STATE OF SOUTH CAROLINA	)	IN THE ADMINISTRATIVE COURT
	)	FOR THE CITY OF FOLLY BEACH
COUNTY OF CHARLESTON	)	BUSINESS LICENSE APPEAL
In re: 704 E. Erie	)	
	)	
Zach Larichiuta,	)	
	)	
Appellant,	)	**FINAL ORDER**
	)	
v.	)	
	)	
The City of Folly Beach,	)	
	)	
Respondent.	)	

This matter comes before me pursuant to § 110.16 of the Folly Beach Code of Ordinances ("Code") by Appellant Zach Larichiuta ("Larichiuta") appealing the decision of the License Official of the City of Folly Beach ("City") denying Appellant's application for an Investment Short Term Rental ("ISTR") business license for the property located at 704 E. Erie ("Property").

PROCEDURAL BACKGROUND

Appellant, under the corporate name LSL, LLC, submitted an application for an ISTR business license for the Property on September 26, 2023. *(City Ex. 1.)* The City's License Official issued a letter denying Appellant's application for an ISTR license on October 30, 2023. (*City Ex. 2.)* On November 13, 2023, the License Official emailed Appellant stating that the certified letter of denial had been returned from the post office and advising him the letter was being resent that day. *(City Ex. 3.)* On December 12, 2023, Appellant submitted notice of this appeal of the License Official's denial via email. (*City Ex. 3.*) With the consent of the parties and to accommodate the schedules of all involved, the appeal hearing was set for more than 30 days after receipt of the notice of appeal, pursuant to § 110.16(C).

The parties participated in a pre-hearing conference held via teleconference on January 5, 2024, at which Appellant appeared *pro se* and the City was represented by City Attorney, Joseph C. Wilson, IV, Esquire. Appellant was reminded of his right to have counsel present at the appeal hearing and was asked to advise the Court if he retained an attorney. Thereafter, Appellant hired Eli E. Lachenman, Esquire to represent him. The parties agreed to exchange their files, including emails, concerning Appellant's applications for ISTR business licenses for the Property by January 26, 2024, and to exchange exhibits and the names of all witnesses to be called at the hearing on or before February 1, 2024, as set forth in the Amended Notice of Hearing in this matter.

The parties and counsel appeared at the hearing on February 5, 2024. Appellant opted to retain a court reporter for the proceeding. Appellant presented testimony by Larichiuta. The City presented testimony by License Official Stacee Ritchie ("Ritchie"). Each party was given the opportunity to cross-examine the witnesses. Appellant entered into evidence *App. Exhibits 1-10,* without objection by the City. The City entered into evidence *City Exhibits 1-7* and *11-18,* without objection by Appellant.

During closing arguments, Appellant's counsel began listing a litany of legal grounds and challenges to the City's business license and ISTR ordinances that were not included in Appellant's appeal email as the stated bases for his appeal or discussed in the License Official's denial letter. Under § 110.16(C)(c) of the Code, "[a]dditional issues not referenced in the notice of denial or suspension and the notice of appeal may not be raised at the hearing unless approved by" the Court. Appellant had provided no notice of these new grounds for challenging the denial of his license application until closing argument. Although the hearing date was pushed back after Appellant retained an attorney to ensure newly-retained counsel had a reasonable opportunity to prepare for the hearing, Appellant's new counsel did not submit an amended appeal notice or

otherwise provide either the City or the Court with any indication that Appellant would be seeking to expand or alter the basis of his appeal. Accordingly, while the Court was open to giving Appellant's counsel some leeway in framing legal arguments based on Appellant's stated grounds for appeal since the notice of appeal was filed without the benefit of counsel, Appellant was instructed that the Court would not consider legal arguments on grounds not referenced in or reasonably inferred from those reasons asserted in the denial letter or notice of appeal.[1] Appellant was permitted, however, to put the new grounds on the record, for purposes of making a record only.

On February 8, 2024, the City requested to re-open the record to accept *City Exhibit 9* into evidence asserting that because there was no indication in the notice of appeal that Appellant was contesting the form or manner of the denial of his 2021 business license application, the City had not included § 110.14 of the Code as it existed in 2021 as an exhibit during the hearing. Appellant did not object to the inclusion of this new exhibit in the record, but maintained his position that the September 29, 2021 email found in *App. Ex. 6* was not a written denial under either § 110.14 or § 110.16 of the Code. Accordingly, *City Ex. 9*[2] was entered into the record without objection.

