

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

SC Court of Appeals

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2015-000733

Kan Enterprises, Inc., d/b/a A1 Food Stores.....Appellant,

v.

South Carolina Department of Revenue, Ellen Fishburne Triplett,
Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill,.....Respondents.

**THE CITY OF COLUMBIA'S
AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENTS**



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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

ARGUMENT:

I. Did The Administrative Law Court Err In Finding That Kan’s Store Poses An Undue Burden On Law Enforcement And A Detriment To The Surrounding Community And Therefore, The Renewal Of The Permit Should Be Denied?.....5

CONCLUSION.....X

TABLE OF AUTHORITIES

CASES:

Carroll v. Gaddy,
295 S.C. 426, 368 S.E.2d 909 (1988).....5

Clark v. Aiken County Gov't,
366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005).....5

Olson v. S.C. Dep't of Health & Envtl. Control,
379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008).....5

Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles,
380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008).....5

S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.,
308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).....5

Turner v. S.C. Dep't of Health & Envtl. Control,
377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008).....5

Wallace v. Miliken & Co.,
300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).....5

Woodall v. Woodall,
322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).....5

STATUTES:

S.C. Code Ann. § 61-6-525 (Supp. 2014).....2

S.C. Code Ann. Regs. 7-201 (Supp. 2011).....2

ISSUES ON APPEAL

- I. Did the Administrative Law Court Err In Finding That Kan's Store Poses An Undue Burden On Law Enforcement And Is A Detriment To The Surrounding Community And Therefore, The Renewal Of The Permit Should Be Denied?**

STATEMENT OF THE CASE

This appeal arises from an order of the South Carolina Administrative Law Court (“ALC”) denying the renewal of the seven-day off premises beer and wine permit (the “Permit”) of the Appellant, Kan Enterprises, Inc., d/b/a A1 Food Stores (“Kan”), located at 4101 Monticello Road, Columbia, South Carolina. The Appellant is headquartered in Atlanta, Georgia and is owned 100% by Hadiya Ahibhai. Mr. Vinoo Sehgal is a principal of Kan and is the store’s day-to-day manager (R., p. ___; Amended Final Order, pg. 2).

On July 31, 2014, Kan submitted an application to renew the Permit (R., p. ___; Department Determination, pg. 1). Subsequently, the Department received valid public protests (collectively, the “Written Protests”) from Michael Hill on behalf of the Hyatt Park/Keenan Terrace Neighborhood Association on June 4, 2014; Samuel L. Munson, Keith McIver and Ellen Fishburne Triplett on June 30, 2014; Jocelyn Tucker Munson on July 2, 2014; and Barry Shirley on July 25, 2014 (collectively, the “Protestants”) (R., pp. ___; Department Determination, pg. 1, 3).

Other than the timely filed Written Protests submitted by the Protestants, the Department determined that Kan met all other statutory requirements for licensure and would have granted the renewal of the Permit (R., p. ___; Amended Final Order, pg. 2). As a result of the timely filed Written Protests, the Department denied the renewal of the Permit pursuant to a denial letter dated August 22, 2014 (R., pp. ___; Department’s Denial Letter, Exhibit 1). Kan timely protested the denial of the Permit via letter received by the Department on November 19, 2014 (R., pp. ___; Kan’s Protest Letter, Exhibit 1).

Kan commenced an action in the ALC by requesting a contested case hearing in December of 2014, seeking relief from the South Carolina Department of Revenue’s (the

“Department”) Determination issued on December 11, 2014 (the “Determination”). Due to timely filed public protests, the Department denied Kan’s application for the renewal of the Permit pursuant to S.C. Code Ann. § 61-6-525 and S.C. Code Ann. Regs. 7-201 (Supp. 2011) (R., p. ___; Department Determination, pg. 3). These statutes allow the public to submit written protests to the Department against the issuance of an off premises beer and wine permit. Accordingly, based on the receipt of the written protests, the Department could not lawfully issue the Permit pursuant to the mandates set forth in § 61-6-525 (R., p. ___; Department Determination, pg. 3).

