MR. DUGGAN:** So the next thing that
9 happened, Your Honor, is the revocation due proc
10 hearing was heard before counsel on April of --
11 August the 16th after this first suit had been
12 initiated. On August the 16th, the hearing began
13 at six o'clock. And because Robbie is so
14 loquacious, it went til 1:30 in the morning. We
15 introduced several hundred pages of documents so at
16 the conclusion, counsel said we're not going to
17 stick around here at 1:30 in the morning to debate
18 this. Reach your decision. And we've got all
19 these documents to look at, so council is taking
20 the matter under advisement. Okay.

21 Then the TRO hearing came up before you in
22 late August and you issued an order on September
23 19th denying the TRO. Ironically, on the same day,
24 the counsel members signed the order revoking the
25 business license of Hailee's which led to the

1 second lawsuit ---

2 **THE COURT:** Okay.

3 **MR. DUGGAN:** --- which challenges on various
4 causes of action the action and the manner in which
5 that action was taken against Hailee's, the
6 revocation. The next thing that happened relevant
7 to the court is that on November the 5th, Hailee's
8 voluntarily closed and went out of business. So I
9 filed a motion to dismiss both lawsuits because
10 they were now moot because Hailee's was no longer
11 in the city. So whether or not our ordinance was
12 valid or applied improperly and all the allegations
13 were rendered moot.

14 That was heard in January by Judge Hill.
15 Judge Hill issued orders in both cases, in which in
16 the initial case, 4773, he threw out everything but
17 a negligence cause of action, which is still before
18 the court. And that's the subject of a number of
19 my motions.

20 The second thing that happened is in the other
21 action, which challenged the validity of the
22 ordinances, Judge Hill's order threw out all of
23 that, except for the allegations that we violated
24 FOIA. That is before you today. So we are down to
25 two causes of actions in the two respective suits.

1 One is FOIA. The other one the allegations of
2 negligence.

3 **THE COURT:** Okay.

4 **MR. DUGGAN:** Now, with respect to the
5 allegations for negligence -- and Your Honor,
6 that's in action 4773. It may be helpful, Your
7 Honor -- I don't know if you can put your hands on
8 the complaint, but it's the third cause of action.
9 I think it would be helpful if you actually look at
10 it.

11 **THE COURT:** Okay. You said what number is
12 the complaint you are referring to?

13 **MR. DUGGAN:** It's in action 4773.

14 **THE COURT:** Okay. I think I've got it.
15 Thank you.

16 **MR. DUGGAN:** And it begins at paragraph 60,
17 Your Honor.

18 **THE COURT:** Yes, sir.

19 **MR. DUGGAN:** At the bottom of the page, he
20 says we were negligent, grossly negligent in the
21 following ways. It says in doing acts specified
22 above, in harassing Hailee's, by retaliating
23 against Hailee's for exercising its right to free
24 association and to do business, and intentionally
25 harming Hailee's for no legitimate reason, in

1 failing to supervise employees, in failing to train
2 employees, and in making statements to the public
3 that Hailee's license had been revoked, all of
4 which they allege are negligent acts giving rise to
5 its right to recover from the city.

6 Your Honor, we filed a motion to strike. We
7 also filed a motion for summary judgement.
8 Specifically, the motion to strike is -- and in a
9 negligence claim, they are not entitled to attorney
10 fees and cost.

11 **THE COURT:** Okay.

12 **MR. CHILDS:** I agree with that.

13 **THE COURT:** All right.

14 **MR. DUGGAN:** So I think that matter is
15 resolved. Now, the --

16 **THE COURT:** Okay.

17 **MR. DUGGAN:** The second matter is our
18 assertions that for two reasons this cause of
19 action is not viable. The first reason, Your
20 Honor, is that what this complaint does is allege
21 some ultimate conclusions of facts, but does not
22 delineate what exact acts of negligence caused
23 damage and what those damages were.

24 For example, in harassing Hailee's -- well,
25 how in the world -- I mean, if he's claiming we

1 harassed Hailee's, he's got to have a specific act
2 that occurred at a specific time. And there's no
3 way for us to know of the three years that Hailee's
4 was open what he's talking about. The same thing
5 is true, retaliating against Hailee's in the
6 exercise of its right to free assembly. We have no
7 idea what that means. It's a general conclusion of
8 fact and not specific enough to give us proper
9 notice of what he claims we did wrong.

10 **THE COURT:** All right.

11 **MR. DUGGAN:** The same thing is true with the
12 allegation for intentionally harming us for no
13 legitimate reason. Uh, failure to supervise
14 employees. Well, what acts -- what duty to
15 supervise was there? What did we not do that was a
16 breach that resulted in some alleged damage? What
17 I submit is this fails to set forth adequate facts
18 to be a viable cause of action to give a defendant
19 notice of exactly what conduct we owed a duty of
20 care and if we specifically in some way breached it
21 that proximately caused some damage. That's the
22 gravamen of our first belief that this is not a
23 properly plead cause of action.

24 **THE COURT:** All right.

25 **MR. DUGGAN:** The second thing, Your Honor,

1 that is more specific is that there are 40
2 specified reasons in the Tort Claims Act that
3 delineate areas in which you can not sue any
4 governmental entity.

5 **THE COURT:** All right.

6 **MR. DUGGAN:** And, Your Honor, I have a copy
7 just so that we can look at these together, but in
8 my legal memo, I expressly address these, and in
9 subsection 4 and subsections 12.

10 **THE COURT:** All right.

11 **MR. DUGGAN:** Now, to go back and talk about
12 this cause of action, what Hailee's has done in
13 this case is say that when we adopted the ordinance
14 in carrying out the enforcement of that ordinance
15 by policemen responding to calls out there -- we
16 had shootings, drug sales, a number of problems --
17 that we were somehow negligent in the enforcement
18 of the ordinance requiring them to close at two
19 o'clock in the morning.

20 Now, I respectfully submit that if you look at
21 subsection 4 of those areas that you may not sue
22 under tort claims, subsection 4 says any loss
23 resulting from the adoption of, the enforcement of
24 or compliance with any law or failure to adopt or
25 enforce any law whether valid or invalid including,

1 but not limited to, any charter, provision,
2 ordinance, resolution, rule, regulation or written
3 policy. That's exactly what we were doing in this
4 case was enforcing an ordinance to close at two
5 o'clock in the morning. So even if we did
6 everything that he claims in his broad brush
7 allegations, it's barred under subsection 4 because
8 we were trying to enforce the ordinance for them to
9 close at two o'clock in the morning ---

10 **THE COURT:** All right.

11 **MR. DUGGAN:** --- which was the gravamen of
12 his lawsuit.

13 **THE COURT:** Okay.

14 **MR. DUGGAN:** So we believe that section 4
15 forecloses any, uh, right to sue for enforcing the
16 2:00 a.m. ordinance.

