

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

RECEIVED

MAR 27 2015

SC Court of Appeals

Show Luv, LLC, d/b/a Mr. Lucky's, )  
)  
Petitioner, )  
)  
v. )  
)  
South Carolina Department of Revenue, )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket No. 14-ALJ-17-6870-00

**ORDER ON MOTION FOR  
RECONSIDERATION AND/OR  
MOTION FOR RELIEF FROM  
JUDGMENT OR ORDER FOR  
SUPERSEDEAS AND FOR STAY OF  
PROCEEDINGS**

This matter is before the South Carolina Administrative Law Court (Court or ALC) upon a motion filed by Show Luv, Inc., d/b/a Mr. Lucky's (Petitioner) seeking the Court to reconsider its February 27, 2015 order (Order) denying Petitioner's application for renewal of its on-premises beer-and-wine permit and liquor-by-the-drink license for Mr. Lucky's, located at 2605 Seminole Road, Columbia, South Carolina 29210, or in the alternative, to stay the Court's Order, or in the alternative, to grant supersedeas pursuant to Rule 241 of the South Carolina Appellate Court Rules (SCACR).<sup>1</sup>

I will address the allegations of error contained in Petitioner's Motion and do so in the order in which Petitioner made them.

**DISCUSSION**

Petitioner moves under Rule 59(e) of the South Carolina Rules of Civil Procedure (SCRCP) and Rule 68 of the Rules of Procedure for the Administrative Law Court (ALC Rules) to reconsider and amend the Order entered February 20, 2015. See ALC Rule 29(D) ("Any party may move for reconsideration of a final decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP."). The Court notes that a party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) ; *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct.App.2008) ("[A] party cannot use a motion to reconsider, alter

<sup>1</sup> Though Petitioner filed one document, the Court will treat the document as three separate motions – one for reconsideration, one for a stay of the proceedings, and one for supersedeas.

**FILED**

March 19, 2015

SC ADMIN. LAW COURT

down there a whole lot” these days, attested to the fact that the music at the location was very loud, leading her to get them to turn down the music – again, the few times she is present. But the evidence also established that even after law enforcement told Respondent to turn the music down, it only remained down for about a week before blaring again. Further, Petitioner was even agreeable to reduce the noise as a condition of renewal, conceding that “the noise problem’s gotta be solved.” However, the Court has already addressed the incredulity of her assurances that noise will not only be reduced but will remain reduced. Therefore, the Court still finds that renewal of Petitioner’s beer and wine permit and liquor-by-the-drink license should not be allowed due to the noise problem and the burden placed on law enforcement as a result of the inordinately high number of calls to the establishment,

### **Reliance on Insufficient Evidence**

Petitioner argues that the evidence presented by the Department’s witness and the Protestants<sup>2</sup> was insufficient to deny renewal of Petitioner’s beer and wine permit and liquor-by-the-drink license. Specifically, as to the finding that 110 dispatch calls placed an undue burden on law enforcement, Petitioner argues that there was no evidence as to who made these calls and how many calls actually resulted in arrests. Petitioner also argues that there was no evidence as to the number of calls made by police to surrounding businesses and how these compared to Petitioner’s business. First, who made the phone calls to law enforcement and how many of those calls resulted in arrests has no bearing on the fact that activities were occurring at the location that gave rise to the calls being made in the first place. Also, regardless of whether arrests were made, law enforcement still had to direct its resources to Petitioner’s business by sending officers to the location 110 times in a single year.

Moreover, as the fact finder in this case, the Court is entitled to determine the credibility of the witnesses, and to weigh direct evidence and any inferences to be drawn from testimony that is circumstantial. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997) (noting that it is for the finder of fact to weigh the evidence, determine the credibility of witnesses, and determine what parts of a witness’s testimony it wishes to believe); *State v. Needs*, 333 S.C. 134, 156 n.13, 508 S.E.2d 857, 868 n.13 (1998) (“The law makes absolutely no distinction between the weight or value to be given to either direct or

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<sup>2</sup> Petitioner refers to “interveners and their witnesses.” However, there were no “interveners” in this case, only a witness for Respondent and Protestants.

changes to remedy the noise problem if the Court were to make it a condition of renewal. Therefore, I find that the testimony of the Department's witness, the Protestants and even Petitioner's owner, to be sufficient to establish that the Petitioner posed a nuisance, both in terms of its burden on law enforcement and in the intolerable noise it created for surrounding area, which demonstrates that Petitioner does not have a reputation for peace and good order in its community and should therefore not have its beer and wine permit and liquor-by-the-drink license renewed.