Prior to the hearing, the Protestants moved to intervene in the case (R., pp. ___; Respondent’s Motion to Intervene). On February 3, 2015, the ALC granted Protestant’s Motion to Intervene in the action (R., pp. ___; ALC’s Order Granting Intervention). On February 10, 2015, the ALC held a contested case hearing on the matter. The ALC issued a Final Order on the matter on February 20, 2015 (the “Final Order”), finding that Kan’s store poses an undue burden on law enforcement and is a detriment to the surrounding community and therefore, the renewal of the Permit should be denied.

Appellant moved to stay the Final Order, for Supersedeas and to alter or amend the Final Order on February 27, 2015. In its motion, Appellant claimed that: (i) the ALC applied the incorrect standard, (ii) ALC’s Final Order relied on unsubstantiated opinion evidence, (iii) the ALC’s Amended Final Order impermissibly deprives the Appellant of a vested interest under South Carolina law, (iv) the ALC’s Amended Final Order violates the Appellant’s Constitutional Rights, and (v) the ALC’s Final Order violates the Appellant’s Equal Protection Rights (R., pp. ___; Appellant’s Memo in Support of Appellant’s Motion for Reconsideration, for a Stay and for Supersedeas, pgs. 2-8). On

March 14, 2015, Respondents Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill moved to reconsider the Final Order, arguing, in pertinent part, that: (i) the ALC properly applied the law as it relates to Permit renewal, (ii) the ALC's final Order was supported by sufficient evidence, (iii) the Appellant was not deprived of a vested right as it relates to the denial of the Permit, and (iv) the Appellant may not properly bring claims for violations of the Appellant's Constitutional rights before the ALC (R., pp. ___; Respondent's Memo in Opposition to Appellant's Motion for Reconsideration, for a Stay and for Supersedeas, pgs. 4-9).

On March 19, 2015, the ALC granted the parties' motions to alter or amend, but denied the Appellant's Motion to Stay and Motion for Supersedeas. The ALC issued an Amended Final Order on March 19, 2015 (the "Amended Final Order"), which clarified and amended some of the facts contained in the Final Order, but ultimately, still found that Kan' store poses an undue burden on law enforcement and is a detriment to the surrounding community and therefore, the renewal of the Permit should be denied.

On April 7, 2015, the Appellant filed a Notice of Appeal and served the same on the Department, the Respondents, and the ALC.

ARGUMENTS

I. **The Administrative Law Court Did Not Err In Finding That Kan's Store Poses An Undue Burden On Law Enforcement And A Detriment To The Surrounding Community And Therefore, The Renewal of the Permit Should Be Denied.**

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the standard of review. See Olson v. S.C. Dep't of Health & Env'tl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env'tl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). **The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.** See Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (emphasis added). Substantial evidence is defined as, "evidence which would allow reasonable minds to reach the conclusion the administrative agency reached." Carroll v. Gaddy, 295 S.C. 426, 368 S.E.2d 909 (1988).

The weight and credibility assigned to evidence presented at [an ALC] hearing. . . is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. See Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Miliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

Here, there is substantial evidence in the record to support the ALC's ruling that Kan's Store poses an undue burden on law enforcement and a detriment to the surrounding community.

Deputy Chief Melron Kelly, who is second in command of the Columbia Police Department (CPD), testified that, "[Kan's Store] overwhelmingly has more calls for service, more reported incidents of violence and more officer initiated activity than all of the other three [similar stores in close proximity]" (R., p. __; Transcript of Hearing pg. 91). Deputy Chief Kelly stated that CPD "very rarely get calls at those other stores [close in proximity]" (R., p. __; Transcript of Hearing pg. 100). Similar stores in close proximity have had half as many arrests as Kan's Store from 2012-2014 (R., pp. __; Transcript of Hearing pgs. 106-108).

Deputy Chief Kelly further testified that since 2011, Kan's Store has had over 300 calls for service per year (R., p. __; Transcript of Hearing pg. 94). The service calls for Kan's Store were at a low point in 2011 and have had at least 20 more calls per year since 2011 (R., p. __; Transcript of Hearing pg. 95). These service calls do not include times when an officer on patrol notices a problem and reports to the store without a call for service (R., p. __; Transcript of Hearing pg. 93). Deputy Chief Kelly further testified that most of these service calls are alcohol related (R., pp. __; Transcript of Hearing pgs. 94-98). Over the past 3 (three) years the percentage of service calls between 7 p.m. and 7 a.m. has steadily increased (R., pp. __; Transcript of Hearing pgs. 119-120).