17 **THE COURT:** All right.

18 **MR. DUGGAN:** The second section says also
19 that you may not sue a governmental entity when
20 it's exercising its licensing powers or functions
21 including, but not limited to, the issuance,
22 denial, suspension, renewal or revocation or
23 failure or refusal to issue, deny, suspend or
24 revoke any permit. This involved the business
25 license permit. So what we submit is that these

1 two exceptions would preclude a lawsuit by Hailee's
2 because we're enforcing a 2 a.m. ordinance.
3 Whether they believed it was valid or not, if we
4 act in good faith and efforts to enforce it, you
5 can't sue us for damages for doing so according to
6 these provisions of the Tort Claims Act.

7 **THE COURT:** All right.

8 **MR. DUGGAN:** So, Your Honor, that is the two
9 bases by which we think it is appropriate for the
10 court to grant summary judgement and/or dismiss the
11 cause of action.

12 **THE COURT:** All right. Mr. Childs?

13 **MR. CHILDS:** Your Honor, uh, I believe, uh,
14 that the record is replete with memorandums and
15 particularly one that was submitted, uh, by the
16 defendant -- uh, by the plaintiff in opposition to
17 the defendant's motion for summary judgement back
18 on March the 12th of, uh, 2012. I don't know if
19 the Court has that. I've got another copy of that.

20 **THE COURT:** I don't have a copy that I can
21 put my hands on quickly.

22 **MR. CHILDS:** All right. I know it's a
23 really big file. But in that -- and there's no
24 telling which file it ended up in.

25 **THE COURT:** Okay. Thank you. Yes, sir.

1 **MR. CHILDS:** In that memorandum, uh, I
2 submitted to the court and I submit to the court
3 now that, uh, these affirmative defenses raised by
4 the defendants in this case have to be pled. And,
5 uh, the purpose behind the pleadings is to
6 determine whether or not, uh, their defenses are
7 such, uh, that would weigh merit to their arguments
8 here for their motion to dismiss slash summary
9 judgement. They haven't plead affirmative defenses
10 in this case. Uh, they've certainly have been
11 aware of the fact that I've raised that issue since
12 March of this year and have not moved to amend
13 their answer or what I had was an unfiled answer,
14 but to change their answer to raise affirmative
15 defenses and affirmative defenses must be pled.

16 Secondly, in addition to that, uh, their
17 allegations are -- well, we don't know exactly what
18 the, uh, issues are based on the pleadings. Uh, I
19 think it's pretty clear from the pleadings that we
20 have made the issues and arguments that are
21 deducible to, uh, derive a cause of action. And I
22 think the difficulty there is that we're still in
23 the stage of discovery. As Your Honor knows, we
24 just gotten discovery responses from them. It's
25 probably a more appropriate motion for summary

1 judgement at some point, uh, that the defense could
2 raise.

3 Uh, so I think two things. One is this motion
4 is not appropriate at this stage of the pleadings.
5 Uh, and secondly, it's an affirmative defense that
6 has to be raised in their answer. They haven't
7 raised these affirmative issues in their answer.

8 **THE COURT:** What do you say, uh, Mr. Duggan,
9 to the, uh, fact that, uh, Mr. Childs is saying
10 that you failed to plead the affirmative defense?

11 **MR. DUGGAN:** He's correct. We have not
12 amended our answer yet. But I don't think that
13 precludes the court from considering it at this
14 point, uh, because we're going to, if we have to.
15 But the point is that at this stage in the game, we
16 now know that we're down to only one cause of
17 action because Judge Hill had the matter completely
18 under advisement on the issue of mootness. At that
19 point, it was premature to worry about amending the
20 pleadings.

21 It's true that since Judge Hill issued his
22 order, I'm not sure, May or June or somewhere along
23 there that I have not amended to assert it, but it
24 still applies with the same force and for the court
25 to hear it on -- consider it, uh, by your own

1 motion with it being raised, I think, is
2 appropriate. We shouldn't waste time to come back
3 up here with me having to formerly move to amend
4 the pleading. The fact is that it either complies
5 or it's barred by the statute of limitations on the
6 face of these allegations.

7 **THE COURT:** All right. Uh, all right. I'll
8 take that matter under advisement and take a look
9 at it. Next issue. Is that the FOIA?

10 **MR. CHILDS:** That's the FOIA allegation.

11 **THE COURT:** Okay.

12 **MR. CHILDS:** I can take that. I know John's
13 talked a bit.

14 **THE COURT:** Sure.

15 **MR. CHILDS:** Uh, let me say that the length
16 of that, uh, revocation hearing was not because I
17 was, uh, loquacious, it was Mr. Duggan was.

18 **THE COURT:** Well, I'm sure neither one of
19 you were. I believe neither one of you were. I'm
20 sure it was somebody else.

21 **MR. CHILDS:** I'm going to be rather short
22 and to the point. In my motion for summary
23 judgement filed May 29th of 2012, and it's 6290,
24 uh, clearly sets out case law that I rely upon and
25 the issue that I rely upon in the proposition that

1 I present to the court.

2 THE COURT: That is -- I'm sorry. You say
3 your memorandum --

4 MR. CHILDS: My motion really --

5 THE COURT: Excuse me, your motion.

6 MR. CHILDS: My motion really has, uh,
7 basically the case law and the issues that I've
8 raised and cite of Bellamy versus Brown and
9 Piedmont Public Services versus Cowart. But here's
10 exactly what happened. The -- actually my -- it
11 appears my motion was filed May 29th of 2012.

12 THE COURT: All right. Yes, sir.

13 MR. CHILDS: Here's what happened. Here's
14 what the Freedom of Information Act provides. I
15 think it entitles us to summary judgement of
16 attorney's fees and injunctive relief to prohibit
17 future violations of the Freedom of Information
18 Act. As Your Honor well knows, the Freedom of
19 Information Act really was the sunshine law that
20 was enacted by the legislature to open up the
21 deliberations of governmental bodies to the public
22 purview.

23 In that act, it provides for certain things.
24 One of those things is that public bodies shall
25 make public decisions public. Uh, there is a

1 provision that you can only go in executive
2 sessions for certain issues and that no formal
3 action could ever take place in executive session.
4 The whole idea and philosophy about the Freedom of
5 Information Act is that when politicians come and
6 start voting about things, the public should know
7 first how they voted and second why they voted.
8 Uh, and so the deliberations of the governing body
9 of the City of Mauldin, obviously to taking
10 official action by the City of Mauldin, there must
11 be a meeting wherein the members of the, uh,
12 Mauldin City Council actually participated in a
13 vote and decided this case. What happened was we
14 had that lengthy hearing. And then, all of a
15 sudden out of nowhere, an order comes forth where
16 they decided against us.