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[1] As best as the Court can discern, Appellant's newly-raised grounds included allegations that § 117 violates S.C. Code § 6-1-400 by requiring a different application for those seeking short term rental licenses than for other business licenses and by improperly transforming a tax into a restriction on the use of real property; that § 117 violates S.C. Code § 6-1-310, which prohibits the imposition of new local taxes; that the Code infringes on Appellant's vested right to use his property the way it is zoned; that the License Official's decision amounts to a taking without just compensation; that § 117 is unconstitutional in violation of the dormant commerce clause; and § 117 violates South Carolina law, which holds that a legal business is entitled to be licensed. Appellant's counsel also did not request an opportunity to brief these legal issues for the Court, nor were they presented in an amended notice of appeal at any time prior to the hearing. As discussed above, the Court will not address these issues raised for the first time during closing statements.

[2] Note, there is a gap in the City's exhibit numbering: no *City Ex. 8* or *City Ex. 10* were submitted. In addition, many of the City's Exhibits 1-7 and Appellants' exhibits are duplicates of each other. For consistency sake and to avoid confusion, I have endeavored to refer to Appellant's exhibit number rather than the City's in the event of a duplication.

FINDINGS

Having carefully considered the evidence and arguments properly before the tribunal, taking into account the credibility of the witnesses and the accuracy of the evidence, and having reviewed all of the parties' submissions, I make the following findings by a preponderance of the evidence:

1. Appellant purchased the Property in March of 2021, with the intent to build a house on the vacant lot and use it for short term rentals.
2. On May 10, 2021, Appellant, using business name Tittys, LLC d/b/a LSL, LLC with FIN 86-1650113, submitted an application for a short term rental business license for the Property via the Charleston County ("County") online portal. (*App. Ex. 6.*)
3. The County forwarded Appellant's online application on May 11, 2021, to Amberly Flowers ("Flowers"), who was the City's License Official at the time. (*App. Ex. 6.*)
4. On May 12, 2021, Flowers reached out to Appellant via email advising him she needed information concerning the business' gross estimated receipts for the application; Appellant responded via email with "$2000 it is," after being advised that was the minimum amount. (*App. Ex. 6.*)
5. On September 20, 2021, Appellant contacted Flowers via email, asking if she could "reinstate" his short term rental business license application since he had obtained a building permit. (*App. Ex. 6.*)
6. On September 29, 2021, Flowers responded to Appellant via email that she "cannot issue a Business License to a dwelling unless it is up to code which includes having a Certificate of Occupancy. A Business License is issued for operating a business and as of right now

there is not [sic] business established." (*App. Ex. 6;* Flowers' September 29, 2021 email is referenced hereafter as "Flowers' Email.")

7. Flowers' statement was consistent with the City's policy at that time regarding the interpretation of its Code as requiring a building to have a CO before it would issue a business license for a short term rental on the property.
8. Appellant admitted he received Flowers' Email,[3] which was sent in reply to an email sent by Appellant.
9. Appellant did not file an appeal of Flowers' determination that she could not issue a business license to a property without a CO within 10 days after receipt of Flowers' Email or at any time in 2021 or 2022.
10. Flowers did not advise Appellant of the codified appeal procedures at the time she communicated to him that she would not issue a business license for a short term rental until the Property had a CO.
11. Appellant did not submit a City short term rental permit application in 2021 in conjunction with his 2021 business license application for the Property.
12. Appellant testified he believed he had a "pending application" with the City for an ISTR business license that was being held open until he received a CO for the Property, but admitted that no one at the City told him the application was pending or that it was or was not being held open.
13. Appellant did not receive a certified letter denying his application for a 2021 business license for the Property.

[3] Indeed, Flowers' Email forms the basis of his alleged understanding that the Licensing Official was holding his 2021 business license application open pending the receipt of a CO.

14. Appellant did not pay any fees for a City business license of any kind for the Property in 2021 or 2022.

15. On July 12, 2022, following an appeal by another property owner of the City's policy of rejecting short term rental business license applications for properties without a CO, this Court ruled that under the applicable Code provisions at the time, the City could not properly deny a business license application due to the lack of a CO, but could properly require that a building have a CO in place prior to issuing a short term rental permit. (*App. Ex. 8.*) The Court further ruled that both a short term rental business license and short term rental permit were required before a property could be legally operated as an ISTR. *HSI LLC and 0 Sandbar Lane v. The City of Folly Beach,* Final Order, p.12 (July 12, 2022).

