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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE COURT

Ralph King Anderson, III, Chief Administrative Law Judge

ALC Docket No. 14-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 RESPONDENTS ELLEN FISHBURNE TRIPLETT, KEITH MCIVER, SAMUEL L. MUNSON, JOCELYN MUNSON, AND MICHAEL HILL

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TABLE OF CONTENTS

Table of Authorities..i

Statement of the Case..1

Statement of Facts..3

Standard of Review..7

Arguments..8

I. **The Administrative Law Court's decision to deny the renewal of Kan's beer and wine permit is supported by substantial evidence in the record..8**

II. **The ALC properly applied the law in the case of beer and wine permit renewals..12**

III. **The ALC did not improperly base its decision upon unsubstantiated opinion evidence..15**

IV. **The ALC's decision to deny Kan's application for permit renewal did not result in deprivation of any vested property interest owned by Kan..17**

V. **The ALC's decision did not violate Kan's constitutional rights........18**

Conclusion..21

TABLE OF AUTHORITIES

Byers v. S. C. Alcoholic Beverage Control Com'n,
281 S.C. 566, 316 S.E.2d 705 (1984)..12, 13, 14

Barfly Enterprises, LLC v. S.C. Dept. of Revenue, 2013 WL 6620406
(Dec. 10, 2013)..13

Fast Stops, Inc. v. Ingram, 276 S.C. 593, 595, 281 S.E.2d 118, 120 (1981)...............8, 9

Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22, 25 (1943)..........................17

Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)...........18

Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985)...........................8,
16

Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172,
656 S.E.2d 346, 350 (2008)..19

Palmer v. S.C. Alcoholic Beverage Control Com'n, 282 S.C. 246,
249, 317 S.E.2d 476, 478 (1984)..9

Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n,
282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984)..19

Pure Oil Division v. City of Columbia, 254 S.C. 28,
173 S.E.2d 140 (1970)...17, 18

S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C.
216, 222, 417 S.E.2d 586, 589 (1992)..17

Sandy Springs Water Co. v. Dept. of Health and Env. Control,
324 S.C. 177, 478 S.E.2d 60 (1996)..20

Skyscraper Corp. v. County of Newberry, 323 S.C. 412, 475 S.E.2d 765 (1996)..........20

Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973)...............................12, 13, 14

Worsley Companies, Inc. v. Town of Mount Pleasant,
339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000)...20

S.C. Code Ann. § 1–23–610 (B) (2014)..7, 8, 16

S.C. Code Ann. § 6–29–1510 (2014)..18

S.C. Code Ann. § 6–29–1520 (10) (2014)...18

S.C. Code Ann. § 61–2–140 (B) (1976)...17

S.C. Code Ann. § 61–4–520 (5) (1976)..8

S.C. Code Ann. § 61-4-520 and 540 (2009)..14

STATEMENT OF THE CASE

Appellant, Kan Enterprises, Inc. ("Kan"), owns and operates a convenience store under the name A1 Food Store located at 4101 Monticello Road in Columbia. There is no dispute that Kan has previously held a permit for selling beer and wine at the A1 Food Store for off-premises consumption. Kan's beer and wine permit was due for renewal by July 31, 2014. On July 28, 2014, Kan filed an application to renew the permit with the South Carolina Department of Revenue ("DOR"). (ABL Renewal Form dated July 28, 2014, R. pp. 512–518.) Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill ("these Respondents") filed timely protests of the renewal of the permit. (Beer, Wine, and Liquor Protest Forms, R. pp. 476–488.)

Because of the protests, DOR denied Kan's application. (DOR's Denial of Application letter, dated August 22, 2014, R. p. 22.) Kan protested the denial and, following the DOR's unfavorable final determination, requested a contested case hearing before the Administrative Law Court ("ALC"). (Department Determination dated December 10, 2014, R. pp. 18–21; Request for Contested Case Hearing dated December 11, 2014, R. p. 511; Notice of Assignment dated December 23, 2014, R. p. 17.) Before the hearing was to be held, these Respondents moved to intervene, (Motions for Leave to Intervene dated January 22, 2015, R. pp. 62–71) and upon the ALC's order granting their motions, became parties to the proceedings. (Order on Motions to Intervene dated February 3, 2015, R. p. 15.)

On February 10, 2015, a contested case hearing was held before at the ALC.
At the hearing, Kan presented the testimony of four witnesses: Vinoo Sehgal, the manager of the store; Anthony Kelly, a local resident; Willie Felder, a local resident; and

Vincent Davis, the store's security guard. (Tr. of Hrg, 13–58, 58–86, and 250–258, R. pp. 84–129, 129–157, 321–329.)

