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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JAN 22 2016

SC Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

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.

**APPELLANT'S RESPONSE TO AMICUS BRIEF OF
THE CITY OF COLUMBIA IN SUPPORT OF RESPONDENTS**

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STATEMENT OF THE CASE

This matter came before the Court for a contested case hearing pursuant to Appellant Kan Enterprises, Inc., d/b/a A1 Food Store's ("A1 Food Store") application for a renewal of its seven-day off premises beer and wine permit filed with the Respondent South Carolina Department of Revenue ("Department") on or about July 31, 2014. (R. pp. 512 - 518.) The Department denied the Appellant's request on or about December 10, 2014. (R. pp. 18 - 21.) Appellant timely appealed this decision to the Administrative Law Court and a contested case hearing was held on February 10, 2015. (R. pp. 72-473).

At the hearing, the Department's attorney stipulated in open court that the Department determined that Appellant met all statutory requirements for the seven-day off premises beer and wine permit and would have granted the permit but for public protest. (R. p. 78, ll. 7-14.) Testimony was then heard by Judge Ralph King Anderson, III ("Judge Anderson"). On February 20, 2015, Judge Anderson issued his Order denying the Appellant's application for a seven-day renewal. (R. pp. 10 - 14.)

Appellant timely moved for reconsideration, for a stay and supersedeas, along with a memorandum of law in support of its motions. (R. pp. 34 - 61.) In response to this motion, the Court issued two orders, an order denying Appellant's motions for reconsideration, for a stay and supersedeas, as well as an order amending its prior February 20, 2015, Order to include additional findings of fact. (A. pp. 1 - 15.) This appeal timely followed. (R. pp. 489 - 510).

During the briefing, The City of Columbia filed a Motion to File Amicus Brief in support of Respondents. Despite Appellant's opposition to this Motion, this Court granted leave to The City of Columbia to file an amicus brief and the City's amicus brief was filed on or about September 10, 2015.

STATEMENT OF THE FACTS

A1 Food Store is located on Monticello Road in Columbia, South Carolina. (R. pp. 340 - 344.) It is owned by Kan Enterprises. (R. p. 118, ll. 20-23.) It is located adjacent to a post office in a heavily trafficked part of Columbia. (R. pp. 94, l. 25 - 95, l. 2.) There is a City of Columbia Police substation located in close proximity. (R. p. 95, ll. 6-14.) Police officers from the substation frequent the business and utilize the business' parking lot. (R. p. 106, ll. 5-18; pp. 107, l. 18 - 108, l. 6.) Across the street is an unrelated business, located at 4039 Monticello Road, which was recently granted an off premises beer and wine permit. (R. p. 95, ll. 15-18.)

A1 Food Store has held an off premises beer and wine permit for many years and for at least two years under its present ownership. (R. pp. 89, l. 23 - 90, l. 1.) This license has never been revoked or suspended. (R. p. 114, ll. 14-16.) Approximately 40 percent of A1 Food Store's business comes from the sale of beer and wine for off-premises consumption. (R. p. 119, ll. 3-17.) In addition to beer and wine, A1 Food Store sells, "...almost everything from day-to-day daily basis...whatever people need. Like it could be Clorox with the detergent powder. It could be toilet paper. It could be automotive oil or soap, you know, the type of things that people need on a day to day basis." (R. pp. 90, l. 20 - 91, l. 3.) In addition, the store sells frozen food. (R. p. 91, ll. 7-12.) It also sells lottery tickets and has an in-store ATM. (R. p. 104, ll. 5-10.)

A1 Food Store also sells beer and wine for off premises consumption. (R. p. 104, ll. 3-20.) In the store, food or drink consumption is not allowed. (R. p. 91, ll. 15-19.) A1 Food Store is open from 5:00 a.m. until 2:00 a.m. during weekdays and 24 hours a day during the weekends. (R. p. 94, ll. 11-16.)

