STATE OF SOUTH CAROLINA
In the Court of Appeals

ON APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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15-ALJ-17-0571-CC
Appellate Case No. 2015-000733

Kan Enterprises, Inc., d/b/a A 1 Food Stores, ...Appellant,

v.

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

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF REVENUE

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II. **Because The Appellant Failed To Raise The Issues Of Deprivation Of A Vested Interest And Violation Of The Appellant's Constitutional Rights To The Lower Court, Are Such Issues Barred From Review By This Court?**

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 A 1 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 responsible for the store's day-to-day management (R., p. [missing, between 6-7]; Amended Final Order, pg. 2).

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"). In its Determination, the Department denied Kan's application for the renewal of the Permit because the Department received timely filed public protests in opposition to the renewal of the Permit pursuant to S.C. Code Ann. § 61-6-525 and S.C. Code Ann. Regs. 7-201 (Supp. 2011)[1] (R., p. 21; 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 if a protestant complies with the requirements of the statute in rendering the protest. Accordingly, based on the receipt of the Written Protests (as defined below), the Department could not lawfully issue the Permit pursuant to the mandates set forth in § 61-6-525 (R., p. 21; Department Determination, pg. 3).

[1]Regulation 7-201 provides, in pertinent part: "If a valid protest is received with respect to the issuance of a new permit or Permit, the new permit or Permit will not be issued until the protest is resolved and the determination is made that the permit or Permit must be issued."

On July 31, 2014, the Department received a renewal application for the Permit from Kan (R., p. 19; Department Determination, pg. 1). Subsequently, the Department received valid public protests to the renewal application for the Permit (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. 19, 21; 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. [missing, between 6-7]; Amended Final Order, pg. 2). As a result of the Department's receipt of the timely filed Written Protests, the Department denied the renewal of the Permit pursuant to a denial letter dated August 22, 2014 (R., p. 22; 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., p. [missing]; Kan's Protest Letter, Exhibit 1).

Prior to the hearing, the Respondents moved to intervene in the case (R., pp. 62-71; Respondent's Motion to Intervene). On February 3, 2015, the ALC granted Respondents Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill's Motion to Intervene in the action (R., pp. 15-16; 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, the Appellant claimed that: (i) the ALC applied the incorrect standard, (ii) the ALC's Final Order was not supported by the evidence at the hearing, (iii) ALC's Final Order relied on unsubstantiated opinion evidence, (iv) the ALC's Amended Final Order impermissibly deprives the Appellant of a vested interest under South Carolina law, (v) the ALC's Amended Final Order violates the Appellant's Constitutional Rights, and (vi) the ALC's Final Order violates the Appellant's Equal Protection Rights. 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.

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'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.

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. 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); Turner v. S.C. Dep't of Health & Envtl. 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). Further, the review of the Amended Final Order must be confined to the record. This Court may not substitute its judgment for the judgment of the Administrative Law Judge as to the weight of the evidence on questions of fact. Specifically, S.C. Code Ann. § 1-23-610(B) states:

> The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2014). See, Travelscape, LLC, v. South Carolina Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011).

> **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.** 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); see Media Gen. Communications, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010) ("A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." (citing S. C. Code Ann. § 1–23–610(B)(a), (d)) (emphasis added).

Centex Intl. Inc. v. S.C. Department of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 68, 69 (2013).

This Court may modify or reverse the Amended Final Order of the ALC if its findings are unsupported by substantial evidence on the whole record. In the present matter, substantial evidence supports the ALC's finding in the Amended Final Order that Kan's store poses an undue burden on law enforcement and is a detriment to the surrounding community and therefore, the ALC's ruling should be upheld[2]. 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).

[2]The Department's position in this matter is that the Respondent met the statutory requirements for the renewal of the Permit. Pursuant to the above-referenced statutes, because the Protestants filed valid public protests with the Department, the determination of whether the Appellant was granted the renewal of its Permit rests solely with the ALC. The Department takes no position on whether it agrees or disagrees with the ALC's ruling in its Amended Final Order with regard to the denial of the renewal of the Permit. Notwithstanding anything to the contrary herein, the Department takes the position that the ALC's Amended Final Order is supported by the evidence presented at trial.