When directly asked by Judge Anderson if he thought that Kan's Store was a burden on law enforcement over the previous 2 (two) years, Deputy Chief Kelly answered in the affirmative (R., p. __; Transcript of Hearing pg. 140).

Officer Tyson Hass, an officer with CPD assigned as a patrol officer in the area at issue, testified that the main issues he has seen at the Store are related to alcohol (R., p. ___; Transcript of Hearing pg. 144). Officer Hass further testified that he did not feel that the problems have gotten better or worse in the two years since new management has taken over (R., p. ___; Transcript of Hearing pg. 145). In Officer Hass's opinion, Kan's Store has more calls because the alcohol is more readily accessible compared to similar stores in close proximity (R., pp. ___; Transcript of Hearing pgs. 146-147). Officer Hass broke a finger and had to have 3 (three) pins inserted in his finger from dealing with an incident at the Store (R., pp. ___; Transcript of Hearing pgs. 145-146).

Lieutenant Chris White, the lieutenant of the region in which Kan's Store is located, testified that the most complaints they receive are in reference to Kan's Store (R., p. ___; Transcript of Hearing pg. 153). He further testified that the problems are so bad at the Store that he has ordered his officers to be more proactive and go past the store more often (R., p. ___; Transcript of Hearing pg. 154).

The record is clear that there is substantial testimony from CPD that Kan's Store is a burden on law enforcement. While officers are tied up dealing with the nuisance of Kan's Store, resources are being stretched thin elsewhere. The City of Columbia is concerned that the City is unable to provide adequate safety in other areas while officers are responding to situations caused by the alcohol being sold at the Store. Not only is Kan's Store a nuisance to the area, testimony showed that it is a danger for physical harm to CPD officers responding to incidents at the location.

The City has a legitimate government interest in this issue because the City has a duty to its citizens to most efficiently and effectively use its police resources. Kan's

difficulty in managing its patrons who purchase alcohol and loiter at the location causes much stress in the surrounding area, which strains CPD's resources used to protect and serve its citizens in other areas in the region.

If Kan's Store were not allowed to sell alcohol, the number of calls for service in the area would be significantly reduced, which would reduce the burden on CPD and would greatly enhance the City's ability to efficiently and effectively serve its citizens.

CONCLUSION

There is substantial evidence in the record and testimony at the hearing to support the ALC's ruling that Kan's Store poses an undue burden on law enforcement and a detriment to the surrounding community. Since the ALC's ruling is supported by substantial evidence, this Court should affirm the ruling denying Kan's Store of its seven-day off premises beer and wine permit. Affirming the ALC's ruling will greatly enhance the City's ability to police its municipal boundaries.

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v.

South Carolina Department of Revenue, Ellen Fishburne Triplett,
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PROOF OF SERVICE


The undersigned hereby certifies that she served a copy of THE CITY OF COLUMBIA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS and THE CITY OF COLUMBIA'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS upon the Attorneys for the Appellant and Respondents by placing a copy in the United State mail, first class postage prepaid to them at their offices as indicated below by on this 9 day of September, 2015:

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September 8, 2015
Columbia, South Carolina



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SC Court of Appeals

We Are Columbia

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September 8, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
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RE: Kan Enterprises, Inc., d/b/a A1 Food Stores v. South Carolina Department
of Revenue, Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson,
Jocelyn Munson, and Michael Hill

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy the *City of Columbia's Motion for Leave to File Amicus Curiae Brief in Support of Respondents* and *City of Columbia's Amicus Curiae Brief in Support of Respondents* along with the *Proof of Service* in the above referenced case. Also enclosed is a self-addressed stamped envelope for return of an extra clocked copy to this office.

By copy of this letter, I am serving same on the attorneys for the Appellants and Respondents.

Sincerely

Patrick C. Sharpe
Assistant City Attorney

PCS/jlh

Enclosure(s) as Stated

cc: (w/encl.): Justine M. Tate, Esquire
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