

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

OCT 15 2015

The Honorable Deborah Brooks Durden, Administrative Law Judge

SC Court of Appeals

Docket No. 15-ALJ-0004-CC

T MMARK Industries, LLC, d/b/a T MMARK LiquorsRespondent,

v.

South Carolina Department of RevenueRespondent,

And

Grace Covenant Tabernacle, IntervenorAppellant.

INITIAL BRIEF OF APPELLANT

Robert J. Thomas
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29202
Telephone (803) 227-2035
Fax (803) 343-7017
E-mail: bthomas@rtt-law.com
Attorney for Appellant

Other Counsel of record:

Richard H. Wallace, Esquire
Harrison & Wallace Law Group, LLC
500 Taylor Street, Ste 400
Columbia, SC 29201

Robert E. Kneece, Jr., Esquire
2520 Devine Street
Columbia, SC 29205
Attorneys for Respondent T MMARK
Industries, LLC

Justine M. Tate, Esquire
Sean M. Ryan, Esquire
South Carolina Department of Revenue
PO Box 12665
Columbia, SC 29211
Attorneys for Respondent South
Carolina Department of Revenue

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CERTIFICATE OF SERVICE BY MAIL

Docket No. 15-ALJ-17-0004-CC

I, the undersigned, do hereby certify that I have served a copy of the foregoing document upon counsel of record by U.S. Mail, postage prepaid, on October 14, 2015, at the following addresses:

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APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

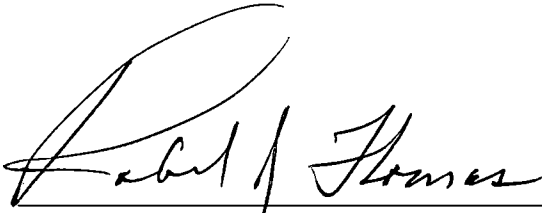
Counsel Served:

Richard H. Wallace, Esquire
Harrison & Wallace Law Group, LLC
500 Taylor Street, Suite 400
Columbia, SC 29201

Robert E. Kneece, Jr., Esquire
2520 Devine Street
Columbia, SC 29205

Justine M. Tate, Esquire
PO Box 12265
Columbia, SC 29211

Sean G. Ryan, Esquire
PO Box 12265
Columbia, SC 29211



Robert J. Thomas
(SC Bar No. 5534)

Statement of Issues on Appeal

-1-

Did the ALJ err in granting the retail liquor store license application of T MMARK as a “renewal” application in light of the undisputed fact that the latter’s initial application was improperly issued after Pastor Gerald Hughes completed, signed and returned a protest form provided him by Deputy Sheriff Bobby Snuffer?

-2-

Did the ALJ err in issuing or renewing a retail liquor license that violated the public policy of South Carolina as expressed in S.C. Code Section 61-6-120 and Department of Revenue Regulation 7-303 after finding that the liquor store was in fact located within 500 feet of Appellant’s church and playground ?

Statement of the Case

T MMARK Industries, Inc., applied for a retail liquor license in April of 2014, for a liquor store to be placed next door to Grace Covenant Tabernacle (“Church”) on Glowworm Road in Lexington County. The newly acquired license would expire on the last day of November, 2014, pursuant to Section 61-2-120, S.C. Code ¹ unless renewed. On April 3, 2014, Lexington County Deputy Sheriff Bobby Snuffer, acting pursuant to instructions from his “chain of command,” ² visited Pastor Gerald Hughes, informed him of the proposed liquor store location next door, and provided him a protest form. Pastor Hughes completed the protest form in the presence of Deputy Snuffer and returned it to him. Deputy Snuffer delivered the completed protest form to the chain of command in his office in Lexington County, but it never reached the Department of Revenue (“DOR”), and the latter issued the retail liquor license in the mistaken belief that the application was uncontested.

Having obtained a license for the few months remaining prior to November 30, 2014, T MMARK almost immediately applied for a *renewal*. On this occasion, there were numerous protests, including an additional protest from Pastor Hughes. This led to a contested case hearing before Judge Deborah Brooks Durden. Church argued at trial that the application

¹ Section 61-2-120 provides: “Biennial licenses and permits issued under this title expire according to the county where the licensed location is situated. The expiration dates are the last day of: ... (4) November in years which end in an: ... (b) even number for ... Lexington. ...”

