THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

George Jensen Aakjer, Jr., et. al.……..Petitioners,

v.

City of Myrtle Beach and City of Myrtle Beach Municipal Court…… Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

I. The City's local helmet ordinance does not conflict with the State's Uniform Traffic law.

II. The City's municipal court has subject matter jurisdiction to enforce the City's helmet ordinance.

III. For purposes of the present declaratory judgment the City can change its enforcement mechanism for its helmet ordinance at any time.

STATEMENT OF THE CASE

The case is before the Court by grant of original jurisdiction. Petitioners claim the City of Myrtle Beach's helmet ordinance is invalid and Petitioners' request a Writ of Prohibition to prevent the City from enforcing its helmet ordinance in the City's municipal court. *Rule 245, SCACR; S.C. Const. art. V, §5; S.C. Code Ann. § 14-3-310*. When granting original jurisdiction, the Court consolidated for purposes of oral argument another case with a similar claim captioned *BOOST a/k/a Business Owners Organized to Save Tourism and Bart Viers v. City of Myrtle Beach.*

Petitioners and the City have filed an Appendix which includes the materials each party deemed necessary to determine the matters before the Court.

STATEMENT OF FACTS

For more than fifteen years the City of Myrtle Beach and its residents have struggled with the public safety and health problems brought about by the noise, congestion, and conduct of motorcycle riders during overwhelming concentrations of

motorcycles in the City during the month of May. [R. pp. 173 – 181]. Popular motorcycle rallies promoted by various commercial interests in and around the City caused those overwhelming concentrations of motorcycles during the month of May. Fall motorcycle rallies have begun to be promoted within the past few years. Those rallies have started growing in popularity.

Evidence of the City's efforts to deal with the public nuisance caused by motorcycle rallies can be seen from the facts that from 1994 through 2009, motorcycle rally problems were addressed before City Council no less than 87 times in formal council meetings. [R. p. 174; 273 – 284; 520 - 653] Several commissions and task forces both within the City and outside the City were formed to find workable solutions to the motorcycle rally problems. [R. pp 182 – 272; 520 - 653] The City attempted to work out solutions with the motorcyclists and the promoters of motorcycle rallies. However, those parties either could not or would not do anything to stop the public safety, health and welfare public nuisances that re-occurred each year in the City during the rallies. [R. pp 496 – 509].

By 2008, the City's residents had enough of the motorcycle problems. [R. p. 3]. City Council enacted and amended certain ordinances created to directly address the problems caused by the motorcycle rallies. [R. pp. 6 -7] One of those ordinances, Ordinance 2008-64 (helmet ordinance), is the focus of the case before the Court. [R. pp. 52 - 54].

The City's helmet ordinance adopted the helmet performance requirements contained in Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. Sec. 571.218). [R. p. 52] Those requirements are generally recognized as the minimum

requirements for helmet safety throughout the United States. [R. p. 706] All motorcycle helmets sold in the United States meet Federal Motor Vehicle Safety Standard No. 218. [R. p 706] Under the City's ordinance, failure to wear a motorcycle helmet while operating a motorcycle is an administrative infraction. [R. p. 52] In the present case, some violators were served with a Uniform Ordinance Summons and the infraction is to be processed through the City's municipal court. [R. p. 72 & p 659]

The purpose of the helmet ordinance is to provide for public health, safety and welfare by lessening the impact of serious motorcycle injuries on the City's health, safety and police resources. Ordinance 2008-64 § 14-227. [R. p. 54] The ordinance cites "How to Identify Unsafe Motorcycle Helmets" published by the U.S. Department of Transportation, National Highway Transportation Safety Administration, DOT HS 807 880 (reprinted February 2001); and Position Statement of the American Academy of Orthopedic Surgeons, December 1985, as two authorities for a rational connection between the City's helmet requirements and the purpose of the ordinance. [R. pp. 54; 706 – 710].

In 2005, 21 states had comprehensive motorcycle helmet laws in place requiring helmet use by all riders. Another 25 states required helmet use for certain riders, usually those under the age of 18. Four states – Illinois, Iowa, New Hampshire and Colorado had no helmet requirements at all. [R. p. 709] North Carolina, Georgia and Tennessee require motorcycle riders of all ages to wear helmets. South Carolina requires motorcycle riders under the age of 21 to wear helmets.

The City of Myrtle Beach covers 23.35 square miles, or two percent of Horry County's 1,134 square miles. [R. p. 175] Myrtle Beach has approximately 6,500 regular business license-holders, of which approximately 4,135 are businesses based inside the city. [R. p. 175] The July 2008 U.S. Census estimate puts Myrtle Beach's full-time population at 30,596, making it the 13th largest city in South Carolina. [R. p. 175]

The Brittain Center for Resort Tourism at Coastal Carolina University reported that Horry County has nearly 100,000 "bedroom equivalents," each capable of sleeping two to four people. [R. p. 176] An estimated 52 percent of those accommodation units are inside the city limits, giving Myrtle Beach overnight accommodations for 200,000 to 400,000 people. [R. p. 176] The unincorporated area of the county has an estimated 27 percent of the overnight accommodations, while North Myrtle Beach has an estimated 18 percent of the available lodging. [R. p. 176]

Residential areas are mixed in with commercial areas throughout the City. Most hotel rooms are located along or near the ocean. [R. p. 176] Although official motorcycle rally sponsored events no longer occur in the City limits during the month of May, large numbers of motorcyclists stay in hotels located in the City. [R. p. 176] In order for motorcycles to travel from their hotel rooms to motorcycle rally events outside the City, motorcyclists travel through residential neighborhoods twenty four hours a day, seven days a week. [R. p. 176]