Respondents Samuel L. Munson, Ellen Fishburne Triplett, Keith McIver, and Michael Hill testified. (Tr. of Hrg, 188–250, R. pp. 259–321.) These Respondents also presented the testimony of three law enforcement officers: Deputy Chief of Columbia Police Department Melron Kelly, Officer Tyson Hass of the North Region Special Operation Group of the Columbia Police Department, and Lieutenant Chris White. (Tr. of Hrg, 86–161, R. pp. 157–228.) These Respondents also presented the testimony of Dolores Walters Johnson, the owner and operator of Walters Care Facility located in the immediate vicinity of A1 Food Store; Sam Davis, a member of Columbia city council whose district includes Kan's store; and Christie Savage, the president of Eau Claire Community Council. (Tr. of Hrg, 161–174, 174–187, 157–160, R. pp. 232–245, 245–258, 228–231.)

On February 20, 2015, the ALC issued a Final Order and Decision denying Kan's application for a seven-day off-premises beer-and-wine permit. (Final Order and Decision dated February 20, 2014, R. pp. 10–14) Kan moved for reconsideration of the Final Order and Decision pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and Rule 29(D) of the Rules of Procedure for the Administrative Law Court. (Notice of Motion for Reconsideration, for Stay, and for Supersedeas, dated February 27, 2015, R. pp. 53–61.) These Respondents filed a memorandum opposing the Motion for Reconsideration and Stay, or Supersedes, on March 13, 2015. (Mem., dated March 13, 2015, R. pp. 23–33.) The ALC denied the motion by Order dated March 19, 2015 (Order on Motion for Reconsideration, for a Stay and for Supersedeas, dated March 19, 2015, R.

pp. 1–5.). However, the ALC clarified its initial Final Order and Decision by issuing an Amended Final Order and Decision. (Amended Final Order and Decision dated March 19, 2015, R. pp. 6–9.) Kan timely appealed. (Notice of Appeal dated April 7, 2015, R. pp. 489–510.)

STATEMENT OF THE FACTS

Kan's A1 Food Store is not a pretty sight. (Tr. of Hrg, 185:1-9, R. p. 256.) Surrounded by a pothole-ridden parking area, it appears as a box of a structure with obstructed windows and a façade plastered with cigarette-advertising posters. (Tr. of Hrg, 246–247, 159, 203–204, R. pp. 317–318, 230, 274–275.) Inside, refrigerators full of beer and wine coolers line an entire wall, while there are several open tubs of beer. (Tr. of Hrg, 203–207 and Ex.1, R, pp. 274–278, 379–387.) Cigarette smoke often fills the air. (Tr. of Hrg, 159:3, R. p. 230.) Contrary to the store's name, sales of alcoholic beverages alone account for at least 40% of Kan's business at the A1 Food Store. (Tr. of Hrg, 48:3-13, R. p. 119.)

The store remains open seven days a week—24 hours a day on Friday and Saturdays and 21 hours a day the rest of the week (Tr. of Hrg, 23:4-16, R. p. 94)—attracting a clientele that needs to be reminded that public drunkenness is not condoned and warned that the property is under constant video surveillance. (Tr. of Hrg, 23:20-25, R. p. 94.) The store sells single beers and "loose" cigarettes. (Tr. of Hrg, 83:16-24, 159:1-10, R. pp. 154, 230.) Savage testified to observing a sale of a "loose" cigarette to a student from Eau Clair High School. (Tr. of Hrg, 159:1-10, R. p. 230.)

The sale of beer in single containers, in particular, promotes loitering and panhandling. (Tr. of Hrg, 121:15–122:14, R. pp. 192–193.) The store's manager, Vinoo

Sehgal, testified that he had to put some of the patrons on "trespass notice" for "chronic problems." (Tr. of Hrg, 28:8-12, R. p. 99.)

Savage testified to observing daily gatherings of two, three, or more people by the store's wall facing the post office. (Tr. of Hrg, 160:15-23, R. p. 231.) Dolores Johnson testified to having observed loiterers "going to the bathroom" and engaging in sexual activity. (Tr. of Hrg, 170:15-25, R. p. 241.) Respondent McIver, testified about observing prostitutes around the store and about being propositioned by a prostitute loitering near the store. (Tr. of Hrg, 242:9-25, R. p. 313.)

The store's patrons often migrate to adjacent properties leaving trails of litter behind. (Tr. of Hrg, 215:23–216:14, R. pp. 286–287.) Respondent Lyman Munson testified that every day he collects around his property a grocery bag full of litter that is traceable to the A1 Food Store. (Tr. of Hrg, 196:25–200:24, R. pp. 267–271.) Just in the morning before appearing to testify, he collected five empty beer cans and an empty beer bottle. (Tr. of Hrg, 200:11-20, R. p. 271.)