² Snuffer testimony, Tr. 32, line 12

should not be treated as a “renewal”³ because Pastor Hughes had previously completed and returned a protest form to Deputy Bobby Snuffer who, Church argued, was an agent of the state of South Carolina. Church contended before the ALJ and now contends on appeal that DOR, in originally issuing T MMARK a license, made two mistakes. First, the location violated the 500-foot restriction in S.C. Code Section 61-6-120(A).⁴ The second mistake was the initial issuance of the liquor license after Pastor Hughes registered his protest with Deputy Sheriff Bobby Snuffer, an agent of the state of South Carolina.⁵ After an adverse ruling from the ALJ, Church served and filed a Motion to Alter or Amend the Final Order calling attention to Church’s overlooked argument that Deputy Bobby Snuffer was an agent of the state of South Carolina; hence the initial liquor license application was issued improperly without a contested hearing. Judge Durden granted Church’s Motion in an *Order Granting Motion to Reconsider* [**Order filed May 4, 2015**] and issued an *Amended Final Order and Decision* [**Second Order filed May 4, 2015**], but failed in

³ Tr. p 9, line 5 – p 10, line7; p 67, lines 17-10.

⁴ This mistake is confirmed by the findings of the ALJ: “Therefore, the Court finds that the distance between the location and the church is the path measured by [Witness] Westbury, 487.72 feet.” [*Amended Final Order and Decision*, p 3]. Section 61-6-120(A) provides, “The department shall not grant or issue any license ... if the place of business is ... within five hundred feet of any church, school or playground outside of a municipality. ...” Regulation 7-303 prescribes the manner in which the measurement is to be conducted.

⁵ This is also an undisputed fact. The ALJ made a finding that Pastor Hughes gave Deputy Hughes the completed protest form but added, “I find that Snuffer incorrectly informed Hughes about the process necessary to file a valid protest, causing Hughes to miss the opportunity to protest the original liquor license issued to the Petitioner.” [*Amended Final Order and Decision*, p 3].

both Orders to address the issue of Deputy Snuffer's agency.

Church appealed these Orders, but the Court of Appeals in an Order filed 7/16/15 dismissed the appeal, finding that the ALJ's Orders were not immediately appealable because she had remanded the case to the Department of Revenue (DOR) "for further proceedings." Church's attorney then attempted to learn what had happened in the DOR after the remand, but was denied that information absent a Freedom-of-Information Act (FOIA) request. A FOIA request resulted in the production from DOR of a letter and two attached documents, with some information redacted. Appellant then filed the present appeal on September 28, 2015.

Argument

Issue 1

Did the ALJ err in granting the retail liquor store license application of T MMARK as a "renewal" application in light of the undisputed fact that the latter's initial application was improperly issued after Pastor Gerald Hughes completed, signed and returned a protest form provided him by Deputy Sheriff Bobby Snuffer?

Deputy Sheriff Snuffer testified:

Q. Does your department sometimes furnish services at the request of SLED?

A. Yes, sir.

Q. And at the request of SLED were you asked to contact residents and persons in the area of this proposed new liquor store?

A. As a request of – my chain of command asked me to do this. ... At the request of my chain of command. I didn't directly speak to SLED. I spoke through my chain of command.

Q. ... And did you go to the church and notify the pastor there? ... That a liquor store had applied – or someone had applied for a liquor store operator license there?

A. I did.

Q. Did you speak with Pastor Gerald Hughes?

A. I did.

Q. And did you give him a protest form?

A. Yes, sir.

Q. And did he fill out that form in your presence?

A. Yes, sir.

Q. Did he give it back to you?

A. Yes, sir.

Q. Did you take it back to the sheriff's office for whatever – from where you got it so that it could be returned to SLED?

A. I did.

Q. And what was the date?

A. It was on April 3rd, 2014.

[Tr. p 31, line 25 – p 33, line 14]

Pastor Hughes testified:

Q. Now, sometime in the year 2014, did you receive a visit from Deputy Bobby Snuffer?

A. Yes, sir. And I don't honestly know exactly what that date was but was in the spring of that year. And I concur that it would have probably been April the 3rd, as Deputy Snuffer would have a record of that.

Q. And did he give you the protest form?

A. He actually called me on the phone first, telling me that – asking if I knew that they were going to open a liquor store up next door to the church. And I said, no, it's the first I heard about it. And so he said, well, if you would like to protest it, I have a form that you can fill out. And I said, by all means. I don't want to let this linger. I'll do it right away. So we met in the driveway of this church and I sat in his squad car, filled out the form, and also told him, by the way, i[f] this is not sufficient, we can get plenty more protest forms. You know, because we sure don't want a liquor store coming in here next door to the church. We've labored and so forth and our whole purpose, you know, to our purpose. So I filled out the protest form in his squad car. And he assured me that, you know, there's

absolute no further for ...