Prior to 2009, a large number of motorcyclists did not show any respect for the residents in the City. [R. p. 176] Those motorcyclists used motorcycles that had mufflers altered to actually increase their noise. They raced their engines and drove

through the residential neighborhoods throughout the night. [R. pp. 176; 711] School officials complained to the City that the motorcycle rallies interfered with the education of school age children in the City. [R. pp. 136-137; 176] Residents of the City made numerous complaints over the years that the noise from the large numbers of motorcycles attending motorcycle rallies interfered with their sleep and with the sleep of their children. [R. p. 177] Some residents were particularly upset because the motorcycle rallies at issue occurred at a time when their children were undergoing standardized testing in their schools. [R. p. 177]

The medical community complained to the City that the combination of motorcycle safety issues and motorcycle rider conduct had overburdened the local medical community's ability to provide adequate health care services to the community. [R. pp. 177; 498 – 499; 621- 627] A representative of the medical community appeared before one of the forums on bike rallies and asked that the rallies be curtailed. [R. p. 499; 621- 627.]

Prior to enacting the ordinances, City Council and its staff were provided reports that the average number of daily calls for emergency vehicles during the peak tourists' months of June, July and August from 2001 to 2008 was 34.06 calls per day. [R. pp. 178; 141 - 155] The average number of daily calls for emergency vehicles for the weekends of the motorcycle rallies during those same years was 134.83 per day. [R. pp. 178; 141 - 155]. The City could not meet the sharp increase in emergency vehicle calls without straining the capacity of its existing emergency medical and public safety resources and without the outside assistance of other local governments. [R. p. 179; 138 - 139] The City had to bring in as many as 400 additional law

enforcement, public safety officers and volunteers to address the problems caused by the density of motorcycles occurring during motorcycle rallies each May. [R. p. 179] The normal size of the City's police force is 190 police officers. [R. p. 179] All days off, vacations and special events are suspended for police, emergency medical personnel and public safety officers during the motorcycle rallies which lasted for as long as three weeks during the month of May. [R. p. 179]

The City estimated that in the year 2008, the density of motorcycles from spring motorcycle rallies required the City of Myrtle Beach to pay an additional $298,425 in extra personnel costs and expenses. Prior to 2008, the annual additional costs the City was required to pay for spring motorcycle rallies averaged approximately $300,000 per year. [R. p. 179]

The City is accustomed to dealing with large crowds throughout any given year. [R. p. 179] However, apart from some rally attendees, the visitors are generally respectful of the residents and the ordinances of the City. [R. p. 179] As a result, the City does not have to provide additional monetary resources or police power resources to address public health and safety problems in the City during other peak tourist periods including the 4th of July when more people are present in the City. [R. p. 179]

In 2009, the City's helmet ordinance went into effect. The City placed warning signs of the helmet requirements at all of the entrance roads to the City prior to the date the helmet ordinance went into effect. [R. pp. 180; 616 - 620] Most motorcyclists who entered the City wore motorcycle helmets and those motorcyclists who wore helmets showed more respect for traffic laws and the other ordinances of

the City. [R. pp. 156; 180] There were no traffic deaths in the City of Myrtle Beach during the 2009 motorcycle rallies. There were three traffic fatalities in 2008. [R. p. 156]. The average number of daily emergency calls in 2009 was 100.31. [R. p. 180] That represented nearly a 25% reduction in emergency calls from the average daily emergency calls during all the previous years for motorcycle rally weekends since 2000. [R. p. 180].

The City's police and administrators noticed during the spring rallies the helmet ordinance assisted in the abatement of the health and safety problems caused by the motorcycles. [R. pp. 138; 156; 180] The helmet ordinance actually affected the safety consciousness of the people who operated motorcycles in the City during the rallies. [R. pp. 156; 180] As a result of compliance with the ordinance, relatively few helmet citations have been issued since the ordinance was enacted. [R. p. 181] The bulk of the outstanding citations were issued when the Petitioners in the present case staged a protest ride into the City in February of 2009. [R. p. 181] Since February of 2009, compliance with the helmet ordinance for motorcycle riders has been almost universal in the City. [R. pp. 156; 181] Because police officers are not required to handle as many traffic collisions with serious injuries requiring long periods to investigate, police officers have had more time to do preventative law enforcement. [R. pp. 156- 157]

When comparing the City's experience before the helmet ordinance was enacted with its experience after the helmet ordinance was enacted, the most dramatic difference can be seen by decrease in the number of motorcycle accidents and motorcycle injuries during spring motorcycle rallies. [R. p. 139]. In 2006 there were

50 motorcycle accidents involving 39 injuries to the motorcyclists that were reported during the spring motorcycle rallies. [R. p. 139] In 2007, there were 82 motorcycle accidents and 67 motorcycle injuries reported. In 2008, there were 72 motorcycle accidents and 68 motorcycle injuries reported. [R. p. 139] By contrast, in 2009, there were only 7 motorcycle accidents and five motorcycle injuries reported. [R. p. 139] Federal statistics show that a motorcycle driver or passenger is twice as likely to receive a head injury in an accident if he or she is not wearing a motorcycle helmet. [R. p. 709].