Sehgal testified that when he or his employees "chase away" those who panhandle or stand with no purpose in front of his store, they "go somewhere, maybe to the post office." (Tr. of Hrg, 254:7-15, R. p. 325.) Loiterers often congregate at the post office building just across the street from the A1 Food Store. (Tr. of Hrg, 65:18-20, 234:15–235:23, R. pp. 136, 305–306.) Respondent Triplett testified that while she was parked at the post office, a person leaving the A1 Food Store approached her vehicle and solicited money from her, becoming angry when she refused. (Tr. of Hrg, 220:23–221:6, R. pp. 291–292.)

The A1 Food Store is very close to a care home for vulnerable adults (Tr. of Hrg, 164:18-23, R. p. 235.) Johnson, the home's operator, expressed concern for the welfare of its residents who have easy access to alcohol because of Kan's mode of selling beer. (Tr. of Hrg, 171:19-25, R. p. 242.)

Respondent McIver testified that he witnessed minors purchasing alcohol at the A1 Food Store. (Tr. of Hrg, 242:4-8, R. p. 313.) Kan's willingness to sell alcohol to underage patrons was further borne out by an undercover operation by the City of Columbia Police Department and the State Law Enforcement Division ("SLED"). (Tr. of Hrg, 117:1–118:18, R. pp. 188–189.) As part of that investigation, an underage patron attempted to purchase alcohol in July of 2014. *(Id.)* Kan's employee sold a 24-oz can of beer without asking for any form of identification. (*Id.*) The officer charged Kan's clerk for the sale of beer to an underage individual. (*Id.*) Despite the citation, Kan did not follow up with formal discipline against the employee other than a verbal warning. (Tr. of Hrg, 54:9-11, R. p. 125.)

Kan does not have any formal procedure in place to prevent sale of alcohol to underage patrons despite the fact that the A1 Food Store is a place where "high school age" children congregate. (Tr. of Hrg, 159:11-14, 190:21-24, R. pp. 230, 261.) The only procedure in place to prevent the sale of alcohol to underage patrons is a sign on the cash register reminding cashiers to check identification for the sale of alcohol and tobacco. (Tr. of Hrg, 41:19–43:11, R. pp. 112–114.)

Kan employees call the police to deal with the patrons who drink on the premises or to disperse gatherings of patrons lingering after making their purchases. (Tr. of Hrg, 27:19–28:7, R. pp. 98–99.) Deputy Chief Kelly, who in 2012 assumed the command of

the Eau Claire–North Columbia patrol district, testified that the police have responded to calls concerning loitering, vagrancy, panhandling, and acts of violence at the A1 Food Store. (Tr. of Hrg, 88:10-12, R. p. 159.) Among the convenience stores in the area, A1 Food Store has generated the overwhelming majority of the calls for service. (Tr. of Hrg, 91:1-15, R. p. 162.) In 2011, there were 304 calls for service, in 2012 there were 351 service calls, in 2013 there were 335 calls for service, and in 2014, there were 324 calls for service. (Tr. of Hrg, 94:13–95:2, R. pp. 165–166; these Respondents' trial exhibits numbers 8, 9, 10, and 11, R. pp. 394–473.) The majority of the calls for service occur between 7:00 p.m. and 7:00 a.m. at the A1 Food Store. (Tr. of Hrg, 119:11-14, R. p. 190.) When those calls for service during that period of the night are compared across years, the evidence demonstrates that there were 188 calls for service during the night in 2011, 209 calls for service during the night in 2012, 250 calls for service during the night in 2013, and 252 calls for service during the night in 2014. (Tr. of Hrg, 119:18–120:8, R. pp. 190–191; these Respondents' trial exhibits numbers 8-11, R. pp. 394–473.)

At the A1 Food Store location, responding officers made 19 arrests in 2011, 21 arrests in 2012, 14 arrests in 2013, and 29 arrests in 2014. (Tr. of Hrg, 108:13-109:14, R. pp. 179–180; these Respondents' trial exhibit number 7, R. p. 390.) Chief Kelly testified that there are significantly higher calls for service and arrests at the A1 Food Store than for other convenience stores selling beer and wine in the area. (Tr. of Hrg, 112: 6-12, R. p. 183.) Chief Kelly further testified that the larger number of calls and arrests for the A1 Food Store, as compared to other convenience stores in the area, stems from "the level of management and/or employee's level of tolerance for what goes around the business." (Tr. of Hrg, 112:18-20, R. p. 183.)