For the past two years, A1 Food Store has been managed by Vinno ("Vinny") Sehgal. (R. p. 84, ll. 11-12; p. 85, ll. 6-16.) Mr. Sehgal testified that he is physically present at the store 6-8 hours a day and is available by phone "24/7." (R. pp. 111, l. 21 – 112, l. 9.) He testified that A1 Food Store maintains an interior and exterior security camera system with "eight or nine cameras." (R. p. 92, ll. 5-14.) These operate "24/7." (R. p. 114, ll. 17-24.) Monitor screens are located in Mr. Sehgal's office and at the counter. (R. p. 92, ll. 15-18; p. 93, ll. 13-19.) Images from these cameras are retained for 2-3 days. On occasion, images from the cameras have been furnished, on request, to the City of Columbia Police Department. (R. pp. 120, l. 23 – 121, l. 11.)

In addition to the security system, the store employs a security guard during night-time hours. (R. pp. 114, l. 17 – 115, l. 10.) This individual was hired after Mr. Sehgal took over management and is physically on the premises from at least 10:00 p.m. until closing each night. (R. p. 115, ll. 4-10; p. 146, ll. 17-25; p. 147, ll. 15-20). The security guard's job is to monitor both the inside and outside premises. (R. p. 147, ll. 3-10.)

Mr. Sehgal testified that individuals are not allowed to drink alcohol in the building or parking lot. (R. p. 98, ll. 15-18.) Sales of alcohol are not made to intoxicated customers. (R. pp. 109, l. 25 – 110, l. 9.) There are signs inside the store regarding underage drinking and employees received "on the job" training regarding sale of alcohol

to underage drinkers. (R. pp. 112, l. 10 – 114, l. 11.) There is a large sign posted on premises indicating that the property is under surveillance and that there is to be no on premises consumption of alcohol, no narcotics, no panhandling and no loitering. (R. p. 94, ll. 19-24.) At times "no trespassing" signs have been placed on the property as well. (R. p. 99, ll. 8-12.)

Two months prior to the hearing, Mr. Sehgal installed high intensity flood lights to illuminate all areas around the business. (R. pp. 96, l. 18 – 97, l. 20.) Mr. Sehgal testified that neither he nor his employees confront individuals who disregard this sign, but instead call upon/rely upon the City of Columbia Police to do so. (R. pp. 98, l. 19 – 97, l. 7.) The City of Columbia Police Department's witnesses acknowledged that this was a good thing to do. (R. p. 197, l. 7).

In addition, Mr. Sehgal testified that at least three times a day his employees check the parking lot and areas surrounding the store for litter. (R. pp. 99, l. 24 – 100, l. 5.) A1 Food Store is located on a busy street and adjacent to numerous other stores and businesses. (R. pp. 101, l. 18 – 102, l. 3.) Mr. Sehgal testified that he does not know where this litter comes from. (R. p. 100, ll. 6-25.) He testified that this litter could come from any of these 10-15 other businesses. (R. pp. 100, l. 17 – 101, l. 10.) He testified that he did everything he could to keep the business neat and clean. (R. pp. 110, l. 13 – 111, l. 6.) Appellant presented testimony from several witnesses to the effect that the condition of the store had improved since Mr. Sehgal took over as manager. (R. p. 130, ll. 14-20; pp. 144, l. 17 – 145, l. 3; pp. 147, l. 22 – 149, l. 2.)

STANDARD OF REVIEW

A reviewing Court may reverse or modify the decision of the Administrative Law Court (ALC) judge if the finding, conclusion or decision reached by the ALC is arbitrary or capricious or characterized by an abuse of discretion or is a clearly unwarranted exercise of discretion; violates constitutional or statutory provisions; or is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or is affected by an error of law. S.C. Code § 1-23-610(B); *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 670 S.E.2d 674 (S.C. Ct. App. 2008).