On February 28, 2009, Petitioners participated in the Myrtle Beach Bike Week Freedom Ride in protest of the City's helmet ordinance. The protest consisted of Petitioners riding their motorcycles into the city limits of Myrtle Beach, receiving a ticket for not wearing motorcycle helmets or protective eyewear in violation of the city's helmet ordinance and then leaving the City to return to the place of their origination – the Beaver Bar in Murrells Inlet. The original summons required the Petitioners to appear before an administrative court established by the City. The administrative court was abolished by the City and a second summons was issued requiring the Petitioners to appear in the City's municipal court. After the Court granted Petitioners' petition for original jurisdiction Petitioners' charges were continued pending the outcome of the present declaratory judgment proceeding.

STANDARD OF REVIEW

Declaratory Judgment

Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues. *Doe v. South*

Carolina Medical Malpractice Liability Joint Underwriting, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). An action for declaratory judgment that a municipal court does not have subject matter jurisdiction is an action at law. *Judy v. Martin* 381 S.C. 455, 674 S.E.2d 151 (S.C.,2009). This Court may make its own findings of fact and conclusion of law under its original jurisdiction. Rule 245, SCACR.

Writ of Prohibition

A writ of prohibition is a drastic remedy which should be granted only where the Petitioner's right to the requested relief is indisputable. *In re Vargas*, 723 F.2d 1461, 1468 (10th Cir. 1983); *In re Missouri*, 664 F.2d 178, 180 (8th Cir. 1981). The ancient prerogative writ of prohibition should be used with forbearance and caution and only in cases of necessity. *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134 (1931).

With regard to the function and scope of the writ of prohibition, it has been settled in South Carolina from an early period that it will only be used to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure; but if the inferior court or tribunal has jurisdiction of the person and subject matter of the controversy, the writ will not lie to correct errors and irregularities in procedure, or to prevent an erroneous decision or an enforcement of an erroneous judgment, or even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction, where an adequate and applicable remedy by appeal, writ of error, certiorari, or other prescribed methods of review are available. *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134 (1931). See also, 72A C.J.S. Prohibition § 4.

Petitioners' Burden Of Proof

A municipal ordinance is a legislative enactment and is presumed to be constitutional. *Southern Bell Telephone and Telegraph Co. v. City of Spartanburg,* 285 S.C. 495, 331 S.E.2d 333 (1985). The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose. *Town of Hilton Head Island v. Fine Liquors, Ltd.,* 302 S.C. 550, 397 S.E.2d 662 (1990), *Bob Jones University v. Greenville,* 243 S.C. 351, 133 S.E.2d 843 (1963). The burden of proving the invalidity of a municipal ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence. See *Rush v. City of Greenville,* 246 S.C. 268, 143 S.E.2d 527 (1965).

Introduction to Arguments

Motorcycle rallies have created a unique public nuisance for the residents of Myrtle Beach. The presence of large numbers of motorcycles in the City for extended periods of time has overwhelmed the police, emergency and healthcare services of the City for a number of years. Home Rule gives local governments broad authority to enact ordinances that abate local nuisances. The essential analysis of the validity of an ordinance calls for balancing the public safety benefits against the individual burden of compliance. The framework that has been established for that analysis involves the local government's authority and the reasonableness of the ordinance. Incidental overlaps between State statutes and local ordinances should not invalidate local ordinances unless the general law expressly prohibits the local government from enacting the ordinance.

The present case involves a challenge to the validity of the City's helmet ordinance which was enacted to abate part of a public nuisance. The arguments that arise in the present case are similar to the ones that have arisen numerous times in various challenges to state helmet statutes. Those arguments run the gamut from the safety of the general public to the right to travel to the elimination of the federal compulsory helmet requirement. See 72 A.L.R.5th 607. A majority of Courts has upheld the validity of helmet statutes and ordinances. *Id.*

Similar validity arguments can be made for cruising ordinances that address the problems of noise and congestion. A number of communities throughout the United States have enacted ordinances to curb the practice of cruising, generally defined in terms of driving a motor vehicle past a designated traffic control point a specified number of times within a specified time period. Such anticrusing ordinances have been regarded as valid exercises of a municipality's police power where they reduce traffic congestion, noise, and air pollution, and ensure access for emergency vehicles. *Brandmiller v. Arreola*, 189 Wis. 2d 215, 525 N.W.2d 353 (Ct. App. 1994), decision aff'd, 199 Wis. 2d 528, 544 N.W.2d 894 (1996); *Lutz v. City of York, Pa.*, 899 F.2d 255; 87 A.L.R.4th 1081 (3d Cir. 1990). The authority for all such ordinances arises from the local government's inherent authority under Home Rule.

The public nuisances caused by the motorcycle rallies affecting the City appear to be moving south to Georgetown County. The City of Myrtle Beach may repeal its helmet ordinance if that public nuisance abates permanently. In that case Georgetown County may need to enact a helmet ordinance. Under the present Home Rule laws it would have the authority to enact that ordinance just as it has the

authority to enact ordinances prohibiting cruising in certain areas. *Brandmiller v. Arreola*, 189 Wis. 2d 215, 525 N.W.2d 353 (Ct. App. 1994), decision aff'd, 199 Wis. 2d 528, 544 N.W.2d 894 (1996); *Lutz v. City of York, Pa.*, 899 F.2d 255; 87 A.L.R.4th 1081 (3d Cir. 1990). That is the genius of Home Rule.