16. As a result of that ruling, between July 12, 2022 and September 13, 2022, there was a window of time in which the City accepted short term rental business license applications for properties without a CO, but the properties could not obtain an ISTR permit until after the CO was in place. (*App. Ex. 8.*)

17. Although the ruling was a matter of public record, the City did not advise Appellant of that opportunity between July 12 and September 13, 2022, and Appellant did not submit a new application for an ISTR business license for the Property or inquire about proceeding with the 2021 application during that time.

18. On September 13, 2022, the City adopted then-§ 117.02(A)(1),[4] which states "No business license shall be issued for the rental of a residential unit which is planned or under construction until a certificate of occupancy is issued for the unit." (*App. Ex. 8 & City Ex. 18.*)

[4] At the time of the hearing, this section was codified as § 117.03(A)(1). (*City Ex. 12.*) The provision has since been modified in Ordinance 001-24, which was adopted on February 20, 2024.

19. On October 11, 2022, "the City was formally presented with a citizen's Petition initiating an ordinance to cap short-term rental business licenses at 800." (*App. Ex. 8. & City Ex. 15.*)

20. Upon the acknowledgement that the City had issued more than 800 ISTRs for the 2022 business license year as of that date, the City enacted Ordinance 32-22 that contained a moratorium on the issuance of new ISTRs within the City for residential dwellings taxed at a 6% property tax rate, with exceptions for the renewals of ISTR licenses for properties "that were legally licensed as of October 18th, 2022." (*City Ex. 16.*) The moratorium in Ordinance 32-22 had an expiration date of January 11, 2023. *(Id.)*

21. On December 13, 2022, Council enacted Ordinance 34-22, which extended the expiration date for the moratorium to April 15, 2023, or five business days after any special election called to adopt the petition for a cap on short term rentals. (*City Ex. 17.*)

22. The Certificate of Occupancy for the Property was issued on February 3, 2023. (*App. Ex. 1.*)

23. The City held a special election on the referendum on February 7, 2023, in which a majority of the registered voters of Folly Beach voting in the election voted in favor of the cap.

24. Accordingly, Chapter 117 of the Code was amended to set a cap of ISTRs at 800 and included an exception, which states: "Any existing [ISTR] business license issued prior to February 7, 2023 which remains in good standing may continue to be renewed annually, even if the number of [ISTR] business licenses exceeds the cap." § 117.02(C)(2). (*City Ex. 11.)*

25. On March 13, 2023, Appellant forwarded a portion of his 2021 email communications with Flowers to Ritchie, indicating he was "following up" on the 2021 application now that the Property had a CO. (*City Ex. 4.*)

26. The portion of the email chain that Larichiuta sent Ritchie on March 13, 2023 (*City Ex. 4*) did not include Flowers' message sent on September 29, 2021, concerning her determination she could not issue a business license for a building without a CO, as appears in *App. Ex. 6.*

27. In November of 2023, Appellant obtained a 2023 Owner-Occupied Short Term Rental Business License ("OSTR") for the Property.

28. An OSTR is defined as "[a] license issued for a dwelling unit that is the legal residence of the owner to be used as a short term rental." § 117.01(B). *(City Ex. 11.)* In contrast, an ISTR is defined as "[a] license issued for a dwelling unit that is not the legal residence of the owner to be used as a short term rental." *(Id.)* "Legal Residence" is defined as "[a] dwelling unit assigned a 4% property tax ratio by the Charleston County Assessor's Office under the requirements of S.C. Code § 12-43-220." *(Id.)*

29. On September 26, 2023, Appellant, under the corporate name LSL, LLC with FIN 00515735, submitted an application for a 2023 ISTR business license for the Property. (*City Ex. 1.*)

30. Appellant testified he submitted the 2023 ISTR application because he understood it was the only way to move his appeal forward at that point.

31. On October 30, 2023, the City's License Official issued a certified letter denying Appellant's application for an ISTR license because the Property was "currently listed as [Appellant's] 4% legal residence by Charleston County therefore [Appellant's] application for a 6% investor license is denied" pursuant to § 117.01(B) of the Code. (*City Ex. 2.*)

32. Appellant's December 12, 2023 emailed notice of appeal[5] of the License Official's 2023 denial set forth the following grounds for appeal: "I applied for an ISTR license in 2021 and was told by Amberly Flowers (who no longer works at the City of Folly) that I needed to wait until I received the CO. After the CO was obtained (before the CAP) I applied for ISTR and was denied." (*City Ex. 3.*)

33. Ritchie was not employed by the City in 2021, when Appellant submitted the 2021 business license application for the Property.

34. Since she started the position as the City's License Official in May of 2022, it has always been Ritchie's practice to issue certified letters when denying a business license application, but she did know what process the prior License Official followed.