DISCUSSION OF LAW

I. THE ADMINISTRATIVE LAW COURT'S ORDER CONTAINS NUMEROUS ERRORS OF LAW

The City of Columbia's brief adopts and sets forth the same arguments that were put forth by Respondents in their argument(s) to this Court. Contrary to the argument of Respondent SCDOR, the Administrative Law Court's Order(s) contain numerous errors of law and are not supported by the evidence presented at the hearing. Appellant respectfully submits that even considering the arguments set forth by The City of Columbia, the Administrative Court's Order should be reversed by this Court.

A. The Trial Court Applied the Incorrect Standard.

The Final Orders and Decisions of the Administrative Law Judge, as well as his Order denying Appellant's post-hearing motions, are based on a misinterpretation and misapplication of the applicable South Carolina Law. As argued in Appellant's Brief, the Administrative Law Court treated this matter as it would a first time permit request and

not as the renewal that it was. *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973), *Byers v. South Carolina Alcoholic Beverage Control Commission*, 281 S.C. 566, 316 S.E.2d 705 (1984). The unreported ALC case of *Barfly Enterprises, LLC v. S.C. Department of Revenue*, 2013 WL 6620406 (Dec. 10, 2013), is grounded on a mistaken interpretation of the law set forth by the Supreme Court in the *Taylor* and *Byers* cases. The application of this incorrect standard by the lower Court in this matter constitutes an error of law and warrants reversal by this Court.

B. The Trial Court's Order Is Not Supported by the Evidence Presented at Trial.

Even if the Trial Judge applied the correct standard in this case (which Appellant denies) the overwhelming evidence in this case does not support a denial of the renewal of Appellant's off premises beer and wine permit.

The City of Columbia cites and relies on the fact that calls to the police had increased and that Appellant's business has created an undue burden on law enforcement. As set forth in Appellant's Brief, this finding and this argument are not supported by the evidence presented to Judge Anderson at trial. There was ample evidence in the record that these calls were the result of Appellant's efforts to keep law enforcement informed and involved in the property and not "to take matters into their own hands." (R. pp. 98, l. 19 - 99, l. 7.) The police department's own witnesses acknowledged that this was a good thing and something that they expect a business owner to do. (R. pp. 197, l. 1 - 198, l. 22). At the hearing the City of Columbia Police's witnesses conceded that the increase in calls could be due to the Appellant's efforts to work with the City to clean up problems related to the property. (R. pp. 208, l. 22-25; 226, ll. 15-24). However, the City's argument here penalizes Appellant (and others like

him) for calling the police as the evidence of such calls will be used against him as Respondents are attempting to do here.

Further, as set forth above, it is clear that the Respondents and the City of Columbia are attempting to make the Appellant the “scapegoat” for all of the neighborhood’s problems involving loitering, litter and crime. The Court’s Order (and the arguments of Respondents) ignore the fact that Appellant’s business is located on a busy thoroughfare, and that there are other businesses located adjacent and close to the Appellant who sell alcohol for off premises consumption. Further, much of the loitering complained of and cited by Respondents occurs on adjacent property and not property owned or controlled by the Appellant. The evidence presented at trial does not support the harsh penalty imposed on the Appellant in this case. The Court’s Order should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reject the arguments of Respondents and the City of Columbia and should reverse the judgment of the Administrative Court Judge denying the Appellant's application for a renewal of its off premises beer and wine license.

Respectfully submitted,

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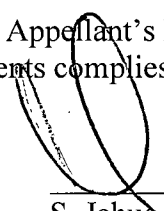
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Response to Amicus Brief of the
City of Columbia in Support of Respondents complies with Rule 211(b) SCAR.


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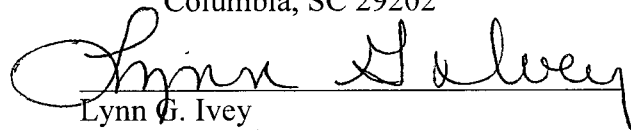
PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served the Appellant's Response to Amicus Brief of the City of Columbia in Support of Respondents by mail, to the following parties by depositing a copy of same in the United States Mail, postage prepaid, on January 22, 2016, addressed as follows:

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