"Further, 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 e.g. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

Given the weight and credibility assigned by the ALC to the evidence presented at the hearing, the following facts support the ALC's decision in this matter: (i) the Appellant's store has frequent issues with loitering, vagrancy and panhandling, (ii) the "alley" adjacent to the Appellant's location is frequented by patrons of the Appellant's store, whereby such patrons engage in solicitation, "using the bathroom," and sexual acts, (iii) there are numerous law enforcement problems at the Appellant's store, including civil disturbances, intoxicated pedestrians and suspicion persons, all which require "calls for service" whereby police are dispatched to the Appellant's store, (iv) the Appellant's store has a "seedy" appearance, in contrast to its neighboring stores with beer and wine permits, which creates an environment that further attracts people who are apt to loiter, (v) Mr. Seghal does not provide any type of formal training to his employees with regard to the prevention of sales to minors, (vi) Mr. Seghal did not punish an employee or terminate his employment after said employee received a violation for selling alcohol to a minor, and (vii) littering occurs frequently on the Appellant's property (R., pp. 7, [missing, between 7-8]; Amended Final Order, pg. 3, 4).

In its Amended Final Order, the ALC clearly states that the above-referenced findings were based on all of the evidence in the record, testimony of the witnesses and Protestants, and the "burden of proof upon the parties" (R., p. [missing, between 6-7]; Amended Final Order, pg. 2). Thus, the ALC's finding in the Amended Final Order that the renewal of the Permit should be denied rested on substantial evidence on the record as a whole.

Because substantial evidence supports the ALC's Amended Final Order, the issue becomes whether the Amended Final Order is based on an error of law. As explained more fully herein, the ALC's Amended Final Order does not contain any error of law. Therefore, the ALC did not abuse its discretion in denying the renewal of the Permit.[3] Accordingly, this Court should uphold the ALC's Amended Final Order.

II. Because The Appellant Failed To Raise The Issues Of Deprivation Of A Vested Interest And Violation Of The Appellant's Constitutional Rights To The Lower Court, Such Issues Are Barred From Review By This Court.

Here, the Court's review is limited to the record below. Section 1-23-610(B). Moreover, issues presented on appeal must have been raised and ruled on at the lower court level. *See, e.g.,* Brown v. South Carolina Dep't of Health and Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (issues not raised to and ruled upon by the ALC are unpreserved for appellate review); *563Carson v. South Carolina Dep't of Natural Res., 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency).

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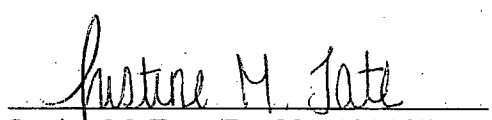
[3]An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 891 (Ct. App. 2004).

In this case, the Appellant did not raise the issues of deprivation of the Appellant's vested interest and violation of the Appellant's Constitutional rights during the ALC hearing. There is no evidence in the record that indicates the Appellant raised these issues at that time, although the Appellant could have done so. Because the Appellant failed to raise such issues at the lower court level, these issues were not raised or ruled on by the Administrative Law Court, and therefore, they are unpreserved for review by this Court.

The Appellant attempts to preserve these issues for review by this Court by raising such issues in the first instance in its Motion for Reconsideration, Stay and Supersedeas submitted to the ALC. However, "[a] party cannot use Rule 59(e) [SCRCP Motion] to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). Thus, because the Appellant failed to raise these issues at the lower court level, such issues cannot now be brought to this Court for review by the Appellant for the first time on appeal in its Rule 59(e), SCRCP Motion for Reconsideration. Accordingly, such issues are barred from review by this Court.

CONCLUSION

For the foregoing reasons, the Department requests that this Court uphold the ALC's Amended Final Order.



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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