35. Ritchie testified that although it is the City's practice to keep completed ISTR applications on file for three years, there was no 2021 ISTR application on file for the Property.

36. Ritchie testified that Appellant's 2021 on-line business license application was incomplete because it did not include the permit paperwork needed for a short term rental license.

37. Appellant's 2023 application cannot be considered a continuation or renewal of his 2021 application because the applications were filed under different company names with different federal identification numbers. *(Compare App. Ex. 4, and City Ex. 1.)*

38. The CO was issued in Appellant's name, not in the name of either of the limited liability companies who are listed as the property owners in the business license applications. *(Compare App. Ex. 1, App. Ex. 4, and City Ex. 1.)*

[5] As discussed above, the License Official's certified letter denying Appellant's 2023 ISTR business license application was misdirected and returned by the post office and the letter was reissued. *(City Ex. 3.)* The City is not contesting the timeliness of Appellant's appeal of Ritchie's 2023 denial under the current Code.

39. Under § 110.14 of the Code as it was in effect in 2021, "[a] decision of the license official shall be subject to appeal as herein provided. Denial shall be written with reasons stated." (*City Ex. 9.*)

40. Under § 110.16(A) of the Code as it was in effect in 2021, "any person aggrieved by a determination, denial, or suspension and proposed revocation of a business license by the license official may appeal the decision to the Council or its designee by written request stating the reasons for appeal, filed with the license official within ten (10) days after service by mail or personal service of the notice of determination, denial, or suspension and proposed revocation." (*City Ex. 9.*)

41. Pursuant to § 110.14 of the Code as amended effective April 11, 2023, "[a] decision of the License Official shall be subject to appeal as herein provided. Denial shall be written in compliance with § 110.16." (*City Ex. 12.*)

42. Under § 110.16(A) of the Code as amended effective April 11, 2023, the written notice of the denial or suspension of a license must contain "(1) A statement of the reasons for the denial or suspension; and (2) A copy of the applicable provisions of this chapter and any other ordinance relevant to the proposed denial or suspension; and (3) Notice that the applicant or licensee may appeal by serving a notice of appeal on the Business License Official within 30 days and in accordance with the provisions of this section; and (4) Notice to the applicant or licensee that failure to serve notice of appeal within 30 days shall result in denial or revocations as applicable." (*City Ex. 12.*)

43. Pursuant to § 110.16(B) of the Code as amended effective April 11, 2023, "any person aggrieved by a determination, denial, or proposed suspension and proposed revocation of a business license by the License Official may appeal the decision to the Council or its

designee by written request stating the reasons for appeal, filed with the License Official within 30 days after service by mail or personal service of the notice" of the determination or denial. (*City Ex. 12.*)

44. Under § 10.05 of the Code, the terms "written" or "in writing" are defined to include "printing and any representation of words, letters, symbols or figures."

45. The terms "service by mail" and "personal service" are not defined in the Code.

46. Pursuant to S.C. Code § 6-1-400(B)(1), which was effective January 1, 2022, business licenses are issued to taxpayers "for a twelve-month period beginning May first and ending April thirtieth. Each business license issued must expire April thirtieth." *(City Ex. 13.)*

47. In 2021, § 117.02 of the Code read: "Any owner wishing to operate a short term rental must maintain a current business license, comply with rental registration requirements, and make proper payment of local, county, and state taxes." *(City Ex. 18, excluding redline revisions.)* Under Section (A), business licenses had to "be renewed annually by the submittal of a form and fee as established by the city." *(Id.)* Under Section (B), "[e]ach new short term license application must be accompanied by an application form provided by the city and must be renewed on an annual basis." *(Id.)*

48. When § 117.02 of the Code was amended effective September 13, 2022, it was revised to read: "Any owner wishing to operate a short term rental must maintain a current business license, comply with rental registration permit requirements, and make proper payment of local, county, and state taxes." *(City Ex. 18, including redline revisions.)* Under Sections (A) and (B) as amended, business licenses and rental registration permits "must be obtained and renewed annually by the submittal" of the appropriate forms and paying the required fees established by the City. *(Id.)* The amendment also added Section (A)(1): "No business

license shall be issued for the rental of a residential unit which is planned or under construction until a Certificate of Occupancy is issued for the unit." and Section (B)(1)(a): "No new business license to operate a short-term rental shall be issued prior to the approval of a rental registration permit."