Shootings have occurred, and officers have suffered injuries at the A1 Food Store. (Tr. of Hrg, 114:10-15, R. p. 185.) Officer Hass echoed Deputy Chief Kelly's testimony and testified to the continued vagrancy, drunkenness, trespassing, and other violations related to alcohol consumption at and around the A1 Food Store. (Tr. of Hrg, 144:19-25, R. p. 215.) In July 2014, Officer Hass even suffered an injury when apprehending a suspect in A1 Food Store's parking lot. (Tr. of Hrg, 145:18–146:11, R. pp. 216–217.)

The documentary and testimonial evidence demonstrates that the A1 Food Store has been a burden to the law enforcement. It has also been a hindrance to attracting investment to the community. According to Columbia City Councilman, Sam Davis, the A1 Food Store negatively affects the way the whole area is perceived by companies and individuals who could participate in its redevelopment. (Tr. of Hrg, 176:10-25, R. p. 247.) Councilman Davis testified to the City's efforts to find someone interested in taking over a former drycleaner location—a vacant building just a block away from the A1 Food Store—efforts that were undermined by the perception of the foot traffic destined for A1 Food Store. (Tr. of Hrg, 179:19–180:25, R. pp. 250–251.)

The one hundred percent owner of Kan, Nadiya Alibhai (ABL Renewal Form, R. pp. 512–518; Tr. of Hrg, 51:7-16, R. p. 122), did not appear at all at the hearing. In fact, the A1 Food Store manager, Seghal, testified that Ms. Alibhai lives in Atlanta and only visits the A1 Food Store "[s]ometimes once a month." (Tr. of Hrg, 51:5–52:6, R. pp. 122–123.)

STANDARD OF REVIEW

Section 1–23–610 (B) of the South Carolina Administrative Procedures Act sets forth the applicable standard of review:

> The review of the administrative law judge's order must be confined to the record. The 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. The court of appeals 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) (2014).

ARGUMENT

I. The Administrative Law Court's decision to deny the renewal of Kan's beer and wine permit is supported by substantial evidence in the record.

Section 61–4–520 (5) of the South Carolina Code provides that a location for sale of alcoholic beverages must be "a proper one." S.C. Code Ann. § 61–4–520 (5) (1976). A "proper location," however, is not a statutorily defined term. *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 595, 281 S.E.2d 118, 120 (1981). The DOR, and the reviewing court, have "broad discretion in determining the fitness or suitability of a particular location." *Id.* They may consider any evidence that is adverse to the location seeking permit. *Kearney v. Allen*, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985). The evidence may pertain not only to the location in the geographic sense of the word, but also to "the nature and operation of the . . . business and its impact upon the community . . . ." *Id.* at 327, 338 S.E.2d at 337.

This Court should uphold the ALC's decision because the record contains substantial evidence showing that the geographic location of the store, the manner in which the store has been managed, the business model employed, as well as the negative impact upon the surrounding neighborhoods, render A1 Food Store an unsuitable location for sale of alcohol.

Substantial evidence is evidence that allows reasonable minds, considering the whole record, to reach the same conclusion the factfinder reached or must have reached in order to justify its action. *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 594, 281 S.E.2d 118, 119 (1981). The fact that two inconsistent conclusions could be drawn from the evidence in the record does not mean that a decision was not supported by substantial evidence. *Id.* A decision must stand if there is "reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Palmer v. S.C. Alcoholic Beverage Control Com'n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (1984).

Here, the ALC had more than substantial evidence upon which to base its decision to deny Kan's renewal of its beer and wine permit. These Respondents presented witnesses who testified to the problems that emanate from Kan's A1 Food Store. Witnesses testified to observing the sale of alcohol and cigarettes to underage individuals. In particular, Deputy Chief Kelly testified to a joint undercover operation between the City of Columbia Police Department and SLED in which one of Kan's employees sold alcohol to a minor without requesting any form of identification. Kan's employee was issued a citation and paid a fine. In response to this illegal sale, Kan's management did little more than give a verbal warning to the cashier that made the sale, and Kan's

employees are given no training on avoiding the sale to underage individual other than a sign posted on the cash register as a reminder to check identification.