Q. He assured you what?

A. He assured that there would be absolutely no further need for any protest forms to be filled out at all.

[Tr. p 45, line 13 – p 47, line 10]

Respondents argued, and the judge apparently agreed, although she did not expressly rule on the issue, that the exclusive method of registering a protest against a retail liquor store's license application is to **mail it**. Indeed the form does have the mailing address of DOR on it, but another part of the licensing statutes provides that "Upon *receipt* [emphasis added] of a timely filed protest, the department shall proceed [etc.]." S. C. Code Section 61-6-185 (B). Thus, the mailing of the protest is not specifically required; all that is necessary is that it be received. Deputy Bobby Snuffer was an agent of the state of South Carolina carrying out a function on behalf of the state. A sheriff is an agent of the state. *See Kemmerlin v. Heartline*, 2010 WL 4340409 (D.S.C 2010); *see also Gullede v. Smart*, 691 F.Supp. 947, 854-55 (D.S.C.1988) (discussing sheriff as agent and alter ego of state and that a deputy sheriff acts as the sheriff's agent), *aff'd* 878 F.2d 379 (4th Cir. 1989); *Carroll v. Greenville County Sheriff's Dep't*, 871 F.Supp. 844, 846 (D.S.C.1994) (suit against the sheriff's office is a suit against the state). Sheriffs' Departments in South Carolina are state agencies, not county or municipal departments. Thus Deputy Snuffer was carrying out a function for the benefit of the state of South Carolina ordinarily performed by SLED.

The ALJ's findings include, "I find that Snuffer incorrectly

informed Hughes about the process necessary to file a valid protest causing Hughes to miss the opportunity to protest the original liquor license issued to petitioner [T MMARK]. [*Amended Final Order and Decision*, p 3]. ***Thus it is an adjudicated fact that Deputy Snuffer received the completed protest form.***

Respondents' argument that mailing is the exclusive method of registering a protest would exclude the effectiveness of *personal delivery* of one's protest to DOR. Such a restriction would be *extraordinary*! If that had been the intent of the legislature, clearer language would have been required.

Issue 2

The ALJ erred in issuing or renewing a liquor license that violated the public policy of South Carolina as expressed in S.C. Code Section 61-6-120 and Department of Revenue Regulation 7-303 after finding that the liquor store was in fact located within 500 feet of Appellant's church and playground.

There is no question here as to what the facts are. The ALJ correctly held, "The original license was *improperly* granted by the Department for this location in contravention of S.C. Code Section 61-6-120 because the location is less than 500 feet from Grace Church." (emphasis added) [*Amended Final Order and Decision*, p 5].

A SLED measurement in DOR's file was made incorrectly. Regulation, 7-303, implementing S.C. Code Section 61-6-120, prescribes

the correct method of measuring the distance required in locating a liquor store near a church.⁶ The drawing in DOR's file does not use the correct method, as the ALJ noted.⁷

She nevertheless held that since the application was for a "renewal," the restriction does not apply, and the originally issued license cannot be reformed because it was not a contract. Church submits that the code provision that exempts renewal applications from the restrictions⁸ must have been drafted as a grandfather provision, to give an established liquor store a safe harbor so that it would not be forced to give up its location when a church is established in the vicinity *after* a liquor store's license is granted. Anyone who wishes to open a liquor store next to a church that was there first would therefore not have the exemption.

⁶ Regulation 7-303 provides, "With respect to a church or a school, the distance shall be measured from the nearest entrance of the place of business by following the shortest route of ordinary pedestrian or vehicular travel along the public thoroughfare to the nearest point of entrance to the grounds of the church or school, or any building in which religious services or school classes are held, whichever is the closer. The South Carolina Department of Revenue has determined that the grounds in use as part of the church or school is restricted to the grounds immediately surrounding the building or buildings which provide ingress or egress to such building or buildings and does not extend to the grounds surrounding the church which may be used for beautification, cemeteries, or any purpose other than such part of the land as is necessary to leave the public thoroughfare and to enter or leave such building or buildings. Only one entrance to the grounds of a church or school shall be considered, to wit: the entrance to the grounds nearest an entrance to the church or school building. Where no fence is involved, the nearest entrance to the grounds shall be in a straight line from the public thoroughfare to the nearest door. The nearest point of the grounds in use as part of a playground shall be limited to the grounds actually in use as a playground and the grounds necessary for ingress or egress to such grounds from the public thoroughfare."