### **Vested Interest under South Carolina Law**

Petitioner avers that it has held an off-premises beer-and-wine permit and liquor-by-the-drink license for approximately thirteen years, and it has incurred expenses and obligations in reliance on the past "proper and non arbitrary renewal of its licenses pursuant to the factors as set forth by South Carolina law and in reliance of these factors (and law) being properly applied." Petitioner then asserts that this Court applied an arbitrary and capricious standard "tantamount to depriving the Petitioner of his vested property right without cause."

First, a beer and wine permit or a liquor-by-the-drink license, unlike a zoning or building permit cited in *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970), is not a contract or a property right. The "vested right" at issue in *Pure Oil* was intended to protect land owners from changes in land use laws. See S.C. Code Ann. §§ 6-29-1520(10), -1530 (Supp. 2014). A beer and wine permit or liquor-by-the-drink license, on the other hand, is a privilege "issued or granted in the exercise of the police power of the state to do what otherwise would be unlawful to do . . . ." *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, - -, 26 S.E.2d 22, 25 (1943). Nevertheless, even if Petitioner has a property right in a beer and wine permit and liquor-by-the-drink license, such a right would not vest unless and until Petitioner satisfied the legal requirements entitling an applicant to that permit and license. This Court has found that Petitioner has failed to meet the qualifications to renew its beer-and-wine permit and liquor-by-the-drink license, because its establishment has had an increasingly adverse effect on the community and has increasingly imposed an undue burden on law enforcement. The Court is unable to address the vague charge of "applying an arbitrary and capricious standard not in accordance to the well established South Carolina law regarding license renewal" without citation to specific examples from the Court's opinion as to how it was arbitrary and capricious. The Court must therefore rest with its Decision as written.

or why [it] applies” insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal).<sup>5</sup>

### Stay Pending Appeal or Supersedeas

In the alternative, Petitioner moves the Court to either issue a stay pending appeal or to grant supersedeas in this matter pursuant to Rule 241, SCACR. First, as to the stay pending appeal, ALC Rule 29(E) states, “At any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, the administrative law judge may stay the final order upon appropriate terms.” The statutory authority for this Court issuing a stay is found at S.C. Code Ann. § 1-23-380(A)(2) (Supp. 2014), which provides, “The agency may grant, or reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.” In order to meet the requirements of Rule 65, SCRCR, a party must demonstrate that “(1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 508 (Ct. App. 2009). Petitioner fails to establish these elements.

In this case, the only element Petitioner attempts to address is the requirement of irreparable harm. However, a mere statement that “[t]he Court’s Order has the **potential** impact of closing the Petitioner’s business and bringing Petitioner to financial ruin” (emphasis added) is insufficient to demonstrate that Petitioner **would** suffer irreparable harm as required by Rule 65, SCRCR. Moreover, the Court has denied renewal of the beer and wine permit and liquor-by-the-drink license at Petitioner’s location because it has concluded that Petitioner’s location has become less suitable since its last renewal due to being a constant burden on law enforcement and becoming a detriment to the surrounding community. Therefore, for these very reasons, which are discussed above and elaborated on in the Order, the Court will not stay its Order. Therefore, Petitioner’s Motion for a Stay is denied.

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<sup>5</sup> Moreover, to the extent that Petitioner alleges a substantive due process violation, even had this argument been raised at the hearing and been properly analyzed in Petitioner’s Motion, Petitioner would have been required to “show that [it] was arbitrarily and capriciously deprived of a **cognizable property interest rooted in state law.**” *Worsley Cos., Inc. v. Town of Mt. Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) (citing *Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir. 1983)) (emphasis added). However, as discussed *supra*, Petitioner had no property interest in its beer-and-wine permit and liquor-by-the-drink license.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

*E. Harvin Belser Fair*

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E. Harvin Belser Fair  
Judicial Law Clerk

March 19, 2015  
Columbia, South Carolina



Sandra Simpkins (Simpkins) is the owner of Mr. Lucky's and has owned Mr. Lucky's since 2002.

Petitioner also has not had a permit or license revoked within the last two (2) years, and notice of the application was lawfully posted both at the location and in a newspaper of general circulation. Although the location is close to a church, the location has been permitted for the sale of beer and wine since 2002. In fact, the undisputed evidence is that the building has been at the site since 1988 and was a poker parlor in the 1990s.