Kan's own witnesses testified about events at the store that call into question A1 Food Store's suitability for sale of alcoholic beverages. Kan's security guard testified that he "runs off" patrons lingering and panhandling around the store, who then disperse onto adjacent properties. (Tr. of Hrg, 78:12-17, 84:13-28–85:1-7, R. pp. 149, 155–156.) The store's manager testified about intoxicated individuals attempting to purchase alcohol. (Tr. of Hrg, 39:1-9, R. p. 110; Tr. of Hrg, 55:15-25–56:1-9, R. p. 126–127.) The ALC relied upon this factual testimony in noting that neighbors and law enforcement witness problems with vagrancy and loitering. (Am. Final Ord., R. p. A–12.) A witness observed persons loitering in the alley behind the store and engaging in sexual activity. (Tr. of Hrg, 170:15-24, R. p. 241.) Another witness for these Respondents testified to being propositioned by a prostitute loitering in the vicinity of A1 Food Store. (Tr. of Hrg, 242:13-23, R. p. 313.)

The ALC's finding that Kan "poses a constant and increasing burden on law enforcement" is supported by specific crime statistics for the store's location, and other comparable stores in the area, which were submitted into evidence through the testimony of three law enforcement officers. (Tr. of Hrg, 86:14–142:19, 142:22–151:4, 151:12–161:5, R. pp. 157–213, 213–222, 222–232; Am. Final Ord., R. p. A–13.) The evidence in the record demonstrates that since 2011 there has been not only an increase in arrests at the A1 Food Store but also an increase in calls for service during the period between 7 p.m. and 7 a.m., which is when the majority of calls for service at the A1 Food Store are received by the Columbia Police Department.

The ALC also relied upon photographs of the A1 Food Store, and not opinion testimony, to determine that the store's "seedy appearance, which stands in contrast to that of the nearby Hess and Sunoco stores, further attracts those who are apt to loiter in the area." (Am. Final Ord., R. pp. A–12–13.) Those photographs document the appearance of the property. (These Respondents' trial exhibit number 1, R. pp. 345–378.)

The finding that "Petitioner . . . does not provide any formal training for the sale of alcohol and tobacco to minors," even though SLED has cited Kan for sale of alcohol to an underage patron, was based on the store manager's own fact testimony. (Tr. of Hrg, 36:3-10; R. p. 107; Am. Final Ord. 4, R. pp. 6–9.) In its brief, Kan maintains that "the employees received 'on the job' training regarding sale of alcohol to underage drinkers. [ ]" (Appellant's Br. 5, 11.) This, however, misrepresents the actual testimony. If anything, Sehgal testified to the presence of "Check ID" signs on each cash register, (Tr. Hrg, 42:8-15, R. pp. 113) thus implying that employees' exposure to those signs somehow amounted to "training on a day-to-day. . . , an hour-to-hour . . . , on minute-to-minute basis." (*Id.*)

It was also Sehgal's testimony upon which the ALC based its conclusion that the amount of effort required to pick up litter on the property is a "reflection of the litter problem that the Store spawns." (Am. Final Ord., R. p. A–13.) Contrary to Kan's assertion, its employees do not just check for litter (Appellant's Br. 29), but, according to Seghal and Kan's attorney, actually have to clean up litter at least three times a day (Tr. Hrg, 29:1-5, 57:10, R. pp. 100, 128) (Tr. Hrg, 139:1-2, R. p. 210).

Thus, there is substantial evidence in the record upon which the ALC based its decision, and this Court should affirm the ALC's decision to deny Kan's renewal of its permit for the sale of beer and wine at the A1 Food Store.

II. The ALC properly applied the law in the case of beer and wine permit renewals.

Kan contends the ALC did not apply the proper standard for consideration of the renewal of alcohol permits because it considered evidence other than that solely relating to a change in circumstances since the prior permit renewal. The case law Kan cites does not articulate a different standard for consideration of a permit renewal as opposed to initial permitting. While it may be relevant for a court to consider whether a permit was previously granted, the fact that such permit was granted establishes neither a strict timeframe nor a benchmark for measuring relative decline in a location's suitability.

Kan cites *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973) and *Byers v. S.C. Alcoholic Beverage Control Com'n*, 281 S.C. 566, 316 S.E.2d 705 (1984), and asserts that the ALC misinterpreted and misapplied South Carolina law. (Appellant's Br. 6.) Kan misapprehends the determinative rulings from *Taylor* and *Byers*. In *Taylor*, the Supreme Court held:

> We agree with the lower court that the relevant testimony of those who oppose the requested permit consists entirely of opinions and conclusions which are not supported by any facts. The claimed detriment to the wellbeing of the community or the lack of adequate police protection are without factual support.

Taylor, 261 S.C. at 171, 198 S.E.2d at 802. Thus, the Supreme Court affirmed reversal of the denial of the permit based upon the failure of those opposing the permit to support their contentions with substantial evidence. A lack of showing that the location was any less suitable than it had been in the prior licensing period was one of many deficiencies of

the record and not the sole factor that determined the outcome of that case.