49. When the City amended Chapter 117 in April of 2023, following the referendum, § 117.02 became § 117.03. *(City Ex. 11.)*

50. Based on the plain and ordinary meaning of the words in Ordinances 32-22 and 34-22, the City's intent to exclude from renewal of ISTR licenses those businesses which did not have a valid, existing ISTR license as of October 18, 2022, is clear and unambiguous. *(City Ex. 16 & Ex. 17.)*

51. Upon passage of the referendum by popular vote on February 7, 2023, the number of the City's ISTR business licenses was capped at 800, but the number of ISTR licenses already in existence exceeded the cap.

52. Based on the plain and ordinary meaning of the words in §117.02(C)(2), as amended in 2023, since the cap had been exceeded, in order for an ISTR business license to be issued or renewed in 2023, the ISTR business license must have been in place prior to and remained in good standing since February 7, 2023.

53. Appellant did not have an ISTR business license prior to and in good standing for the Property on February 7, 2023, and, therefore, did not satisfy the requirements to be grandfathered in under the ISTR Ordinance.

LEGAL STANDARDS

I have applied the following legal standards in evaluating the evidence and arguments. A municipal business license ordinance should be interpreted based on the general rules of statutory

construction. Olds v. City of Goose Creek, 424 S.C. 240, 246, 818 S.E.2d 5, 9 (2018). Similarly, § 10.02 of the City's Code instructs "[u]nless otherwise provided herein, or by law or implication required, the same rules of construction, definition and application shall govern the interpretation of this code as those governing the interpretation of state law." Under § 10.07, "[t]he provisions of this code, so far as they are consistent with any prior ordinances, shall be construed as continuations of the prior provisions and not as new enactments."

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the [enacting body]." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001) (citing Charleston County Parks and Rec. Com'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995)). In addition, "the [ordinance] must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Similarly, the ordinance should be read "in a manner consonant and in harmony with its purpose." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010)).

The terms in the ordinance should be given their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the [ordinance's] operation." Sloan, 371 S.C. at 499, 640 S.E.2d at 459. Where the words in an ordinance are unambiguous, the court should apply their literal meaning. Id. at 498, 640 S.E.2d at 459. Under the plain meaning rule, a court may not employ the rules of statutory interpretation where an ordinance is unambiguous and

conveys a clear and definite meaning. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998). Under § 10.06 of the Code, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." If an ordinance is ambiguous, however, the courts must construe its terms by following the "settled rules of construction." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).

Licensing officials who are given administrative duties under an ordinance are vested with discretionary powers in administering the law. Momeier v. John McAlister, Inc., 203 S.C. 353, 27 S.E.2d 504, 509–10 (1943); *see also,* Landing Development Corp. v. City of Myrtle Beach, 285 S.C. 216, 329 S.E.2d 423 (1985); Kerr v. City of Columbia, 232 S.C. 405, 102 S.E.2d 364 (1958). "The construction of a[n ordinance] by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Env't Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Denton v. S.C. Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Licenses are not property rights, but rather are permits issued by a governmental entity. Army Navy Bingo, Garr. No. 2196 v. Plowden, 281 S.C. 226, 314 S.E.2d 339 (1984.)

On the other hand, a business license fee is a tax on the privilege of doing business within a county or municipality. Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 648, 760 S.E.2d 103, 103 (2014); City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 675 (1967). "It is a well-established principle of law that tax statutes cannot be extended by implication beyond the clear import of the language used, and in case of doubt, such doubt must

be resolved against the government, and in favor of the taxpayer." Hadden v. S.C. Tax Com'n, 183 S.C. 38, 190 S.E. 249, 251 (1937); Triplett v. City of Chester, 209 S.C. 455, 40 S.E.2d 684 (1946).

DISCUSSION

In his email which constitutes Appellant's Notice of Appeal, Appellant characterized the reasons for his appeal as follows: "I applied for an ISTR license in 2021 and was told by Amberly Flowers (who no longer works at the City of Folly) that I needed to wait until I received the CO. After the CO was obtained (before the CAP) I applied for ISTR [sic] and was denied." *(City Ex. 3.)* During the hearing, Appellant testified that the wording of his appeal notice should be corrected to state that he "followed up on his 2021 application" rather than he "applied." This edit would be necessary because, otherwise, his appeal ground as initially phrased was not a true statement since, as Appellant admitted at the hearing, he did not submit his 2023 application for the ISTR until after the referendum vote adopting the cap was held.