### **Suitability**

Petitioner's business has been a source of criminal activity and noise complaints over the last two years. In 2014, the Richland County Sheriff's Department had 110 dispatch calls to Mr. Lucky's. The dispatch calls ranged from complaints of loud music to shootings and disturbances. As a result, this location has become an undue burden on law enforcement. Furthermore, Petitioner's business has been a constant source of excessive noise during the late night hours. Residents who live near the business are often awakened by the loud music coming from Mr. Lucky's. In fact, even Residents who live several blocks from Mr. Lucky's are disturbed by the music coming from the business. Even Simpkins noted that on occasion, when she was at Mr. Lucky's, she asked that the music be turned down because it was too loud. Additionally, the patrons of the business also create excessive noise as late as 3:00 or 4:00 a.m.

Simpkins asserts that she will abate these noise problems. Specifically, Simpkins noted that should the Court grant renewal of the license and permit, she planned to relocate the front door to reduce noise from the business into the adjacent neighborhood. However, the evidence did not establish that relocating the door would solve the noise problems. Indeed, Simpkins is not consistently at the location during the late evening hours to monitor the noise emanating from her business. If there are problems at the location, Simpkins testified that she gets up and goes to the business to deal with those issues. Moreover, her assertion that the excessive noise will be eliminated is not supported by her previous actions. The Richland County Sheriff's Department visited the location at least twice due to complaints about loud music, but the business only reduced the music noise for one week.

For the above reasons, I find that the Petitioner's business poses an undue burden on law enforcement and is a detriment to the surrounding community.

## **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, I conclude the following as a matter of law:

### **General Conclusions**

S.C. Code Ann. § 1-23-600 (Supp. 2010) grants jurisdiction to the ALC to hear contested cases under the Administrative Procedures Act. Furthermore, S.C. Code Ann. § 61-2-260 (2009) grants the Court the responsibility to determine contested matters governing alcoholic beverages, beer, and wine. *See also Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984) (“[T]he issuance or granting of a license to sell beer or alcoholic beverages rests in the sound discretion of the body or official to whom the duty of issuing it is committed. . .”).

Petitioner seeks renewal of both an on-premises beer and wine permit and liquor-by-the-drink license. Those permits and licenses have common and distinct criteria. Generally, neither a license for the sale and consumption of alcoholic beverages nor a beer and wine permit is a contract or a property right. It is, rather, a privilege granted in the exercise of the State’s police power “to do what otherwise would be unlawful to do. . .” *Feldman v. S.C. Tax Comm’n*, 203 S.C. 49, 26 S.E.2d 22, 25 (1943). Furthermore, no license or permit may be issued unless the applicant is the owner of the business seeking the permit or license and “the person and all principals are of good moral character.” S.C. Code Ann. § 61-2-100 (2009).

### **Suitability of the Location**

#### **Beer and Wine Permits**

S.C. Code Ann. § 61-4-520 (2009) sets forth the specific requirements for the issuance of a beer and wine permit. Section 61-4-520(1) requires that “[t]he applicant, a partner, or co-shareholder of the applicant, and each agent, employee, and servant of the applicant to be employed on the licensed premises are of good moral character.” Section 61-4-520(5) further requires that the location of the proposed place of business be a “proper one.” In making that determination, the Department, and thus the ALC, “may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches.”<sup>1</sup> *Id.* § 61-4-520(6).

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<sup>1</sup> Unlike with a liquor-by-the-drink license, the precise distance that the proposed location must be from the aforementioned places is not set forth for a beer and wine permit.

The determination of a "proper" location is not necessarily a function solely of geography. *Palmer*, 282 S.C. at 249, 317 S.E.2d at 478. Rather, in making that determination, the ALC "may consider any evidence adverse to the location." *Kearney v. Allen*, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985). The determination involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community within which it is to be located. *Id.* at 327; 338 S.E.2d at 337. Also relevant to the determination is whether the proposed location has been previously approved for a permit or license. See *Smith v. Pratt*, 258 S.C. 504, 508, 189 S.E.2d 301, 302 (1972); *Taylor v. Lewis*, 261 S.C. 168, 171-72, 198 S.E.2d 801, 802 (1973).