I. THE CITY'S LOCAL HELMET ORDINANCE DOES NOT CONFLICT WITH THE STATE'S UNIFORM TRAFFIC LAW.

In South Carolina the analysis for determining whether a local ordinance is valid is a two-step process. *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). The first step is to ascertain whether the municipality had the power to enact the ordinance. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the municipality had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state. *Id. See also Hospitality Ass'n of South Carolina, Inc. v. County of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113, 117 (1995).

a. The City has the authority to enact its motorcycle helmet ordinance.

1. The City's authority to enact a helmet ordinance.

The City's authority to enact its motorcycle helmet ordinance comes from its police power granted in the Home Rule amendments to the South Carolina Constitution and statutes. *S.C. Const. art. VIII, § 17; S.C. Code Ann. § 5-7-30.*

The authority contained in § 5-7-30 is as follows:

> Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads,

> streets, markets, law enforcement, health, and 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 … *Id.*

The manner in which the Courts are to interpret statutes granting local governments authority is contained in *S.C. Const. art. VIII, § 17*:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

The Record shows the City's helmet ordinance was enacted to address public safety problems caused by large concentrations of motorcyclists in the City that overwhelmed the City's police and emergency resources causing injuries and deaths particularly during the spring motorcycle rallies. *Ordinance 2008-64 § 14-227.* [R. pp. 54; 138 – 140; 177; 498 – 499; 621- 627] As this Court stated in *Denene, Inc. v. City of Charleston 359 S.C. 85, 596 S.E.2d 917 (S.C.,2004)*, local governments are empowered by the state and federal constitutions with the authority to legislate for the protection of the public health, welfare, and safety. *Id.*

2. Preemption of local government authority.

If the State has preempted a particular area of legislation, then the ordinance is invalid because the State has retained all authority in that area and the local government has no authority to exercise. Preemption of local government authority may be express or implied.

a) Express preemption.

To expressly preempt an entire field, "an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way." Bugsy's, 340

S.C. at 94, 530 S.E.2d at 893 (citing Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1990)). In the present case the General Assembly has not made manifest an intent to prevent local governments from requiring persons twenty one years or older to wear motorcycle helmets to alleviate overburdening the local government's police, emergency and health care resources. The General Assembly has been silent on regulation of motorcycle helmets for persons over the age of twenty one and it has not expressly preempted the field of regulation of motorcycle helmets for persons over the age of twenty one by local governments. See *S.C. Code Ann. § 56-5-3660; Denene, Inc. v. City of Charleston 359 S.C. 85, 596 S.E.2d 917 (S.C.,2004)* (when the General Assembly is silent on a subject, local governments have the authority to speak).

b) Implied field pre-emption.

Under implied field preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity. *South Carolina State Ports Authority v. Jasper County 368 S.C. 388, 629 S.E.2d 624 (S.C.,2006)* Implied preemption occurs when: (1) general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; (2) general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or (3) general law partially covers the subject and the adverse effect of a local ordinance on transient citizens of the state outweighs the possible municipal benefit. See 5 McQuillin Mun. Corp. § 15:18 (3rd ed.).

(1) General law does not so completely cover the subject as to clearly indicate the matter is exclusively one of state concern.

In the present case, there are three possible areas of general law which may be the subjects covered by the City's helmet ordinance. The first subject is public nuisance. The second subject is traffic and the third subject is motorcycle helmets. The State's general law on each of those subjects does not indicate that any of the subjects covered are exclusively subjects of State concern.

Local governments are expressly authorized to deal with public nuisances by the State's statutes. S.C. Code Ann. § 5-7-30 (authority to abate nuisances). Local governments share authority on the subject of traffic regulation in the S.C. Uniform Traffic Act. S.C. Code Ann. § 56-5-30 (authority to adopt additional traffic regulations which are not in conflict with the provisions of the Uniform Traffic Act).

On the third subject motorcycle helmets the language of the motorcycle helmet statute is instructive. See S.C. Code Ann. § 56-5-3660(It shall be unlawful for any person under the age of twenty-one to operate or ride upon a two-wheeled motorized vehicle unless he wears a protective helmet of a type approved by the Department of Public Safety). The statute is silent on whether a local government could require persons twenty one or older to wear a helmet to abate a public nuisance. The statute does not outlaw persons twenty one or older from wearing motorcycle helmets.

If Petitioners were to claim that the General Assembly gave persons twenty one or older the right to choose whether to wear a motorcycle helmet, the entire statute would be called into question because the statute denies 18 year olds the same right to choose to not wear a helmet. S.C. Const. art. XVII, § 14 (Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this

Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities); Also see *State v. Bolin 378 S.C. 96, 662 S.E.2d 38 (S.C.,2008).* It should be noted that there cannot be a conflict of legal consequence between an existing ordinance and an invalid statute. See 5 McQuillin Mun. Corp. § 15:18 (3rd ed.).

> *(2) General law does not partially cover public nuisances, traffic or motorcycle helmets in terms clearly indicating a paramount state concern that will not tolerate further local action.*

An example of a statutory indication that the State will not tolerate further local action can be drawn from the statutory history of State driver's license statutes. Before the enactment of the first state licensing requirement in 1930, several municipalities had local ordinances requiring that residents possess a local license in order to operate a motor vehicle in the municipality. Such provisions were upheld as lawful in the case of *State vs. Perry,* 138 S.C. 329, 136 S.E. 314 (1927). After the first statewide licensing statute was enacted and until its amendment in 1959 to prohibit local licenses, many municipalities continued to require local residents to have local drivers licenses. Those local ordinances were again upheld as lawful, despite the existence of the state statute. *State vs. Mosely,* 174 S.C. 187, 177 S.E. 156 (1934)." 1979 S.C. Op. Atty. Gen. 216.