17 Now there were five members of the council
18 present for that hearing. Four members of council
19 that were present signed this order. We don't know
20 what was deliberated about that. Okay. And we
21 don't know what that fifth member decided, whether
22 he voted no or he just wasn't around. I don't
23 know. But any time that a governing body makes a
24 decision, uh, about their official duties, which
25 this was one, they have to make that voting public.

1 Now, the defense tries to say, well, maybe
2 they were just kind of deliberating like a judge
3 would. You know a judge could hear the issues and
4 a judge can listen to all the facts and a judge can
5 go back there and decide, well, you know, I like
6 this proposition better than the other or the Court
7 of Appeals can do that. But they are not governing
8 bodies of a public entity. The Court of Appeals is
9 not a governing body of a public entity. So the
10 Freedom of Information applies to governmental
11 decisions.

12 In this case, a governmental decision was
13 reached to revoke my client's business license
14 outside of a public hearing. That's a violation of
15 the Freedom of Information Act. That's as simple
16 and straightforward as we can put it.

17 **THE COURT:** All right. Mr. Duggan.

18 **MR. DUGGAN:** Yes, Your Honor, can y'all put
19 your hands on the legal memo that we faxed to you
20 on 6290?

21 **THE COURT:** I do. I have it right here.

22 **MR. DUGGAN:** Okay. Your Honor, if you'd
23 flip over to Exhibit 3, Bob Cook, who was many
24 years on county council and has been on Mauldin
25 City Council now for many years, signed this

1 affidavit and he presided over the hearing for the
2 revocation.

3 Now, I want to back up because I think we need
4 to put this whole thing into context. A hearing
5 was scheduled for both parties to submit evidence
6 to council on whether to revoke the license or not.
7 As Mr. Childs now concedes, the city clerk, five
8 days before the hearing, in full compliance with
9 FOIA, gave notice to the media and posted public
10 notice that this hearing was going to take place.

11 What Mr. Cook has done is describe the events
12 that occurred. And what he said in this affidavit,
13 that's now germane, because we're down to one
14 narrow factual issue under the FOIA. He said that
15 after the revocation hearing took place, the matter
16 was taken under advisement because hundreds of
17 pages of exhibits were introduced by Mr. Childs and
18 me. And it was 1:30 in the morning when we
19 concluded the evidentiary hearing. He and one of
20 the council members obtained legal advice from an
21 attorney, because I couldn't talk to council and
22 would not talk to them because I was pursuing the
23 revocation. So it would be unfair for me to advise
24 council while I'm prosecuting the revocation.

25 After approximately two weeks had passed after

1 the hearing, I contacted each council member to
2 determine if each one was ready then to issue a
3 decision. I then sent a letter to Mr. Duggan to
4 draft a proposed order in a copy of my letter to
5 Mr. Childs.

6 On September 16th, I received a proposed order
7 from Mr. Duggan, which I copied to Mr. Childs. The
8 order was then disseminated to all five members to
9 read. After the hearing on August the 16th, no
10 meeting or executive session was held to discuss
11 the matter. So deliberations took place. They all
12 just had an opportunity to review the hundreds of
13 pages of exhibits that were introduced during the
14 hearing. Then on September 19th, just prior to the
15 next regularly scheduled meeting, the original
16 order was circulated to each council member without
17 any discussion about the merits of the case for the
18 council members signing to revoke.

19 Now, Your Honor, if you look to the next page
20 of my legal memo, it's Exhibit 4.

21 **THE COURT:** All right.

22 **MR. DUGGAN:** And that is the order that
23 council issued. And the reason why I want to bring
24 it to your attention is this, Mr. Childs asserts
25 that we must have a meeting. But we held one. It

1 was in public. And in fact, two reporters were
2 there who wrote it up in the Greenville News and on
3 patch -- the Mauldin Patch, which is a newspaper
4 online. They both have articles about it. So a
5 public hearing was held.

6 As Mr. Childs has said, not unlike you, over
7 and over again in cases after you received the
8 evidence, including exhibits, you want to review
9 that before you issue a decision. But when council
10 signed this order, they sent out in this order --
11 Mr. Childs' complaint is that we should know why
12 they voted the way they did and how they voted.

13 The response is, if you read this order, it is
14 14 pages long. It summarizes the testimony of
15 every witness. It includes a description of all
16 the exhibits introduced by both parties followed by
17 pages of specific findings involving credibility
18 and so forth followed by the conclusion to
19 terminate the business license of Hailee's. So
20 this order -- which is a public document, anybody
21 can get a copy of it -- gave the reasons why and
22 how council reached that conclusion.

23 The position we take is that council doesn't
24 have to meet again after they have reviewed the
25 documents separately. As long as they don't

1 deliberate, hold an executive session, they don't
2 have to meet again to sign an order ruling on what
3 they intended to do. And that order gives the
4 public the reasons why they reached the conclusion
5 they did. So certainly, the spirit of FOIA is
6 complied with and, we believe, to the letter of the
7 law.

8 Your Honor, the last thing I want to point out
9 is Mr. Childs cites one relevant case in support of
10 his motion and that's the Piedmont Public Service
11 District versus Cowart case.

12 THE COURT: Okay.

13 MR. DUGGAN: I submit to you that that case
14 is not applicable to the facts of this case. It's
15 quite different. Because what happened in that
16 case is Mr. Cowart was Executive Director of the
17 Piedmont Public Service District. And he was given
18 a 20-year contract by the commissioners who were
19 going out of office. The new commissioners who
20 came into office felt that a 20-year contract
21 binding them to keep this executive director, whom
22 they really didn't know, for another 20 years was
23 against public policy. It was too long. We have a
24 case out of Beaufort where going out of the door,
25 the mayor and council had the city administrator,

1 gave him a 20-year contract at the last council
2 meeting. State Supreme Court held 20 years is an
3 unreasonable length of time against public policy
4 and tied the hands of the newly elected city
5 council inappropriately.

6 So what the new commissioners did, clearly in
7 violation of FOIA, was hold a public meeting in
8 which they went into executive session. While in
9 executive session, they actually debated this man's
10 employment contract and voted to terminate his
11 employment contract in a secret executive meeting.
12 Then they came out and informed the public they had
13 voted on this in executive session and his contract
14 was terminated.

15 What the Court of Appeals said was holding a
16 meeting in executive session doesn't violate FOIA,
17 but voting in executive session does. And it was
18 the voting in an executive session that offended
19 this specific requirement of FOIA. Completely, I
20 agree with that case.

21 Here, counsel never held a subsequent meeting.
22 There was no subsequent public meeting in which
23 they debated the merits nor did they take a vote in
24 some kind of an executive session in violation of
25 the bar against holding executive sessions and

1 voting in an executive session. Each one of them
2 reviewed this case individually after the hearing
3 and then simply signed the order.