In closing arguments, Appellant asserted he was denied due process under § 110.16 because his 2021 application was not formally denied and, therefore, he was not on notice of the need or opportunity to appeal. Appellant contends Flowers' Email was not a written denial under §§ 110.14 or 110.16. He further asserted he was denied equal protection in that other similarly-situated property owners received ISTR business licenses without a CO. As these restatements of the grounds for appeal were potentially inferable or implied based on the documents Appellant exchanged as exhibits during the pre-hearing process, the Court will address them.

Of note, Appellant did not include in his appeal any challenge to the License Official's finding that the property could not be issued an ISTR in 2023 because it is listed as his 4% legal residence by the County. Finally, in closing arguments, Appellant raised for the first time several

new legal grounds challenging the validity of Chapters 110 and 117 of the Code, which, as discussed above, the Court has declined to address pursuant to § 110.16(C)(c).

I. Appellants' 2021 license application was not pending or left open until 2023 awaiting the issuance of a CO.

As his initial ground for appeal, Appellant argues that his May of 2021 ISTR business license application remained open pending his obtaining a CO for the Property, even though the CO was not issued until February of 2023. Given the change in circumstances regarding ISTR business licenses between the time Appellant purchased the Property in 2021 and the issuance of the CO on the Property in February of 2023, it is understandable that Appellant wishes his 2021 application to have been in some type of pending or holding status for almost 2 years from its date of initial submission so that it might possibly be considered to predate the moratoria and imposition of the cap on the issuance of new ISTR business licenses.

Appellant admits, however, no one with the City told him that his application would be held open until such time a CO was issued for the property. There is nothing in any of Flowers' emailed statements in the record that could be construed as a promise to keep the application open until a CO was issued. Rather by explaining she would not be able to issue the license "to a dwelling unless it is up to code which includes having a Certificate of Occupancy," Flowers makes clear that other factors besides a CO may affect whether she could issue the license. *(App. Ex. 6.)* Flowers' next stated, "A Business License is issued for operating a business and as of right now there is not business." This also is not the type of statement that implies a promise to hold an application open pending a CO. Rather it communicated Flowers' position that Appellant needed to wait to apply for a business license until after his business was in a position to be operating.

As Appellant did not submit the paperwork for the short term rental permit in conjunction with the business license application, his 2021 application was also not complete, so more was

missing to complete the ISTR business license and permit application process besides the CO. In addition, the City did not collect any payment or fee from Appellant in conjunction with the alleged pending 2021 application that would conceivably serve as a basis for it remaining in an open or in progress status. Also, the City did not maintain a copy – other than the email string – of Appellant's 2021 application, as one would expect if it was being held open. Appellant did not provide evidence of any other applications being held open indefinitely in this fashion. Moreover, as business licenses expire annually and must be renewed each year, Appellant's May of 2021 application would have needed to be renewed by May 1 of 2022, and it was not.

To the extent Appellants' 2023 application is meant to harken back to his 2021 initial application, there is a lack of continuity between the two. His 2021 application was submitted under the name Tittys, LLC and his 2023 application was submitted under the name LSL, LLC, each with a different federal identification number. They are not they same entities – and his current OSTR license is held in his name, personally, not under any business name.

Accordingly, based on the evidence presented, I do not find persuasive evidence to support Appellant's argument that his 2021 application was being held open by the City waiting for him to provide a CO, at some indefinite point in the future.

II. Appellant was not denied due process in conjunction with his 2021 application.

At the time of his 2021 application, the City's business license ordinances contained an appeal procedure similar, although not identical, to that which Appellant used to trigger the hearing before this Court in 2024. Then-§ 110.16(A) provided "any person aggrieved" by the actions of the business license official in issuing a "determination" or "denial" concerning a business license application with the opportunity to appeal the decision by filing a written request for appeal with the licensing official within ten days. (*City Ex. 9.*) Under §§ 110.14 and 110.16(A) of the Code as

they were in effect in 2021, there was no specific format that was required for either the license official's decision or the appeal notice other than they should be "written" and state the reasons on which they were based. (*City Ex. 9.*) Thereafter, then-§110.16(B) provided for a hearing to be held before Council or (as happened here) Council's designee (this Court) at which time the appealing party would have the right to be represented by counsel, present evidence, and cross-examine witnesses and would receive a "written decision based on findings of fact and conclusions on application of the standards herein." This written decision by Council or its designee would constitute the "final decision of the Municipality," which would "be binding and enforceable unless overturned by an applicable appellate court after a due and timely appeal." § 110.16(B) & (C). Then, as now, an aggrieved party could appeal the City's final decision to the Charleston County Circuit Court pursuant to S.C. Code § 18-7-10.