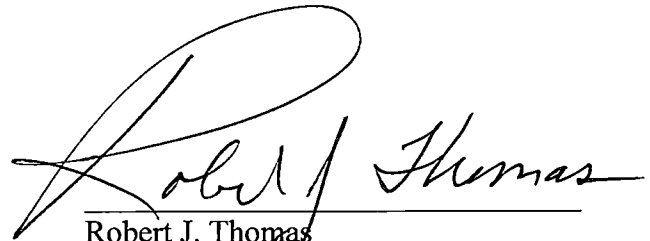
⁷ Footnote 4, *supra*.

⁸ "The above restrictions do not apply to the renewal of licenses and they do not apply to new applications for locations which are licensed at the time the new application is filed with the department." S.C. Code Section 61-6-120.

Conclusion

The original licensing of the liquor store next to Church's location was a violation of the public policy of South Carolina -- a mistake. Having found that the liquor store was improperly and unlawfully located next door to Church, the ALJ could have corrected the mistake.

Since the ALJ did not correct the mistake -- one that the court itself recognized -- Church respectfully submits that the judgment of the ALJ should be reversed.



Robert J. Thomas
Rogers Townsend & Thomas, PC
Post Office Box 100200
Columbia, South Carolina 29202
Telephone (803) 227-2035
Fax (803) 343-7017
E-mail: bthomas@rtt-law.com

October 14, 2015

Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL
Docket No. 15-ALJ-17-0004-CC

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Document:

INITIAL BRIEF OF APPELLANT

Counsel Served:

Richard H. Wallace, Esquire
Harrison & Wallace Law Group, LLC
500 Taylor Street, Suite 400
Columbia, SC 29201

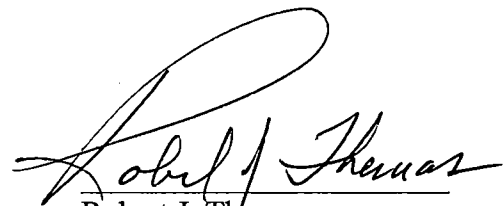
Robert E. Kneece, Jr., Esquire
2520 Devine Street
Columbia, SC 29205

Justine M. Tate, Esquire
PO Box 12265
Columbia, SC 29211

Sean G. Ryan, Esquire
PO Box 12265
Columbia, SC 29211

Hon. Jana E. Cox Shealy
Clerk, Administrative Law Court
Edgar A. Brown Building, Suite 224
1205 Pendleton Street
Columbia, SC 29201

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SC Court of Appeals


Robert J. Thomas
(SC Bar No. 5534)



ROGERS TOWNSEND & THOMAS, PC

ATTORNEYS AND COUNSELORS AT LAW

Mail PO Box 100200 (29202)
220 Executive Center Drive, Suite 109
Columbia, SC 29210

www.rtt-law.com

Tel 803-771-7900

Fax 803-343-7017

Robert J. Thomas
Supreme Court Certified Mediator
bthomas@rtt-law.com
(803) 227-2035

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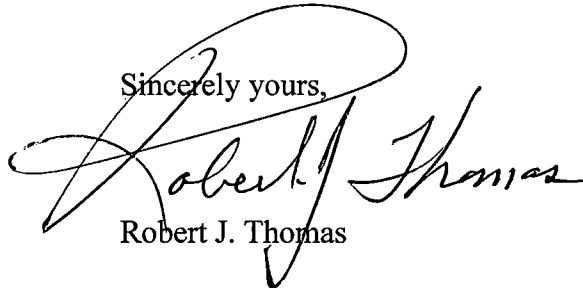
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Attention: V. Claire Allen, Deputy
PO Box 11629
Columbia SC 29211

Re: T TMARK Industries, LLC, d/b/a T TMARK Liquors v. South Carolina Department of
Revenue and Grace Covenant Tabernacle. Docket No. 15-ALJ-17-0004-CC

Dear Ms. Allen:

I submit for filing *Initial Brief of Appellant* and *Appellant's Designation of Matter to be Included in the Record on Appeal* with our certificate showing service on opposing counsel.

Sincerely yours,



Robert J. Thomas

/s


Copy of letter with enclosures to:

Richard H. Wallace, Esquire
Robert E. Kneece, Jr., Esquire
Justine M. Tate, Esquire
Sean M. Ryan, Esquire

Hon. Jana E. Cox Shealy
Clerk, Administrative Law Court

ERS TOWNSEND
RNEYS AT LAW

TOWNSEND & THOMAS, PC
OFFICE BOX 100200
IA, SOUTH CAROLINA 29202
COM

neopost[®] FIRST-CLASS MAIL
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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Attention: V. Claire Allen, Deputy
PO Box 11629
Columbia SC 29211