4 **THE COURT:** Isn't that just kind of the flip
5 side though? I mean, the Court of Appeals was
6 considering whether or not they should have voted
7 in executive session. This is whether they should
8 have voted in an open meeting. In other words,
9 they didn't have a meeting. It's not that they --
10 they didn't have a meeting at all, but were they --
11 but does FOIA require them to have a meeting?

12 **MR. DUGGAN:** That's right. That's why, Your
13 Honor, you just made the point that I assert which
14 is the Piedmont Public Service District case
15 doesn't apply to the facts of our case. It doesn't
16 give us guidance for this case.

17 **THE COURT:** But what about the answer to
18 that question?

19 **MR. DUGGAN:** My answer to the question --
20 Your Honor, my answer to the question is this.
21 Council, when it sits to hear a case as a judge is
22 behaving differently from when it is passing
23 ordinances and debating those ordinances and
24 receives input from the public because it's held in
25 a public session where the public can have input.

1 Here, if they had held a public meeting and
2 had asked members of the audience what you think
3 about what we should do about revoking the business
4 license, that would have been a violation of the
5 fairness, fundamental fairness of Hailee's because
6 they would be receiving input that's not a part of
7 a due process hearing. All they -- their
8 obligation at that point was to issue a ruling that
9 told the public why they did -- what action they
10 did and why they took it in a public document
11 subject to disclosure to the public which
12 ultimately was reported in the meeting that the
13 business license was revoked.

14 And so the gravamen of why we have FOIA is so
15 there's public input. You can't have in a
16 circumstance like this when counsel is sitting as
17 judge and can only consider the evidence that was
18 presented at the due process hearing. So you can't
19 take public input. And as long as you give the
20 reasons why and how you rendered that decision, I
21 submit that complies with FOIA when you are sitting
22 as a judge and not as a legislator.

23 **THE COURT:** Okay.

24 **MR. DUGGAN:** The last thing I would say is
25 this, Your Honor. Even if you assume that this is

1 a narrow violation of FOIA, I would submit that it
2 is one that is inconsequential because counsel has
3 given the public the information about what action
4 it took and how it reached it and why it reached
5 it. Which the ultimate goal of sunshine government
6 is that the public know what action is taken and
7 why the elected officials took the action they did
8 and that this court has the discretion to award or
9 not award attorney's fees and they issue an
10 injunction to tell us not to do this again in the
11 future or not. And we submit that even if there
12 were a technical violation, the award of attorney's
13 fees is not appropriate where they are acting in
14 good faith sitting as a judge, not as a
15 legislature.

16 And, uh, secondly, we don't have any problem
17 with an injunction if the court had any concern
18 about this although I think it is evident that
19 these council members acted in good faith. When
20 you read the summary in this order, all of the
21 evidence in this case on why they did what they
22 did, they had sound reasons to do it. So Your
23 Honor, that's our position on why we do not believe
24 that this is a viable FOIA violation and, even if
25 it were, it is a minor one that doesn't warrant

1 sanctions from this court.

2 The last thing I want to say is Mr. Childs has
3 handed up to me an affidavit on attorney's fees. I
4 would ask Your Honor to rule on the issue of
5 whether this violation of FOIA and whether you
6 would award fees first because I will have some
7 questions about the amount of time expended and may
8 need a hearing on that issue depending on how you
9 rule on whether this FOIA violation occurred.

10 THE COURT: All right.

11 MR. CHILDS: And I would have no objection
12 to that, Your Honor.

13 THE COURT: All right.

14 MR. CHILDS: Let me say this. Public input
15 is not the gravamen of the Freedom of Information
16 Act. You can look at the cases. One of those is
17 mine, which is Quality Towing versus the City of
18 Myrtle Beach. It is subjecting the actions of
19 government to public scrutiny is the gravamen of
20 the Freedom of Information Act.

21 Mr. Duggan interchangeably uses public hearing
22 and a public meeting interchangeably. A public
23 hearing is certain things that are mandated by
24 statute that you have to have public input into
25 which are zoning cases where you're amending the

1 zoning ordinance or you're amending the statute or
2 an ordinance before city council.

3 The fact is what they were required to do is
4 hold a subsequent meeting where they actually got
5 up there on the council bench and discussed this
6 case and made a decision. We have no idea what
7 that fifth member decided. Uh, he's not on the
8 order.

9 But I think it's telling why this is a
10 violation of the Freedom of Information Act from
11 the one thing that Mr. Duggan pointed out. The
12 chairman, the guy that -- Mr. Cook -- and Mr. Cook
13 and I go way back and also with Mr. Duggan. He
14 actually telephoned the members of this committee
15 and asked them if they had reached a decision. And
16 that is telephone polling. That's a violation of
17 the Freedom of Information Act as much as anything
18 else. But the whole gravamen of this case is they
19 didn't sit up there and make their decision
20 publicly, and they were required to by the Freedom
21 of Information Act.

22 Let me point out one other analogy. There is
23 no, uh, business license revocation exception to
24 the Freedom of Information Act. There's no
25 exception to the governmental agency if it's making

1 a quasi judicial decision. It's not the subject of
2 the Freedom of Information Act.

3 In fact, as Your Honor knows, you probably
4 heard enough Board of Zoning appeals cases already
5 to know that all of those decisions are made in
6 public. There is no secret decisions made by a
7 Board of Zoning appeals, which is a quasi judicial
8 body much more than a city council is. So there is
9 not a judicial exception to a decision. Any
10 decision by a governmental agency has to be open to
11 the public and debated. And I guess the best quote
12 was to submit the bright line of public scrutiny
13 helps ensure that the issue was fully debated and
14 more carefully considered.

15 **THE COURT:** All right. All right. I'm
16 going to take this matter under advisement. I'll
17 be issuing a decision shortly.

18 **MR. CHILDS:** All right. Thank you.

19 **THE COURT:** Thank y'all.

20 **MR. DUGGAN:** Thank you, Your Honor.

21 **MR. CHILDS:** Did we run you late?

22 **THE COURT:** No, not a bit.

23 **(WHEREUPON, the proceedings conclude at**
24 **approximately 3:44 p.m.)**
25

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

COURT OF COMMON PLEAS
2011-CP-23-06290

K&S FOOD SERVICES, INC. D/B/A)
HAILEE'S BAR AND GRILL,)
PLAINTIFF,)

vs.)

CITY OF MAULDIN AND MAULDIN)
CITY COUNCIL,)
DEFENDANTS.)

TRANSCRIPT OF RECORD

ORIGINAL

February 7, 2013.
Greenville, South Carolina

B E F O R E:

THE HONORABLE LETITIA H. VERDIN, JUDGE.

A P P E A R A N C E S:

ROBERT C. CHILDS, III, ESQ.
Attorney for the Plaintiff

JOHN B. DUGGAN, ESQ.
Attorney for the Defendants

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 THE COURT: The next case is K&S Food Service v. City
3 of Mauldin.