Likewise, in *Byers*, this Court upheld the reversal of a denial of a beer and wine permit based upon the finding that the Alcohol and Beverage Control Commission's conclusions were either irrelevant to a determination of suitability or not supported by substantial evidence. 281 S.C. 566, 568-69, 316 S.E.2d 705, 707. The reference to *Taylor* merely added support to this Court's determination that the permit was improperly denied.

In this case, the Administrative Law Court fully considered and evaluated the effect of *Taylor* and *Byers* in its determination to deny renewal of Kan's beer and wine permit for sales at the A1 Food Store. In its Order on Motion for Reconsideration, For a Stay and For Supersedeas, the Administrative Law Court explained its reasoning as follows:

> Moreover, *Taylor* and *Byers* do not stand for the proposition that businesses can continue to have problems with littering, loitering, and other activities requiring constant calls to law enforcement without any noticeable improvements can simply continue to operate in a like manner as long as they were able to get permitted under like conditions beforehand. Such an absolute rule would allow locations that have become a nuisance to the community and a burden to law enforcement to continue adversely affecting the community under the theory that their aberrant behavior is vested. Under [Kan's] theory, the Court cannot consider the improvement of the community around the location in determining the renewal of a permit or permit involving alcohol because a prior determination of suitability renders the surrounding community's condition irrelevant.

(Order on Motion for Reconsideration, for a Stay and for Supersedeas, internal footnote omitted; R. p. A–3.)

The application of *Taylor* in renewal cases was also articulated in the order of another Administrative Law Judge:

> Petitioner places too much emphasis on a single phrase pulled from the *Taylor* case, arguing that, regardless of any other evidence of the unsuitability of the location for the proposed business, a permit or permit to sell alcoholic beverages must be issued if there is no showing that the location is less suitable for the sale of beer now than at the time the location was previously permitted. . . . A full and careful reading of *Taylor*, however, reveals that the case turned on the fact that there was no competent factual evidence supporting the finding that the location was unsuitable sufficient to overcome the presumption that the location was suitable to continue to be permitted to operate to sell beer, wine and liquor.

Barfly Enterprises, LLC v. S.C. Dept. of Revenue, 2013 WL 6620406 (Dec. 10, 2013).

Taylor and *Byers* do not state a determinative proposition of law regarding the renewal of beer and wine permits, but add another factor to the consideration of the suitability of the location. The Administrative Law Court properly acknowledged and considered this factor in its determination to deny Kan's beer and wine permit, stating:

> S.C. Code Ann. § 61-4-520 and 540 (2009) generally set forth the requirements for the issuance of a beer-and-wine permit. Section 61-4-520(5) provides that the location of the proposed business must be a proper one.
>
> Although "proper location" is not statutorily defined, the ALC is vested, as the trier of fact, with the authority to determine the fitness or suitability of a particular location. *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 118 (1981). The determination of a "proper location" is not necessarily a function solely of geography. *Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (1985). It 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. It is also relevant to consider whether the proposed location has been previously approved for a permit or permit and whether its suitability has altered over time. *See Smith v. Pratt*, 258 S.C. 504, 508, 189 S.E.2d 310, 302 (1972); *Taylor v. Lewis*, 261 S.C. 168, 171-72, 198 S.E.2d 801, 802 (1973); *Byers v. S.C. Alcoholic Beverage Control Comm'n*, 281 S.C. 566, 569, 316 S.E.2d 705, 707 (1984).

(Amended Final Order and Decision, R. p. A–14.)

As properly held by the Administrative Law Court, this case is distinguishable from *Taylor* and *Byers* because these Respondents presented competent evidence sufficient to overcome any presumption of suitability. In particular, the evidence regarding the increasing amount of crime emanating from the A1 Food Store and the documented sale of alcohol to an underage individual demonstrates the unsuitability of that location for a beer and wine permit.

To the extent this Court could determine that Appellant properly interprets *Taylor* as standing for the proposition that there must be a demonstrated decrease in suitability in order to deny renewal of a beer and wine permit, there is substantial evidence in the record showing that the location is less suitable than it was when Kan's beer and wine permit was previously renewed. The documentary and testimonial evidence demonstrates that since the last renewal, the number of arrests at the A1 Food Store have increased, calls for police service at night have increased, in July 2014 Kan violated the law by selling alcohol to an underage individual, and the condition and appearance of the store have hindered recent community efforts to improve the neighborhood. Accordingly, this Court should affirm the ALC's decision to deny renewal of Kan's beer and wine permit.