"The fundamental requirements of [procedural] due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 171–72, 656 S.E.2d 346, 350 (2008)(citing S.C. Const. art. 1, § 22; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)). Based on the above provisions, I find the City's Code provided an appeal procedure that met the standards of due process in September of 2021.

Appellant contends that despite this appeal procedure being spelled out in the Code, he was denied due process because his 2021 application was not formally denied and, therefore, he was not on notice of the opportunity to appeal. Due process does not necessarily require a "formal denial," however, but rather requires some action or event that would constitute "notice." Looking again at then-§ 110.16(A) of the Code, "any person aggrieved by a determination, denial, or suspension and proposed revocation of a business license by the license official" could appeal the

determination, denial, or suspension that aggrieved them. *(Emphasis added.)* Similarly, under then-§ 110.14, a "decision of the license official shall be subject to appeal. . . ." *(Emphasis added.)* Likewise under 110.16(B), "a hearing on an appeal from a license denial or other determination of the license official . . . shall be held by Council or its designee . . . ." *(Emphasis added.)* Therefore, based on the clear language in the Code, there was no specification or requirement for a "formal denial" of an application to trigger to the appeal. The Code at the time allowed for an appeal of not only a denial of an application but also any "determination" by the license official that aggrieved a party. But here, whether it is deemed a determination, decision, or denial, it is clear Flowers' Email was an expression of her final position that she would not issue a business license for the Property at that time and that Appellant was "aggrieved" by that determination in that he was denied the business license he sought at the time.

While a "formal denial" was not required to trigger an appeal under the 2021 Code, the notice of the determination or denial must (1) be written or in writing; (2) state the reasons for the decision; and (3) be provided to the applicant by "mail or personal service." § 110.16(A). I find that Flowers' Email satisfied all of these requirements.

The first prong addresses the need for the decision to be in writing as found in § 110.14 and §110.16(A) (2021). *(City Ex. 9.)* The terms "written" or "in writing" are defined in the Code to include "printing and any representation of words, letters, symbols or figures." § 10.05. Flowers' Email most certainly meets that definition.

Next, looking at the content of Flowers' Email, it satisfies the second prong of the requirements that the writing include the reasons for the decision or determination, which is found in §110.14 (2021). *(City Ex. 9.)* Flowers explains her reasons for refusing to process Appellant's application in her email to Appellant: she will not process the application because the Property

does not have a dwelling on it that meets the Code, which includes having a CO and it is not in a position to be operating as short term rental business. Accordingly, the second prong is met.

Looking at the third prong, Appellant admits he received Flowers' Email. To the extent he is claiming that the email did not constitute "personal service," the term was not defined in the 2021 Code, but the Code does direct that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." § 10.06. In addition, "due process is flexible and calls for such procedural protections as the particular situation demands." Kurschner, 376 S.C. at 172, 656 S.E.2d at 350 (citing S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002)).

"Personal service" is generally defined as "[a]ctual delivery of the notice or process to the person to whom it is directed" BLACK'S LAW DICTIONARY 1180 (8th ed. 2004). There is no contextual basis in the 2021 Code or the generally accepted definition of the words to indicate that personal service of decisions or determinations by the licensing official needed to be delivered to an applicant via a process server or even hand delivery or another manner similar to that required under the Rules of Civil Procedure, for instance. To operate a government licensing office in such a manner would be overly cumbersome, expensive, and a poor use of tax payer funds. Rather, the purpose underlying the concept of personal service is ensuring that the intended person receives reasonable notice of an action. See Roche v. Young Bros. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Indeed, our courts of appeal recognize this concept and have held that that an email sent from the authority issuing the determination and received by the intended party constitutes sufficient service to trigger an appeal before either the South Carolina Court of Appeals or the Supreme Court. *See* Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211,

215–19, 810 S.E.2d 856, 858–60 (2018). Finally, it is worth noting that Appellant's notice of appeal that triggered this proceeding was in the form of an email sent to the Licensing Official, who accepted it as sufficient notice to start this process once Appellant included the reasons for his appeal in the message. Thus, I find that notice of Flowers' decision sent via email to Appellant's email address that the parties were actively using to communicate at the time and that Appellant admits he contemporaneously received constituted personal service sufficient under the Code to trigger Appellant's right to appeal in 2021, thus meeting the third prong.