When the General Assembly decided it would not tolerate any further local government action on the subject of drivers licenses, it enacted S.C. Code Ann. § 56-1-20. That statute contains the following language: "Any person holding a currently valid motor vehicle driver's license issued under this article may exercise the privilege thereby granted upon all streets and highways in the State and shall not be

required to obtain any other license to exercise such privilege by any county, municipal or local board or body having authority to adopt local police regulations..." S.C. Code Ann. § 56-1-20.

The General Assembly could adopt a helmet statute similar to the driver's license statute that indicates it will not tolerate any local action on motorcycle helmets. To date the General Assembly has not enacted such a statute. The City contends that until the General Assembly acts, its authority to regulate motorcycle helmets to abate a public nuisance has not been preempted by general law.

Petitioners ask the Court to imagine the chaos if municipalities could change otherwise uniform traffic laws. The City contends that the Court does not need to engage in such speculation because since 1993 the Uniform Traffic Act has expressly permitted local governments to change otherwise uniform traffic laws. S.C. Code Ann. § 56-5-4210. That statute contains the following statement:

> Anything in this article to the contrary notwithstanding …
>
> ….
>
> And the Department of Transportation or such local authority may, by like notice, regulate or prohibit, in whole or in part, the operation of any specified class or size of motor vehicle, trailer or semitrailer on any highways or specified parts thereof under its jurisdiction, whenever in its judgment, such regulation or prohibition is necessary to provide for the public safety and convenience on such highways or parts thereof by reason of traffic density, intensive use thereof by the traveling public or other reasons of public safety and convenience. The notice or the substance thereof shall be posted at conspicuous places at terminals of and all intermediate cross-roads and road junctions with

> the section of highway to which such notice shall apply. After any such notice shall have been posted, the operation of any motor vehicle or combination contrary to its provisions shall constitute a violation of this chapter. *Id.*

In that statute shows the General Assembly acknowledges that special conditions caused by traffic density, intensive use thereof by the traveling public or other reasons of public safety and convenience may be grounds for special regulations of classes of vehicles which cause special problems. Some reasonable flexibility is needed to deal with the various conditions existing on South Carolina's roads. For example, signs showing changes in connection with limits on the number of wheels allowed on a vehicle, the size or the weight allowed for certain classes of vehicles on certain roads may be found throughout the State.

Traveling in a motor vehicle on the public highways of this state is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. *State v. Collins*, 253 S.C. 358, 170 S.E.2d 667 (1969); *Summersell v. South Carolina Dep't of Public Safety,* 334 S.C. 357, 366, 513 S.E.2d 619, 624 (Ct.App.1999), *vacated in part on other grounds*, 337 S.C. 19, 522 S.E.2d 144 (1999). The privilege may be revoked or suspended for any cause relating to public safety, but it cannot be revoked arbitrarily or capriciously. *Taylor v. South Carolina Dep't of Motor,* 368 S.C. 33, 36, 627 S.E.2d 751, 753 (Ct.App.2006) *cert. granted; Sponar v. South Carolina Dep't of Pub. Safety,* 361 S.C. 35, 39, 603 S.E.2d 412, 415 (Ct.App.2004).

> *(3) General law partially covers the subject but the adverse effect of a local ordinance on transient citizens of the state does not outweigh the possible municipal benefit.*

The City contends the Court's determination of the question of whether the transient citizens' burden of compliance outweighs the possible municipal benefit is the essence of the case before the Court. The City contends the answer to that essential question may be found in the actual experience the City has had with its helmet ordinance. The City's helmet ordinance has been in effect since February of 2009. As shown by the evidence stated above, the helmet ordinance appears to have had a dramatically beneficial effect on abating the public nuisance facing the City. [R.pp.136-181] Petitioners have not produced any evidence to refute the beneficial effects of the City's helmet ordinance. Further, Petitioners have not shown that the City's helmet ordinance has had an adverse effect on transient citizens. To the contrary, the City has shown that compliance with the ordinance has been not been difficult for transient citizens. In fact the record shows that compliance has been almost universal. [R. pp 156; 181] Although it is an old cliché, it retains its power because it is true: "The proof is in the pudding."

c) Implied conflict preemption.

For there to be a conflict between a state statute and a municipal ordinance 'both must contain either express or implied conditions which are inconsistent or irreconcilable with each other.... If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand. *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. at 553, 397 S.E.2d at 664 (quoting *McAbee v. Southern Rwy., Co.*, 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932).

Petitioners claim the conflict between state statute and the City's helmet ordinance on the subject of traffic is contained in the General Assembly's expressed

intent in the State's Uniform Act Regulating Traffic on Highways. *S.C. Code Ann. § 56-5-30* contains the following statement:

> The provisions of this chapter shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. ***Local authorities may, however, subject to the limitations prescribed in § 56-5-930, adopt additional traffic regulations which are not in conflict with the provisions of this chapter***. (emphasis added) *Id.*

Contrary to Petitioners' claim, the above statute expressly authorizes local authorities to enact ordinances that impact traffic regulations. The requirement of helmets for persons twenty one years or older is not in conflict with any statutes in the Uniform Traffic Act. As stated above, the General Assembly has not outlawed the wearing of motorcycle helmets for persons twenty one or older and it has not prohibited local governments from requiring helmets.

