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Aug 24 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

Appeal from the  
ADMINISTRATIVE LAW COURT  
The Honorable Shirley C. Robinson

Appellate Case No. 2020-000837  
Case No. 19-ALJ-17-0001-CC

Eighteen Ink, LLC, d/b/a Group Therapy.....Respondent,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall, April C. Lucas, Michael Drennan.....Intervenors, Appellants.

**PETITION FOR REHEARING**

The Court is incorrect that this matter is moot because otherwise the pendency of a matter like this one on appeal for more than three years will *always* render an alcohol beverage licensing (ABL) dispute over a two-year license “moot” and the Administrative Law Court’s (ALC’s) decision unreviewable. That is the quintessential definition of capable of repetition while evading review. The Court should grant rehearing and issue a new opinion vacating the ALC’s Final Order for the reasons argued in Intervenors, Appellants’ brief.

The Final Order abuses broad discretion. The ALC ignored uncontradicted evidence from law enforcement witnesses about alcohol-related harms like violence and public disorder and contorted the record with demonstrably false and misleading factual findings. See Intervenor’s Br.

28–34. This is one of those exceptionally rare cases where the proverbial trial testimony shows the traffic light was “red” but the court found it was “green.” The ALC then used its fictive view of the record to reach flawed legal conclusions, specifically when applying the “suitability doctrine” courts routinely apply in ABL disputes to discern whether a permit or license will have an adverse impact on the community. See Intervenor’s Br. 34–37. Precedent applying that doctrine has always considered facts on the ground—not the applicant’s bad conduct. (Bad conduct by the applicant is a separate basis for rejecting a permit or license and there was ample evidence of that too.) Instead, the ALC gave *no weight* to the mountain of uncontradicted evidence (including admissions from the bar owner) concerning alcohol-related violence and chaos flowing from the bar and in its vicinity, while crediting speculative and irrelevant facts that have no bearing on suitability. See id. at 36–37. Finally, the ALC avoided an alternative ground for denying the permit and license—i.e., constitutional eligibility—by excluding all the evidence Intervenor’s offered to advance that argument. This denied Intervenor’s their right under South Carolina Code § 61-6-1825(A)(3) to raise “reasons” the application should be denied without ever confronting the substantive issue. See Intervenor’s Br. 38–48. In short, the Final Order is an abuse of discretion *and* legally flawed.

Intervenors are not asking the Court to take any adverse action toward Group Therapy. The Dismissal Order is correct that after the Final Order was issued, South Carolina Department of Revenue (DOR) issued Group Therapy two-year licenses for 2020–2022 and 2022–2024. The Court is also correct that, after a public protest and initial denial, DOR and Group Therapy negotiated a settlement that resulted in public protests being withdrawn and the license and permit being renewed subject to restrictions and conditions, which the ALC granted. Intervenors *support and applaud* that agreement as it is designed to address the very concerns raised in this case. Again, Intervenors are not asking the Court to take Group Therapy’s permit and license; indeed, the

procedural vehicle to do that is a public protest and contested case hearing on the current license and no such protest or case has been filed.

However, the Court should grant rehearing and withdraw the Dismissal Order because the conclusion “[b]ecause the 2018–2020 permit and license at issue in this appeal are no longer in effect, we find this appeal is now moot and does not meet any of the exceptions to the mootness doctrine[,]”<sup>1</sup> effectively eliminates *any* appellate review of an ALC’s grant of a two-year ABL license. Consider the record in this case.

On July 17, 2018, Group Therapy filed its renewal application. R. App. 1. On December 4, 2018, DOR denied the applications based on public protests. R. App. 1.3 On January 2, 2019, Group Therapy requested a contested case hearing. R. App. 1. On February 4, 2019, Intervenors were allowed to intervene. R. App. 2. On September 27, 2019, the Columbia Police Department Chief was added as a protestant. R. App. 2. On December 9, 2019, DOR amended its prehearing statement to inform the ALC it no longer considered Group Therapy suitable due to a recent criminal citation. R. App. 2. On December 19, 2019, the University of South Carolina (UofSC) was added as a protestant. R. App. 2. The ALC held a contested case hearing on February 11–12, 2020. On April 29, 2020, the ALC issued the Final Order (R. App. 1–18), with almost the entirety of the 2018–2020 permit and license period having expired during the pendency of the ALC case.