As for Appellant's contention he was unaware of the opportunity to appeal, while it is true that Flowers' Email did not provide Appellant with a reference to the Code's appeal provisions or explain the appeal procedure to him, that was neither required by the Code at the time, nor part of the typical standards required for due process. "Rather citizens are presumed to know the law and are charged with exercising 'reasonable care to protect [their] interest[s].'" Morgan v. S.C. Budget & Control Bd., 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting Smothers v. U.S. Fidelity & Guar. Co., 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct.App.1996)). While it is helpful to the public that under the current version of § 110.16(A) of the Code, the appeal procedure is required to be provided to applicant as part of the written notice of denial, such a step is not necessary to effectuate the elements of procedural due process. *(See City Ex. 12.)* In 2021, the opportunity for appeal of unfavorable decisions of the license official and the mechanisms of the appeal process were set forth in plain language in the Code, which was published on-line and available to the public. Appellant was at liberty to avail himself of the process, which he failed to do. Accordingly, I find no merit in Appellant's argument that he was denied due process in regard to his 2021 application.

III. Appellant was not denied equal protection because some applicants were able to obtain business licenses in 2022 despite not having a CO on their properties.

Appellant next argues he was denied equal protection because other similarly-situated property owners received ISTR business licenses without a CO. The Equal Protection Clause of the Fourteenth Amendment "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 112 S.Ct. 2326, 120 L.Ed.2d1 (1992). To prevail under an alleged violation of equal protection, Appellant must demonstrate he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

As a result of another property owner undertaking an appeal of the license official's policy, there was, indeed, a brief window of time in which the City accepted short term rental business license applications for properties without a CO, although the properties were still not eligible to receive short term rental permits until after they obtained a CO. *(App. Ex. 8.)* This window opened on July 12, 2022, when this Court issued its ruling in HSI, LLC and ended on September 13 of 2022, when the City adopted then-§ 117.02(A)(1). *(App. Ex. 8 & City Ex. 18.)* The City did not advise Appellant of that opportunity between July 12 and September 13, 2022. Appellant has provided no evidence or caselaw to support a finding that the City was required to go back over its files to locate any old, closed applications from prior years that might meet the criteria and offer the property owners the opportunity to re-apply for a license, however. Moreover, since Ritchie has replaced Flowers as the licensing official in May of 2022, there is no evidence that Ritchie was even aware of Appellant's 2021 application during the window.

Pursuant to *App. Ex. 8*, the only applicants who received business licenses without a CO were those few whose 2022 applications were still pending or were submitted during that window. As discussed above, Appellant's 2021 application was not pending in July of 2022. Although the

ruling was a matter of public record, Appellant did not submit a new application or inquire about proceeding with the 2021 application during that time. Accordingly, Appellant has presented no evidence to indicate that he was similarly situated to those other applicants, such that an equal protection claim could be supported.

IV. To the extent Appellant's 2023 appeal could be deemed an appeal of the 2021 decision, the substance of that appeal is not before the Court as the appeal is untimely.

Generally, "[t]he requirement of service of the notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (quoting Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).) Therefore, having found Appellant missed his opportunity to appeal the 2021 determination by the Licensing Official, this Court lacks jurisdiction to further consider that appeal.

V. Appellant provides no basis to reverse the denial of his 2023 ISTR application.

Appellant did not assert as a ground for appeal a challenge to the City's stated reason for denying his 2023 ISTR application based on the property being listed as his 4% legal residence by the County. To the extent such an appeal point was intended, however, based on a plain reading of the ordinance, which is clear and unambiguous, properties with a 4% property tax ratio by the Charleston County Assessor's Office under the requirements of S.C. Code § 12-43-220 or, in other words, properties that are the owner's legal residence, are not eligible for an ISTR business license under § 117.01(B). *(City Ex. 11.)* Instead, they are properly characterized and licensed as an OSTR. *(Id.)*

Moreover, even if it were somehow improper to deny Appellant's ISTR application based on the property's tax basis, the fact remains that pursuant to the clear and unambiguous ordinances,

Appellant did not have an existing ISTR business license in good standing prior to February 7, 2023. As Appellant did not meet the exceptions to the cap when he submitted his ISTR application in 2023, the City properly followed §117.02 in denying the application.

CONCLUSION

Therefore, for the foregoing reasons, the appeal is DENIED.

IT IS SO ORDERED.

Christie Companion Varnado
Hearing Officer
City of Folly Beach

March 8, 2024

Charleston, South Carolina

NOTE: Appeal of this decision may be made to the Charleston County Circuit Court pursuant to S.C. Code Ann. § 18-7-10 et. seq., within 30 days after notice of the judgment. The appealing party must serve notice of the appeal on the Hearing Officer so the Hearing Officer can timely file the Return per S.C. Code Ann. § 18-7-60.