4 I've had an opportunity to review your attorney fee
5 affidavit.

6 And, Mr. Duggan, I've had an opportunity to review
7 your objections.

8 But I'd be happy to hear argument, if y'all want to
9 just hit the high points. That's fine by me.

10 MR. CHILDS: I'll do that, Your Honor. And I have a
11 couple cases in support of that.

12 THE COURT: And I will tell you that I won't -- I'm
13 not -- I want to go through the itemized bill, the
14 itemized attorney's fees, along with the objections sort
15 of side by side. And I've not yet done that.

16 MR. CHILDS: Okay.

17 THE COURT: So I will tell you I don't intend to rule
18 today.

19 MR. CHILDS: All right. That's fine.

20 THE COURT: All right. Yes, sir.

21 MR. CHILDS: Your Honor, the -- as you know, you
22 heard this case on the violation of Freedom of Information
23 Act. We submitted our affidavit of attorney's fees. And
24 the Defendant has submitted a memorandum in opposition to
25 sections of the attorney's fees.

1 First, they appear to argue against the Court's
2 previous ruling by arguing that the violation was not
3 willful or egregious. It's difficult to believe that a
4 governing body could believe they can take official action
5 outside a public meeting for -- on anything. And so,
6 thus, I think that it's fairly obvious it was a willful
7 action.

8 Secondly, honoring the legislative intent expressing
9 the Freedom of Information Act, an award of attorney's
10 fees serves as an impetus for the public body to comply
11 with the Freedom of Information Act. That's stated in
12 Sloan v. Friends of the Hunley.

13 The Defendants next argue that local governments are
14 strapped for cash. I don't know that to be true. That's
15 just a mere assertion on their part with no evidence.

16 Next, the Defendants argue that the issues were not
17 complicated. And that was not their argument when they
18 were accused of violating the Freedom of Information Act..
19 They did not concede those actions were in violation, but,
20 instead, argued that -- they had had a public hearing.
21 They argued that the decision was properly made privately,
22 and the decision was judicial in nature exhibiting them
23 from the act.

24 Next, the Defendants contend that \$350 an hour is an
25 excessive rate for an attorney with 28 years of experience

1 in governmental litigation. I would point to the
2 [inaudible] matrix used in federal courts that indicates
3 \$505 per hour is a reasonable rate, and, also, look at
4 Layman v. State Retirement System, which cites fees of
5 \$600 an hour.

6 Furthermore, their assertion is that the rates do not
7 purport with the market rates in this jurisdiction.
8 Again, they don't have any evidence of that. They just
9 merely assert it in their brief..

10 Next, there's a series of entries which I can refute
11 line by line, and if the Court feels necessary, I'll do
12 that. But I will state that they attempt to isolate the
13 FOIA violations from the other portions of the litigation
14 saying it would take significantly less time. Again, that
15 assertion is not supported by any evidence.

16 But I would, also, point out Charleston Lumber
17 Company v. Miller Housing, which I provided to you as
18 well, and Hardaway Concrete v. Hall that says that if
19 those issues are intertwined with the issue for
20 recoverable attorney's fees, the amount of the attorney's
21 fees is recoverable. In other words, if the issues are so
22 intertwined, the entire amount is recoverable.

23 THE COURT: I think he really takes issue -- well,
24 not really, I'm sure he takes issue with all the parts of
25 it. But he appears to take issue with some things that

1 might seem clerical in nature. In other words, preparing
2 a cover sheet or faxing things.

3 MR. CHILDS: Right.

4 Well, certainly, those are attorney's fees that are
5 recoverable. And, as a matter of fact, the Courts have
6 said that even paralegal fees are recoverable for those
7 things. I guess their argument might be I should have
8 billed for that as paralegal fees. But the fact is I look
9 at everything that goes out the door. And so I have to.
10 That's my job. And I bill for those items appropriately.

11 But the real issue -- they, also, say later that you
12 can't recover attorney's fees for pursuing your attorney's
13 fees. And they cite no authority for that proposition.
14 But, essentially, that would reward a violator of the
15 Freedom of Information Act by allowing them to
16 super-litigate the issue of reasonableness of attorney's
17 fees.

18 Basically, an offender could take depositions, do
19 interrogatories, requests to produce, all on the issue of
20 reasonableness of attorney's fees, and the Plaintiff would
21 be a loser overall and the net effect of that. I think
22 that's contrary to the clear intent of the act as shown in
23 Sloan v. Hunley.

24 Their last argument, which is the epitome of their
25 arguments is Section W in their brief, which they state

1 that 2.25 hours preparation for this hearing is too much
2 time. And I would only point out the epitome of that is
3 that I, actually, spent four and a half hours in
4 preparation for this hearing mainly because I got a
5 14-page memo with 14 attachments totalling 95 pages from
6 the Defendant.

7 So I think -- the only thing I think I can concede in
8 the overall itemization provided by the Defendant is Item
9 F. There's a \$70 charge for a letter to the client. And
10 I'll concede that that's probably not an appropriate
11 charge that the Defendant should be responsible for. And
12 so I would reduce my request to \$19,600. I can go line by
13 line on the others, if the Court wishes.

14 THE COURT: No.

15 MR. CHILDS: But I think overall in the range of
16 reasonableness, our attorney's fees are reasonable.
17 They're within the market. I can tell the Court that
18 right now, we're appealing a case from the Town of Mount
19 Pleasant where we felt like \$37,000 in attorney's fees
20 wasn't sufficient for a violation of the Freedom of
21 Information Act. I can't do any more than attest to what
22 my affidavit says about this work in this case.

23 Again, it's all intertwined together. It's all
24 recoverable on that basis. And the pursuit of the
25 attorney's fees is recoverable because it complies with

1 the intent of the act. And the rest of the opposition to
2 the attorney's fees is, basically, raised by the Defendant
3 on speculation or conjecture.

4 THE COURT: All right. Thank you, sir.

5 Mr. Duggan.

6 MR. DUGGAN: Thank you, Your Honor.

7 Your Honor, there's a little bit of history in why I
8 respectfully don't agree with Mr. Childs characterization
9 for the Court. And what this had to do with is we began
10 having problems with inordinate numbers of calls out at
11 Hailee's.

12 And so council decided that we needed to make all the
13 bars close at 2:00 a.m. And we -- in July, we had second
14 and final reading of an ordinance to require every bar in
15 the city to close at 2:00 a.m.

16 The day after that, Mr. Childs filed a lawsuit with
17 five cause of actions. None of them had to do with the
18 Freedom of Information Act. Yet, the hearings this Court
19 conducted, with the exception of one, had arguments from
20 motions in both cases.