Petitioners claim that because the General Assembly enumerated certain powers for local authorities in the Uniform Traffic Act, local authorities have no authority over traffic except the authority expressly given in S.C. Code Ann. § 56-5-710. e.g. *See Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000) (the canon of construction "expressio *unius est exclusio alterius* " or " *inclusio unius est exclusio alterius* " holds that "to express or include one thing implies the exclusion of another, or of the alternative"). Petitioners are wrong because the General Assembly has expressed other alternatives in both the Home Rule statutes and in the State's Uniform Act Regulating Traffic on Highways. S.C. Code Ann. § 56-5-30. Also see *South Carolina State Ports Authority v. Jasper County* 368 S.C. 388, 629 S.E.2d 624 9 (S.C.,2006)*(*maxim expressio unius est exclusion alterius or "to express one thing

implies the exclusion of the other, or the alternative" does not apply to local government authority because it would revive Dillon's Rule, which has been overruled by Home Rule).

Whether an ordinance conflicts with the general laws is determined by whether the ordinance permits or licenses that which the statute prohibits and forbids, and vice versa. See 5 McQuillin Mun. Corp. § 15:18 (3rd ed.). The City's helmet ordinance does not criminalize behavior permitted by state statute. The ordinance provides for a civil infraction for persons who violate the City's helmet ordinance. *Ordinance 2008-64.* A civil infraction penalty is permitted even though the State does not criminalize the conduct. See F*oothills Brewing Concern, Inc. v. City of Greenville,* 377 S.C. 355, 660 S.E.2d 264 (2008). Under the City's helmet ordinance, the City's only penalty for violation of the helmet ordinance is civil infraction fine in the amount of one hundred dollars. See *Ordinance 2008-99, Code of Ordinances of the City of Myrtle Beach, South Carolina.*

Petitioners claim that by adopting a different standard for the performance of the motorcycle helmet, the City has improperly permitted helmets that have not been approved by the State. Petitioners do not have standing to complain about the City's motorcycle helmet standards because they were not wearing any helmets when they violated the helmet ordinance. [R. p. 101]; *State v. Barker* 138 N.C.App. 304, 531 S.E.2d 228 (See N.C.App., 2000). Even if Petitioners had standing to complain about the City's helmet standards, the State's standard only applies to persons under twenty one. Petitioners are all over twenty one.

On the issue of helmet standards, the City contends there is not a conflict between the City and the State on helmet standards. The difference between the standards is not the construction of the helmets but the test used to determine compliance. The test for motorcycle helmets contained in the City's ordinance is the same test required for all motorcycle helmets sold in the United States. O*rdinance 2008-64* [R. p 52] *Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. Sec. 571.218) (*requires all motorcycle helmets sold in the United States to pass the tests in FMVSS 218). [R. p. 706] The helmet construction test still on the books with the S.C. Department of Public Safety is a test that has been updated or replaced by the federal government and by other states. American National Standards Institute (ANSI) Standard #Z90.1-1966 is the Department of Public Safety's standard test required for motorcycle helmets for motorcycle riders under the age of twenty one. *South Carolina Administrative Code Reg. § 38-151.* That standard test was updated by ANSI by ANSI Standard #Z90.1-1992. South Carolina did not update its regulations. ANSI later dropped ANSI Standard #Z90.1 altogether. The current universal standard test required for testing all motorcycle helmets sold in the United States is the same one adopted by the City. See *Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. Sec. 571.218).* There is nothing in the record to show that the construction of a helmet passing the test under Standard #Z90.1-1966 is ultimately different from the construction a helmet under FMVSS 218. Petitioners cannot claim that South Carolina does not permit helmets passing the standard test required of all helmets sold in the United States. *49 C.F.R. Sec. 571.218.*

Petitioners may claim that any motorcycle helmet regulation is not a reasonable exercise of police power for the protection of the public's health, welfare, and safety. Petitioners may claim that helmet ordinances affect purely private matters because the only person harmed by one who chooses not to wear a motorcycle helmet is the motorcyclist. However, the reasonableness of helmet regulations has been tested many times in many different states. See *72 A.L.R.5th 607*. Courts have found that the lack of a helmet impacts the public interest because the lack of a helmet subjects a motorcyclist to numerous dangers that may cause him to lose control of his motorcycle and thus become a hazard to other motorists. E.g., *Ritter v. State* 258 Ga. 551, 372 S.E.2d 230 (Ga.,1988); *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972); *Bisenius v. Karns*, 42 Wis.2d 42, 165 N.W.2d 377, 379-384 (1969); *Love v. Bell*, 171 Colo. 27, 465 P.2d 118, 122 (7) (1970); *State v. Lombardi*, 104 R.I. 28, 241 A.2d 625, 627 (1968). Additionally, a "motorcyclist who endangers himself plainly imposes [economic] costs on others," *Tribe, American Constitutional Law*, § 15-12, p. 939 (1978), including but not limited to the costs of caring for cyclists who suffer severe injuries and become public charges, see *State v. Odegaard*, 165 N.W.2d 677, 679 (N.D.1969); *Love v. Bell*, supra, 465 P.2d at 121; *State v. Laitinen*, 77 Wash.2d 130, 459 P.2d 789, 791-792 (2-3) (1969); *Bisenius v. Karns*, supra, 165 N.W.2d at 379-384.

Petitioners claim the City's contentions that the ordinance was created to abate a public nuisance is a ruse designed to get around the limitations of the Uniform Traffic Act. The Court will have to make that determination based upon the Record it has before it. The burden of proving the invalidity of a municipal ordinance is on the

Petitioners, and it is incumbent on Petitioners to show the arbitrary and capricious character of the ordinance ruse through clear and convincing evidence. See *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965). The City contends the facts in the Record of this case clearly show the City had a unique problem with a public nuisance and the helmet ordinance was enacted along with several other ordinances to abate that public nuisance.