III. The ALC did not improperly base its decision upon unsubstantiated opinion evidence.

Kan asserts that the ALC improperly relied on unsubstantiated opinion evidence in reaching its decision. This is incorrect. Not only did the ALC base its decision on fact evidence in, any opinion testimony that may have been considered was grounded in facts directly observed and related by the witnesses called to the stand.

In formulating the findings of fact of its original Final Order and Decision (R. pp. 10–14), the ALC relied on the eye-witness accounts regarding littering, crime, loitering, alcohol consumption, and solicitation at and around the A1 Food Store. The ALC expressly invoked this factual testimony in noting that neighbors and law enforcement "witness problems with vagrancy and loitering." (*Id.*, R. p. 11.) The specific crime statistics submitted into evidence by these Respondents' three law enforcement witnesses allowed the ALC to find that Kan's store has been "an undue burden on law enforcement." (*Id.*, R. p. 12.) The ALC relied upon photographs of the store, and not opinion testimony, to determine that its "seedy appearance, which stands in contrast to that of the nearby Hess and Sunoco stores, further attracts those who are apt to loiter in the area." (*Id.*) The ALC relied upon Sehgal's own fact testimony that "Petitioner does not provide any formal training for the sale of alcohol and tobacco to minors" even though the South Carolina Law Enforcement Division has cited the store for the sale of alcohol to minors. (*Id.*) The ALC also relied on these Respondents' fact testimony about their efforts to improve their neighborhood. Furthermore, Kan's own witness testified to the amount of effort required to pick up litter—an effort, which the ALC rightly found to be a "reflection of the litter problem that the Store spawns." (*Id.*, R. p. 13.)

This issue was addressed in Kan's Motion for Reconsideration. In response, the ALC issued an Order on Motion for Reconsideration, for a Stay and for Supersedeas, explaining that the ALC, in fact, relied not only on the fact evidence submitted by these Respondents, but also on Kan's own witnesses' testimony regarding the proliferation of litter around the A1 Food Store. (Order on Motion for Reconsideration, a Stay and for Supersedeas, R. pp. 1–5.) The ALC reiterated that its determination was based upon the

first-hand accounts of these Respondents' witnesses and not merely upon opinion testimony. (*Id.*) The ALC's Amended Final Order and Decision reflects these considerations. (R. pp. 6–9.)

The record in this case contains direct, fact evidence linking problems in the area with the sale of alcohol at the A1 Food Store. In deciding the case, the ALC was free to consider any evidence that was adverse to Kan, *see Kearney v. Allen*, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985), and it was also free to weigh that evidence and judge witnesses' credibility as it deemed appropriate. *See* S.C. Code Ann. § 1–23–610 (B) (2014); *S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

Therefore, considering the ALC's prerogative to freely weigh the evidence before it and the ample contents of the record, this Court should affirm the ALC's denial of renewal of Kan's beer and wine permit.

IV. The ALC's decision to deny Kan's application for permit renewal did not result in deprivation of any vested property interest owned by Kan.

Kan could not have been deprived of a vested property interest because it had none. It cannot have a property interest in an alcohol permit because, under S.C. Code Ann. § 61–2–140 (B) (1976), alcohol permits are the property of the DOR. According to our Supreme Court, permits for sale of alcohol are:

> neither contracts nor rights of property. They are mere permits, issued or granted in the exercise of the police power of the state to do what otherwise would be unlawful to do; and to be enjoyed only so long as the restrictions and conditions governing their continuance are complied with.

Feldman v. S. C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22, 25 (1943). Because Kan had no property interest in its beer and wine permit, it could not have ever had any vested property right to such permit's renewal.

Kan argues, citing *Pure Oil Division, et al. v. The City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970), that the ALC's decision was "tantamount to depriving the Appellant of his vested property right without cause." (Appellant's Br. 16.) The facts of *Pure Oil*, however, are a poor analog for Kan's situation. That case involved a right to build and operate a gas station pursuant to a zoning ordinance in force. The principles on which *Pure Oil* rested are reflected in the Vested Rights Act, S.C. Code Ann. § 6–29–1510 (2014), *et seq.*, wherein "vested right" is a defined term. S.C. Code Ann. § 6–29–1520 (10) (2014). "'Vested right' means the right to undertake and complete the development of property under the terms and conditions of a site specific development plan or a phased development plan as provided in this article and in the local land development ordinances or regulations adopted pursuant to this chapter." *Id.* Thus, the concept of vested rights, under that statute, is meant to protect land owners from changes in land use laws. No change in land use laws, however, affected Kan's status as a beer and wine permit holder.