21 And my point is that Mr. Childs says they're
22 intertwined. They aren't intertwined in the sense that
23 there were two separate actions in which we both filed
24 motions which the Court consolidated for argument --

25 THE COURT: I see.

1 MR. DUGGAN: -- but involved very different legal
2 challenges. You may recall that in late August of that
3 year, you heard his motion for an injunction in the first
4 cause of action -- in the first case --

5 THE COURT: Right.

6 MR. DUGGAN: -- which had nothing to do with the
7 Freedom of Information Act.

8 So, for example, when he lists all this time to
9 prepare for and argue the case on January 5th of last year
10 before Judge Hill, it involved more motions addressing the
11 first lawsuit than what addressed the second lawsuit. And
12 most of the time that Judge Hill took was addressing the
13 five causes of action in that case, which he, ultimately,
14 threw out. And so Mr. Childs did not separate out the
15 time spent on that separate lawsuit. And that is a part
16 of our concern is it had nothing do to with the FOIA
17 issues whatsoever.

18 Now, the second thing that I've raised -- and I've
19 gone through it line by line, item by item, and attached
20 exhibits so you and your clerk don't have to wade through
21 the file -- both files, that is. But I do want to call to
22 the Court's attention Exhibit No. 1 appended to our
23 memorandum.

24 THE COURT: Yes, sir.

25 MR. DUGGAN: And if you go into the complaint to

1 paragraph 16 -- unfortunately, the pages aren't numbered.
2 So you'll just have to do it by paragraph.

3 THE COURT: All right.

4 MR. DUGGAN: The bottom of that page begins the cause
5 of action for FOIA, which is the only thing before the
6 Court. It quotes a lengthy statute. The next paragraph
7 at the top of the page quotes a lengthy statute. And it
8 ends on the next page. It is a total of two pages in
9 length.

10 His initial itemizations on the 20th of September and
11 the 22nd, when he says he drafted this FOIA, he claims
12 7.55 hours to draft this two-page portion of this
13 complaint. He doesn't say the whole complaint. It
14 expressly states, Prepared FOIA cause of action. Then it
15 says, Reviewed September 19th order and FOIA
16 applicability, and then finalized cause of action for
17 FOIA, and then revised FOIA cause of action, and file
18 amended complaint.

19 And, Your Honor, I do not believe that a lawyer as
20 experienced, capable, and knowledgeable about FOIA as
21 Mr. Childs could possibly take 7.55 hours, half of which
22 are simply direct quotes of the statute and the act. And
23 that is why I have these concerns.

24 And, as you have mentioned, a number of these things
25 are filling out the cover sheet to file with the clerk, or

1 an affidavit of service signed by a paralegal. And these
2 are not things that counsel is doing or should be doing
3 for which a city should have to pay. This is clerical
4 work or paralegal work. It is not lawyer work. And it
5 doesn't take a lawyer 20 minutes to look at a cover sheet
6 that a paralegal has typed on. And so I'm concerned that
7 what we have is a lot of time listed here which
8 predominantly is clerical time for many of these entries.

9 Another thing, Your Honor, is the amount of time he
10 listed for reviewing and reading the order that city
11 council issued, which was 14 pages in length. And I think
12 that the time it took for him to read that as itemized,
13 certainly, seems more than substantial.

14 And, also, I would note that the entries leading up
15 to and for the hearing before Judge Hill, which took place
16 on January the 5th of 2012, list many hours of work. And
17 I submit that, again, most of that was the motions I had
18 made that related to the first case where he had sought
19 injunctive relief.

20 And what had happened, Your Honor, is on the first
21 Saturday in November, late at night, Hailee's closed and
22 moved their stuff out and left the city limits. And among
23 the various motions I filed was a motion that the case was
24 now moot, that the issue of whether or not we -- that our
25 ordinance was improper or it shouldn't have been directed

1 to them was no longer relevant because they weren't in the
2 city anymore.

3 And so Judge Hill spent a lot of time on that and
4 then asked us to submit a post-hearing brief by January
5 22nd, which I did on those issues. So, again, the amount
6 of time listed there for that hearing, I think, is
7 inordinately high where almost none of the time involved
8 the Freedom of Information Act claimed.

9 And if you look at Judge Hill's order issued in May,
10 it had one paragraph mentioning the Freedom of Information
11 Act claim. That's all. I mean, it is a reflection of the
12 fact that we probably spent 10 minutes talking about the
13 second case that asserted the FOIA claim.

14 Now, Mr. Childs says that the concerns that I raised
15 earlier he didn't think were meritorious. And I want to
16 address that. Because I do think that you have broad
17 discretion in determining the fee. And there are a number
18 of factors to be considered. And one of them is the
19 conduct by counsel. And, obviously, we have a concern and
20 a strongly-held public policy to see that government acts
21 in public, unless it's one of a few sensitive issues such
22 as certain personnel matters, criminal matters, and so
23 forth.

24 But, in this case, what counsel did was sign this
25 order just prior to a meeting. Unfortunately, because I

1 had represented the city in the prosecution of the claim
2 against Hailee's, I could not advise them. So, at the
3 time they did this, they couldn't ask me how they were
4 supposed to do this. All five of them had never sat in a
5 hearing for a revocation of a business license. This was
6 totally new to everybody on council.

7 And the order itself listed all of the reasons they
8 concluded that Hailee's was a public nuisance. And after
9 the meeting, it was given -- that order was given to the
10 media who wrote articles and had -- and broadcast on
11 television the results of that order. Now, that's not an
12 indication they're trying to hide the ball from the public
13 or that they're acting willfully. And I would
14 respectfully submit that in your consideration of an
15 appropriate fee that you factor in the level of
16 misconduct.

17 Now, if these guys had been trying to do this, bury
18 it, never tell the public what happened, I think that that
19 would be a relevant factor for an enhanced fee. But,
20 here, I would submit that it is not. And in balancing
21 what is fairness, we are talking about public funds that
22 are normally used to provide services to the taxpayers.
23 And I do think that that is an appropriate consideration
24 for the Court in your discretion in determining what a
25 reasonable fee is.

1 Now, the issue -- the FOIA issue -- and one of the
2 factors is the complicated nature of the services. Your
3 Honor, this involved a very simple question, did they goof
4 by signing it before they went into public meeting,
5 instead of signing it in the public meeting? This is not
6 complicated litigation. This is not convoluted
7 complicated facts or a complicated extraordinary legal
8 issue requiring truly sophisticated services. And so when
9 you're determining the amount of the fee and the hourly
10 rate, it is relevant to consider how complicated this was.

11 I do submit that the hourly rate -- we've all
12 practiced law. None of us are new to this. This is a
13 very gracious request by the hour, one I would, certainly,
14 love to make as an attorney but don't. And I just don't
15 think that it is reasonable.