II. THE CITY'S MUNICIPAL COURT HAS SUBJECT MATTER JURISDICTION TO ENFORCE CIVIL INFRACTIONS.

At the outset, the City would like to point out that although it contends its municipal court has jurisdiction to enforce the City's helmet ordinance, the enforcement mechanism used in the present case is entirely separate from the City's helmet ordinance. Further, the ordinance does not depend upon a municipal enforcement mechanism for its validity. The City could invoke equitable remedies to enforce its helmet ordinance in Circuit Court. See *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000).(In order for a city to get an injunction for an ordinance violation, the city must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance). Petitioners may claim that equitable remedies are an unrealistic enforcement mechanism. However, since the City's intention is to abate a public nuisance and not to regulate traffic, equitable remedies in Circuit Court may be the enforcement mechanism of choice for chronic violators of the City's helmet ordinance.

a. The source of the municipal court's subject matter jurisdiction.

The City's Municipal Court is a duly constituted municipal court under the State's uniform judicial system pursuant to S.C. Code Ann. § 14-25-5. *City of Pickens v. Schmidt*, 376 S.E. 2d 271,297 S.C. 253 (1989). The City's municipal court has jurisdiction to try all cases arising under the ordinances of the City, except where otherwise provided by law. *§13.1(1)* Ordinances of the City of Myrtle Beach, South Carolina.

The City has adopted the use of a Uniform Ordinance Summons allowed by *S.C. Code Ann. § 56-7-80*. See *§ 13-14* Code of Ordinances of the City of Myrtle Beach, South Carolina. The ordinance summons may be used by the police and code enforcement officers of the city for enforcement of the City's ordinances. The only limitations are on ordinances that regulate the use of motor vehicles on the public roads of this State. S.C. Code Ann. § 56-7-80(b). Helmets and motorcycles are completely separate subjects. Helmets are not part of the equipment of motorcycles. S.C. Code Ann. § 56-5-120 - § 56-5-616 (equipment listings). Further, the City's helmet ordinance seeks to abate what had become a public nuisance. Abating public nuisances is different from regulating motor vehicles. Finally, if there is any doubt on whether the City's use of a Uniform Ordinance Summons in the present case is limited by S.C. Code Ann. § 56-7-80(b), the City contends that doubt should be resolved in the City's favor. All laws concerning local government shall be liberally construed in their favor. S.C. Const. art. VIII, § 17:

Petitioners who are charged by the City with civil infractions in the present case are charged under the Uniform Ordinance Summons. Originally, the City charged those Petitioners using civil infraction citations with a hearing scheduled in

an administrative court system. However, the City changed its charging documents to the Uniform Ordinance Summons with a hearing scheduled in municipal court. The City has served some but not all of the Petitioners with the Uniform Ordinance Summons. [R. pp. 659 – 705]. Since a charging document is now considered a notice document under modern jurisprudence, the City was permitted to serve Petitioners with a new charging document and thereby vest the municipal court with jurisdiction for the civil infractions. See *State v. Gentry* 363 S.C. 93, 610 S.E.2d 494 (S.C., 2005). Approximately one half of the Petitioners had been served with a Uniform Ordinance Summons when the infractions were called in the City's Municipal Court. [R. pp. 97-98].

b. The Municipal Court and civil matters.

Petitioners claim that municipal courts cannot assert subject matter jurisdiction over civil infraction of municipal ordinances because they claim the General Assembly took that power away when it created municipal courts. The powers of municipal courts are set forth in *S.C. Code Ann. § 14-25-45*:

> Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established. The court shall also have all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates. The court shall have the power to punish for contempt of court by imposition of sentences up to the limits imposed on municipal courts. The court shall have no jurisdiction in civil matters. *Id.*

Petitioners claim the isolated sentence "the court shall have no jurisdiction in civil matters" means that municipal courts may only try criminal matters. They claim municipal courts have no power over civil infractions of municipal ordinances because they would be classified as civil matters. Civil matters are not defined in the

statutory scheme for municipal courts. The City contends that enforcement of a City ordinance through a civil infraction penalty is not intended to be classified as a "civil matter" in South Carolina's municipal court system. The phrase as used in S.C. Code Ann. § 14-25-45 more properly refers to private actions between private parties.

The City contends the first statement in S.C. Code Ann. § 14-25-45 controls whether municipal courts may hear civil infractions for violations of municipal ordinances. That statement is: "Each municipal court shall have jurisdiction to try all cases arising under the ordinances of the municipality for which established." *Id.* Because municipalities have the power to enact ordinances that impose civil infraction penalties, municipal courts may try violations of ordinances arising as civil infractions. F*oothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008); *Beachfront Entertainment, Inc. v. Town of Sullivan's Island* 379 S.C. 602, 666 S.E.2d 912 (S.C.,2008) An important purpose for a municipal court is to provide a means by which a municipality may enforce its own ordinances. The whole statutory scheme is designed for that end. S.C. Code Ann. §§ 14-25-5, et. seq. Again, all laws concerning local government shall be liberally construed in their favor. S.C. Const. art. VIII, § 17

The City's contention is supported by the Uniform Ordinance Summons statute 1992 Act No. 328, § 1 (S.C. Code Ann. § 56-7-80). That statute contains the following:

> A) Counties and municipalities are authorized to adopt by ordinance and use an ordinance summons as provided herein for the enforcement of county and municipal ordinances. Upon adoption of the ordinance summons, any county or municipal law enforcement officer or code enforcement officer is authorized to use an ordinance summons.