In addition to the factors set forth above, in determining the suitability of a location, it is relevant to consider whether the location will be a burden to law enforcement. See *Palmer*, 282 S.C. at 250, 317 S.E.2d at 478 ("The findings . . . that there have been law enforcement problems in the area, support the conclusion that the location is unsuitable for the sale of cold beer and wine."). It is also relevant to consider whether the location will be a nuisance to the community. Moreover, S.C. Code Ann. § 61-4-580(5) (2009) prohibits a permittee from knowingly allowing any act "which tends to create a public nuisance" on the licensed premises.

A nuisance is a substantial and unreasonable interference with the use and enjoyment of one's property. *O'Cain v. O'Cain*, 322 S.C. 551, 562, 473 S.E.2d 460, 466 (Ct. App. 1996). "It is anything which hurts, inconveniences, or damages; anything which essentially interferes with the enjoyment of life or property." *Id.* To constitute a public nuisance, a nuisance must be in a public place or where the public frequently congregates, or where members of the public are likely to come within the range of its influence. *Neal v. Darby*, 282 S.C. 277, 286, 318 S.E.2d 18, 23 (Ct. App. 1984). "The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing or activity itself." *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (Ct. App. 1989). In other words, "[a] nuisance is public because of the danger to the public which might have been created." *Id.* However, it is not based on "the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights, the fact that it is in a public place and annoying to all who come within its sphere." *Belton v. Wateree Power Co.*, 123 S.C. 291, 115 S.E. 587, 590 (1922). Furthermore, whether an act(s) constitutes a nuisance depends upon the facts of the

case and “no definite rule can be laid down for the determination of the question.” *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 160, 130 S.E.2d 363, 367 (1963).

#### Liquor-by-the-Drink Licenses

The Alcoholic Beverage Control Act regulates the licensing to sell alcoholic liquors by the drink. S.C. Code Ann. §§ 61-6-10 et. seq. (2009). The Act establishes that renewal of a license to sell alcoholic liquors by the drink must not be granted unless the provisions of S.C. Code Ann. § 61-6-1820 (2009) are met. Though Section 61-6-1820 does not set forth whether the suitability of a proposed location may in general be considered in determining whether an applicant should be issued a license, the South Carolina Supreme Court held in *Schudel v. S.C. Alcoholic Beverage Control Comm’n*, 276 S.C. 138, 276 S.E.2d 308 (1981), under a similar statutory provision, that such consideration was proper. In fact, in *Kearney*, the Supreme Court, in determining the suitability of a location for a minibottle license and a beer and wine permit, specifically set forth that the factfinder “may consider any evidence adverse to the location” without any distinction to the type of permit or license. *Kearney*, 287 S.C. at 326, 338 S.E.2d at 337. Moreover, S.C. Code Ann. § 61-6-1820 (2009) requires that an applicant for a nonprofit liquor-by-the-drink license must have a “reputation for peace and good order in its community.” Accordingly, the broad examination set forth above for beer and wine permits is appropriate in determining the issuance of a license to sell alcoholic liquors by the drink.

#### Conclusion

Because the evidence shows that Petitioner is an undue burden on law enforcement and a does not have a reputation for peace and good order, I find that Petitioner’s applications for a beer and wine permit and liquor-by-the-drink license should be denied. Furthermore, the analysis of the suitability of Petitioner’s location applies equally to both the proposed liquor license and the beer-and-wine permit. Here, the proposed location has historically proved to be problematic to law enforcement. Moreover, the location has been a nuisance for the neighborhood. Accordingly, the proposed location is unsuitable for either a liquor license or a beer-and-wine permit.

#### **Proximity to a Church**

Protestant Larry Umberger asserted that the Petitioner’s business is within five hundred feet of his church in violation of S.C. Code Ann. § 61-6-120 (2009). Section 61-6-120 sets forth that the department “shall not grant or issue any license” for the sale of alcoholic liquors “if the

place of business is . . . within five hundred feet of any church, school, or playground situated outside of a municipality. However, Section 61-6-120(A) also specifically provides that the above restriction "do[es] not apply to the renewal of licenses." Therefore, Section 61-6-120 is inapplicable to this case.<sup>2</sup>

**ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

**ORDERED** that Petitioner's application for an on-premise beer-and-wine permit and liquor-by-the-drink license be **DENIED**.

**AND IT IS SO ORDERED.**



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Ralph King Anderson, III  
Chief Administrative Law Judge

February 27, 2015  
Columbia, South Carolina

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<sup>2</sup> Even if I were to consider this issue, it does not appear that Mr. Umberger's measurements complied with 1 S.C. Code Ann. Regs. 7-303 (2011).