16 And, Your Honor, in closing, the last thing I
17 mentioned is one of the other factors is the results
18 obtained by counsel. Mr. Childs asserted five causes of
19 action in the first lawsuit. All were thrown out by the
20 Court. He asserted three causes of action in this case,
21 which included the FOIA. The Court dismissed the other
22 two. Of the eight causes of action, seven, all the
23 substantive claims, were lost by the Plaintiff.

24 So the level of beneficial results here is very
25 limited. And it's only because of the way council handled

1 the signing of the order. They didn't realize they needed
2 to do it in a public proceeding.

3 And the last thing about a public proceeding is these
4 fellows were concerned because they knew they were sitting
5 as a judge. And if they had dealt with this in a public
6 council meeting, typically, at the beginning and end of
7 the council meetings, they allow the public to get up and
8 make comments about what council is going to consider.
9 And if some citizen had stood up during the council
10 meeting and said, I want you to revoke the license of
11 Hailee's. My son used to go there and get drunk, or yada
12 yada, we would then have violated Hailee's due process
13 rights to a hearing and a ruling only on what was
14 presented in the due process hearing in August.

15 So there's, also, a reason why council had some
16 reluctance to sign this order in a meeting where they
17 could have gotten people commenting on that from out in
18 the audience. Because on their agenda, the first thing
19 they do is have public input. And the last thing they do
20 on their agenda before they adjourn is have public input.

21 So I think there's some mitigating circumstances in
22 this case that would warrant consideration in you
23 determining the amount of the fee. The rest of it I went
24 through item by item. You and your office can conclude
25 what you think is appropriate.

1 And it's good to see you, Judge.

2 THE COURT: It's nice to see you.

3 Well, I'm going to take this matter under advisement,
4 as I said in the beginning. And I'll compare the itemized
5 bill with the objections to it and the other issues that
6 the city has raised. And I'll be issuing a decision very
7 shortly.

8 MR. CHILDS: Your Honor, can I add one additional
9 thing?

10 Mr. Duggan mentioned that Your Honor dismissed other
11 causes of action in the other case. In fact, your order
12 doesn't list that other case. That was a letter that
13 Mr. Duggan faxed to you after you issued your order. And,
14 as it's stated now, 2011-4773 is still active. As a
15 matter of fact, they've scheduled a pre-trial conference
16 on that case.

17 THE COURT: All right. I apologize.

18 MR. CHILDS: And Mr. Duggan faxed a letter over
19 there. And I considered that a motion to reconsider it to
20 add that proper case number on there. If you could look
21 at that and make the appropriate amendment.

22 I'm going to have to file a motion to reconsider on
23 that case, just so Your Honor knows. Because we still
24 haven't gotten discovery back from the Defendants. And
25 that's one of the issues that I'd like to argue at length

1 in response to each one of these.

2 We got documents like this to review every time
3 something came up in this case. You've got to review a
4 notebook just to figure out if there's anything in there
5 about the Freedom of Information Act violation.

6 The other thing I would say is that we did separate
7 out that other lawsuit. You don't see any charges for it
8 about preparing its complaint, about dealing with this
9 issue.

10 And all the arguments that Mr. Duggan raises about
11 mitigation are not in evidence. They're just mere
12 speculation on his part about what council's motivation
13 was. Any council would know that taking official action
14 outside a public hearing is a violation of the Freedom of
15 Information act.

16 THE COURT: All right. We will -- we'll take care of
17 that other case being added to the order. And I apologize
18 for that.

19 MR. DUGGAN: Yeah.

20 The problem we got into is because the order had only
21 one civil action, but you heard motions in the two cases,
22 the clerk, of course, dutifully listed it in the one case,
23 but not the other. And so I called Robbie. And we agreed
24 I would send you the letter and copy him so we could get
25 both docket numbers on the order so the clerk would know

1 how to file it.

2 THE COURT: I don't know why -- for some reason, I
3 don't think I've seen that letter, but I'll -- but we'll
4 get it straightened out.

5 MR. CHILDS: I saw the fax on it. It came across my
6 desk. It may not have made it to yours.

7 THE COURT: It may have and I just didn't --

8 MR. CHILDS: Well, you know, I told Mr. Duggan I
9 would consider that a motion to reconsider. He got that
10 letter over to you a couple days after the order was
11 issued.

12 THE COURT: Okay. Well, I apologize.

13 MR. CHILDS: I, also, told him once that's issued,
14 I've got some issues dismissing those causes of action for
15 the other case.

16 THE COURT: All right.

17 MR. CHILDS: Thank you, Your Honor.

18 THE COURT: Thank you.

19 *****END OF TRANSCRIPT OF RECORD*****
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

C.A. No.: 2011-CP-23-6290

AND

C.A. No.: 2011-CP-23-4773

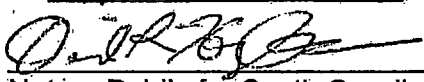
AFFIDAVIT OF CINDY MILLER

I am the Municipal Clerk for the City of Mauldin, South Carolina. On August 11, 2011, I posted the attached Notice on the bulletin board in the lobby of Mauldin City Hall and also the bulletin board in the Administration Department at City Hall which provides Notice to the public of the hearing concerning Hailee's Bar & Grill. In addition, on August 11, 2011, I also posted the attached Notice on our City cable television channel and emailed the Notice to Nate Carey of the Greenville News and Shawn Drury of Patch.com.

As of the date of this Affidavit, I have not been served with a Summons and Complaint in the case of K&S Food Services, Inc., d/b/a Hailee's Bar and Grill vs. City of Mauldin and Mauldin City Council.


Cindy Miller
Municipal Clerk, City of Mauldin

SWORN to before me this 21st day
Of November, 2011.


Notary Public for South Carolina
My Commission expires: 9/29/2016

FILED-CLERK OF COURT
GREENVILLE CO S.C.
PAUL B. HICKMAN

2012 JAN -3 AM 11:06



Mauldin

Expect Great Things.

WEEK OF AUGUST 15, 2011

MONDAY, AUGUST 15, 2011

**NO COUNCIL. RESCHEDULED TO AUGUST
22ND**

TUESDAY, AUGUST 16, 2011

**8:45 A.M.
6:00 P.M.**

**DEPT HEAD MEETING
HAILEE'S PUBLIC HEARING IN
COURTROOM**

WEDNESDAY, AUGUST 17, 2011

9:00 A.M.

CITY TRAFFIC COURT

THURSDAY, AUGUST 18, 2011

FRIDAY, AUGUST 19, 2011

SATURDAY, AUGUST 20, 2011

SUNDAY, AUGUST 21, 2011

John Duggan

From: Cindy Miller [cmiller@mauldincitysc.com]
Sent: Monday, November 14, 2011 12:04 PM
To: John Duggan
Subject: FW: weekly
Attachments: CAL WEEK OF August 15.doc

The original email with the calendar was sent Thursday, August 11th as you can see by the stamp on it. This calendar gets posted to our cable channel, is sent to both Nate Carey from the Greenville News and Shawn Drury from Patch.com, and several residents.