….

> D) Service of a uniform ordinance summons vests all magistrates' and municipal courts with jurisdiction to hear and dispose of the charge for which the ordinance summons was issued and served. …. *Id.*

The primary rule of statutory construction is to ascertain and effectuate the intent of the General Assembly. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In construing statutory language, the statute 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. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998). A statute should not be construed by concentrating on an isolated phrase. *South Carolina State Ports Authority v. Jasper County* 368 S.C. 388, 629 S.E.2d 624 (S.C.,2006). The Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something. F*oothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 660 S.E.2d 264 (2008). The General Assembly intended to vest municiapl courts with the power to hear civil infractions of municipal ordinances when it enacted S.C. Code § 56-7-80. If Petitioners' interpretation of "civil matters" prevailed, the creation of a Uniform Ordinance Summons for vesting jurisdiction in a muncipal court would be a futile act. *Id.*

III. FOR PURPOSES OF THE PRESENT DECLARATORY JUDGMENT ACTION THE CITY CAN CHANGE ITS ENFORCEMENT MECHANISM FOR ITS HELMET ORDINANCE AT ANY TIME.

Petitioners claim that the City's enforcement mechanism for the helmet ordinance is unconstitutional and the whole ordinance is defective as a result. The

City contends the helmet ordinance's enforcement mechanism is constitutional as shown in Argument II above. However, even if the Court were to discover a technical flaw in the City's choice of enforcement of the helmet ordinance against Petitioners in the present case, the test for whether the flaw could be severed from the ordinance is different from the test suggested by Petitioners.

Petitioners cite the case of *Am. Petroleum Inst. v S.C. Dept. of Revenue* 382 S.C. 572, 677 SE 2d 16 (SC 2009) as the test for severability. That case is inapposite to the facts in the present case. In *Am. Petroleum Inst.*, supra., the Court addressed the remedy of severability when the Court found that an enactment of the General Assembly violated the one subject rule. In such cases, the Court found that the entire Act was violative of Article III, § 17 of the S.C. Constitution. The City's helmet ordinance has nothing to do with the one subject rule which applies only to statutes enacted by the General Assembly. S.C. Const. art. III, § 17.

Severability of a local ordinance is a question of state law. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (finding that severability of a local ordinance is a question of state law). In South Carolina, "[t]he test for severability of a municipal ordinance is whether the constitutional portion of the ordinance remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislative body would have passed it independent of that which conflicts with the constitution." *Joytime Distributors and Amusement Co., Inc. v. State* 338 S.C. 634, 648, 528 S.E.2d 647, 654 (1999). When the residue of an ordinance, sans that portion found to be unconstitutional, is capable of being executed in accordance with the

legislative intent, independent of the rejected portion, the ordinance as a whole should not be stricken as being in violation of the State Constitution. *Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959).

The essential question is one of the City's legislative intent. *Id.* In other words, would the City have enacted the helmet ordinance if the enforcement mechanism were through a magistrate's court or the circuit court? *Id.* The indisputable answer is yes.

The best evidence of the City's legislative intent is the text of the ordinance. *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002) The City's primary legislative purposes as stated in its helmet ordinance are public health, safety and welfare. *§ 14-227*, Ordinance 2008 – 64 Code of Ordinances of the City of Myrtle Beach, South Carolina. The City's helmet ordinance does not contain any provisions that require enforcement of the helmet ordinance in municipal court or the repealed City administrative court. See *Ordinances 2008-64, 2009 – 25.* Code of Ordinances of the City of Myrtle Beach, South Carolina. The City's helmet ordinance only states that violation of the helmet ordinance is an administrative infraction and the fine for such violation is $100. See *Ordinance 2009-99*, Code of Ordinances of the City of Myrtle Beach, South Carolina.

The use of the Uniform Ordinance Summons and municipal court to enforce the City's helmet ordinance is not required by the City's helmet ordinance. The fact that the City prosecutors chose to use that particular enforcement mechanism to prosecute Petitioners in municipal court in the present case does not affect the validity of the helmet ordinance. The City prosecutors could have prosecuted the

Petitioners for an administrative infraction of the helmet ordinance through the use of a Uniform Ordinance Summons in magistrate's court. S.C. Code Ann. § 56-7-80. They could have sought enforcement through equitable remedies in Circuit Court. See *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000).

Any claims that the City's repealed administrative court ordinance affected the constitutionality of the City's helmet ordinance were rendered moot when the City repealed the administrative court ordinance in Ordinance 2009-99 Code of Ordinances of City of Myrtle Beach, South Carolina. See *Peterson Outdoor Advertising Corp. v. Beaufort County*, 291 S.C. 533, 354 S.E.2d 563 (1987) (repeal or amendment of zoning ordinance during appeal renders the appeal moot); *Georgia Outdoor Advertising, Inc. v. City of Waynesville* 833 F.2d 43, 46 (4th Cir. 1987).

CONCLUSION

Respondents respectfully request that its motorcycle helmet ordinance be upheld and Petitioners' declaratory judgment action be dismissed.

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Counsel for Respodent City of Myrtle Beach hereby certifies that the Brief of Defendant complies with Rule 211(b) of the South Carolina Appellate Rules.

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