An appeal was noticed on May 26, 2020. All final briefs were submitted by April 12, 2021—already outside the 2018–2020 period, but still *before* the September 21, 2021, issuance of the 2020–2022 permit and license that was the product of a consent agreement between the parties. For more than two years, this appeal was fully briefed. During that time, the 2020–2022 permit and license took effect. Beginning November 8, 2021, numerous rounds of correspondence sought

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<sup>1</sup> Dismissal Order, 3.

oral argument conflict dates, scheduled oral argument, and rescheduled oral argument until argument was finally set by correspondence dated May 2, 2023. On May 15, 2023, Group Therapy moved to supplement the record with notice of the subsequent licenses, prompting the Court to cancel oral argument on May 30, 2023, and issue the Dismissal Order on August 9, 2023.

This case presents a classic example of a dispute capable of repetition yet evading review, *see, e.g., Byrd v. Irmo High School*, 321 S.C. 426, 431–32, 468 S.E.2d 861, 864 (1996), because the time that passes during the pendency of the matter in the ALC and this Court guarantees an ABL dispute over a two-year permit or license will *never* receive appellate review before it is deemed moot under the Dismissal Order’s rationale. Precedent holds that this exception “is most applicable in situations where the prejudice suffered by the complaining party is temporary and has ended by the time of appellate review.” *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480–81, 860 S.E.2d 352, 356 (2021) (citing *Byrd*). For example, in *Byrd*, short-term student suspensions were held to evade review because they are, “by their very nature, completed long before an appellate court can review the issues they implicate.” 321 S.C. at 432, 468 S.E.2d at 864. So too here. Moreover, litigation delay has nothing to do with whether an appeal is moot so long as a court still has power to grant the relief an appellant seeks. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 428 S.C. 638, 643, 837 S.E.2d 485, 487 (2020) (reversing mootness dismissal predicated on three-year delay).

The Final Order below is a gross injustice and misapplication of fact and law which, if left in place, will serve as precedent for future undeserving ABL applicants who sow precisely the sort of alcohol-related harms in a community that the statutory public protest regime is designed to prevent. This Court can and should grant relief in the form of an order vacating that decision. Doing so *in no way* affects Group Therapy’s current ABL permit and license, and it preserves

future appellants—whether they be public protestants, DOR, or bar owners—ability to come to this Court for the correction of errors.

Under Rule 221(a), SCACR, the petition for rehearing should be granted.

Respectfully submitted,

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AND DRENNAN

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Columbia, South Carolina.

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**PROOF OF SERVICE**

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I certify that on August 24, 2023, I served Intervenors, Appellants’ Petition for Rehearing on Respondent Eighteen Ink, LLC, d/b/a Group Therapy by emailing it to its attorneys of record, John R. Alphin (jalphin@stromlaw.com), Bakari T. Sellers (bsellers@stromlaw.com), Matthew B. Robins (mrobins@stromlaw.com), and Whitney B. Harrison (wharrison@mcgowanhood.com), and on Respondent South Carolina Department of Revenue by emailing it to its attorneys of record, Patrick McCabe (Patrick.McCabe@dor.sc.gov) and Jason Luther (Jason.Luther@dor.sc.gov).

Respectfully submitted,

s/Christopher P. Kenney  
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The Honorable Jenny Abbott Kitchings  
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In re: Eighteen Ink, LLC, d/b/a Group Therapy v. S.C. Dep't Rev.,  
Appellate Case No. 2020-000837

Dear Ms. Kitchings:

Enclosed please find Intervenors, Appellants' petition for rehearing and proof of service for filing. Please file the documents and return clocked copies to me.

Thank you in advance for your assistance.

With warm regards, I am

Sincerely,

  
Christopher P. Kenney

CPK:  
Enclosure  
cc: Counsel of Record (email only)