Accordingly, this Court should find that Kan was deprived of no vested right and affirm the ALC's denial of renewal of Kan's beer and wine permit.

V. The ALC's decision did not violate Kan's constitutional rights.

Kan argues that the ALC's decision to deny the renewal of the permit resulted in a violation of Kan's constitutional rights to due process and equal protection. (Appellant's Br. 16–18.) This Court should reject Kan's argument for two reasons.

First, these issues have not been preserved for appeal: Kan raised them for the first time in its Motion for Reconsideration. However, a "party cannot use Rule 59(e) 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). Accordingly, the alleged violations of constitutional rights are not part of the record before this Court.

Second, even if Kan preserved the issues of violation of constitutional rights by raising them it in its Motion for Reconsideration, Kan's argument must fail as it lacks any merit.

Kan argues that the ALC's action violates its rights under the due process clause of the Fourteenth Amendment to the United States Constitution. That clause provides that a state shall not "deprive any person of life, liberty, or property without due process of law[.]" U.S. Const. amend. XIV, § 1. Procedural due process is a flexible concept, calling "for such procedural protections as the particular situation demands." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). It requires "notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* at 171, 656 S.E.2d at 350; *see also* S.C. Const. art. 1, § 22. A party claiming denial of due process in an administrative proceeding must show substantial prejudice. *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

Here, Kan had notice of the matters to be tried and an opportunity to be heard. First, it was on notice that its application for renewal its of beer and wine permit had been protested and that the DOR had to deny it. Second, it was on notice that it could seek a contested case hearing to challenge the denial. Finally, Kan requested the hearing before

the ALC and at the hearing its counsel presented evidence and cross-examined Respondents' witnesses.

It appears that at the core of Kan's due process argument is the allegation that Kan "did not have any notice that the Court was going to disregard well established legal principles. . . . [and, therefore,] it did not have an adequate opportunity to prepare evidence to rebut the opinion testimony presented at the trial." (Appellant's Br. 16.) This is unavailing. As Judge Anderson noted in his Order on Motion for Reconsideration, Kan "was aware of the witnesses who would be called. In fact, [it] had copies of the protests that the witnesses had filed and also had the right to discovery." (Order on Motion for Reconsideration, for a Stay and for Supersedeas dated March 19, 2015, R. p. A–6.) As for the alleged application of the incorrect standard, Kan took advantage of procedural safeguards provided by Rule 59(e) of the South Carolina Rules of Civil Procedure and Rule 29(D) of the Rules of Procedure for the Administrative Law Court to address that issue.

Nor were Kan's substantive due process rights violated. Substantive due process provides protection against deprivation of life, liberty, or property for arbitrary reasons. *Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). Kan would have to show that by denying its renewal application, the ALC not only deprived it of a cognizable property interest rooted in state law, but also did so in an arbitrary and capricious manner. *Id.* As set forth above, Kan has no "cognizable property interest" in the renewal of its beer and wine permit because such permits are the property of the DOR. And furthermore, the ALC's decision was made upon thorough

consideration of competent evidence related to suitability of the A1 Food Store for sale of alcoholic beverages.

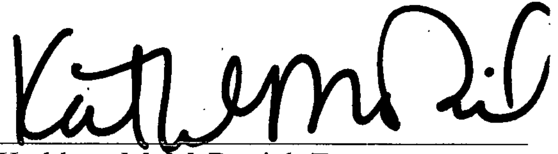
Finally, Kan argues that its equal protection rights have also been violated, citing two cases in support of its argument: *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 475 S.E.2d 765 (1996) and *Sandy Springs Water Co. v. Dept. of Health and Env. Control*, 324 S.C. 177, 478 S.E.2d 60 (1996). In both of those cases plaintiffs sought to challenge discriminatory classifications imposed by a statute or ordinance. *Id.* In this case, Kan points to no statutory classification as the basis for its equal protection claim. Here again, these arguments have no merit and were not preserved for appeal. Accordingly, this Court should affirm the ALC's denial of renewal of Kan's beer and wine permit.

CONCLUSION

This Court should affirm the decision of the Administrative Law Court because it is supported by substantial and competent evidence in the record and is not marked by any error of law or constitutional right.

[Signature on following page.]

Respectfully submitted,



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January 13, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ADMINISTRATIVE COURT

Ralph King Anderson, III, Chief Administrative Law Judge

ALC Docket No. 14-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.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 211(b), SCACR:

I certify that this Final Brief complies with the requirements of Rule 211(b), SCACR.

Kathleen M. McDaniel, Esq.

Columbia, South Carolina

January 13, 2016