The calendar is also posted upstairs on a bulletin board in the administration department as well as on a bulletin board downstairs in city hall outside the police department dispatch area.

As soon as I find out who gave me the lawsuit papers, I will call you with that info. I have left messages with both officers.

Cindy

From: Cindy Miller
Sent: Monday, October 31, 2011 3:18 PM
To: 'John Duggan'
Subject: FW: weekly

I found the original email that was sent out. Here it is. On the calendar sent Thursday, August 11th.

Cindy

From: Cindy Miller
Sent: Thursday, August 11, 2011 8:28 AM
To: Bob Cook (bcc12fcc@charter.net); 'George Acker'; jamckinley@bellsouth.net; 'John Duggan'; 'Nate Cary'; Olivia Harris; 'Patricia Getty'; paulcalabrese@yahoo.com; Russell Sapp; 'Shawn Drury'
Subject: weekly

11/14/2011

ROA PAGE 165

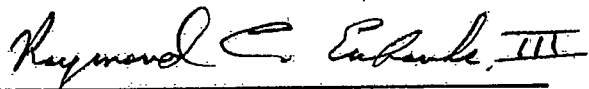
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

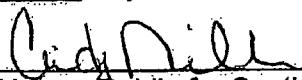
C.A. No.: 2011-CP-23-6290

AFFIDAVIT OF RAYMOND C. EUBANKS, III.

I am the Chief Executive Officer of the City of Mauldin, South Carolina. Attached to this Affidavit is a copy of the Minutes of the August 16, 2011 meeting of City Council which have been approved by City Council.


Raymond C. Eubanks, III.
Chief Executive Officer, City of Mauldin

SWORN to before me this
18 day of June 2012.


Notary Public for South Carolina

My Commission expires: January 7, 2018

2012 SEP -1 A 8:52

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

MINUTES OF MAULDIN CITY COUNCIL MEETING
AUGUST 16, 2011

On August 16, 2011, City Council held a meeting for the purpose of conducting a business license revocation hearing concerning K&S Food Services, Inc., d/b/a Hailee's Bar & Grill. Present at the hearing were Council Members Bob Cook, James Kennedy, Patricia Geddys, Michael Reynolds, and Dale Black. The meeting commenced at 6:00 p.m. and concluded after midnight. Councilman Bob Cook presided over the hearing. A certified court reporter was present and made a record of the hearing which was available for either party to order a verbatim transcript.

Upon commencement of the meeting/hearing, counsel for Hailee's Bar & Grill, Robert C. Childs, III, made several motions including a motion to disqualify Council and for a continuance. In addition, Mr. Childs moved to dismiss the revocation action upon the basis that Mr. Peter Nomikos, head of the Building, Zoning and Business License Department, rather than the Business License Clerk, issued the revocation notice. Mr. Childs also moved to dismiss the action because the notice of revocation was not properly served upon Hailee's Bar & Grill, and because the City had subsequently issued a business license to Hailee's for the 2011-2012 business cycle. These motions were denied.

Both counsel for the City of Mauldin, John Duggan, and counsel for Hailee's, Mr. Childs, made opening statements to Council summarizing the case for their respective clients. Thereafter, each party was allowed to call any witnesses it chose to testify on its behalf, and to introduce documents and any other relevant evidence for consideration by Council.

The City of Mauldin called the following witnesses: Bryan Turner, Chief of Police; Jessica Thompson, Kimberly Mitchell, Rachel Druin, Hanna Cooley, Phillip Metz, Jr., Sheguee Roman, Peter Nomikos, George Miller, Ray McHone, Andy Hamilton, Derrick Pendergrass, Charles Osborne, Samuel Harrell, and Cpt. Tripp.

The Defendant called the following witnesses: William Ninan, Jared Hilderbrand, and Sonny Ninan.

During the hearing both parties introduced documents into evidence consisting of several hundred pages.

At the conclusion of the hearing, both attorneys made closing statements summarizing the case on behalf of their respective clients.

Thereafter, Council took the matter under advisement in order to afford all Council Members an opportunity to review the documents introduced into evidence before a determination concerning revocation of the business license of Hailee's Bar & Grill.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge
H. Garrison Hill, Circuit Court Judge

Appellate Docket No.: 2013-001714

RECEIVED

SEP 23 2014

SC Court of Appeals

K&S Food Services, Inc. d/b/a Hailce's Bar and Grill.....Appellant,

v.

City of Mauldin and Mauldin City Council, John Gardner,
Brian Turner, and Callista, LLC,

Defendants,

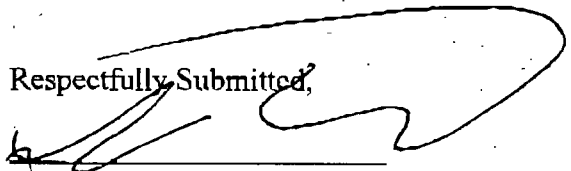
Of whom City of Mauldin and Mauldin City Council,
John Gardner and Brian Turner are the.....Respondents.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all of the matter designated by the Parties
and no irrelevant matter.

I further certify that the Record on Appeal has been redacted in compliance with the
Supreme Court's Order 2009-03-18-01.

Respectfully Submitted,


Robert C. Childs III
Childs Law Firm
2100 Poinsett Hwy., Suite D
Greenville, SC 29609
(864) 242-9997
Counsel for Appellant.

July 21, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE
COMMON PLEAS COURT
Appellate Case No.: 2014-

RECEIVED

JUL 23 2014

SC Court of Appeals

Letitia H. Verdin, Circuit Court Judge
H. Garrison Hill, Circuit Court Judge
Appellate Case No.: 2014-1718

K&S Food Services, Inc. d/b/a Hilee's Bar and Grill, ... Appellant,

v.

City of Mauldin and Mauldin City Council, John Gardner,
Brian Turner, and Callista, LLC,

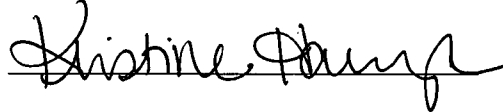
Defendants,

Of whom City of Mauldin and Mauldin City Council, John Gardner
and Brian Turner are the, ... Respondents.

I certify that I have on the 21st day of July, 2014, I served the Record on Appeal on the
Respondent by placing a copy of same in the United States Mail, first class postage prepaid,
addressed to counsel of record as follows:

John B. Duggan
Love, Thorton, Arnold & Thomason, P.A.
POB 449
Greer, SC 29652-0449

Respectfully submitted,



CHILDS LAW FIRM
2100 Poinsett Hwy. Suite D
Greenville, SC 29609
(864) 242-9997
Counsel for Appellant.

July 21, 2014.