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MAR 18 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Fnu Satish Kumar d/b/a Piney Xpress,
Petitioner,
vs.
South Carolina Department of Revenue,
Respondent.

Docket No. 16-ALJ-17-0008-CC

FINAL ORDER AND DECISION

FILED

MAR 14 2016

SC ADMIN. LAW COURT

APPEARANCES: Kenneth E. Allen, Esquire For Petitioner
Sarah Khouri, Esquire For Respondent

STATEMENT OF THE CASE

This matter came before the Administrative Law Court ("ALC" or "Court") as a contested case hearing pursuant to S.C. Code Ann. § 1-23-600 (Supp. 2014) and S.C. Code Ann. § 61-2-260 (2009):

Respondent South Carolina Department of Revenue ("Department" or "SCDOR") denied Fnu Satish Kumar d/b/a Piney Xpress ("Petitioner" or "Applicant") application for a seven day off-premises beer and wine permit because of the timely filed protest by Reverend Dr. Johnnie Cordero.¹

A hearing on this matter was held at 10:00 a.m. on Tuesday, March 8, 2016 at the offices of the ALC in Columbia, South Carolina. After listening to the testimony and weighing all evidence presented at the hearing, this Court finds that Petitioner's permit for the sale of beer and wine for off-premises consumption shall be granted.

At the commencement of the hearing, Reverend Cordero presented the Court with a Motion to Intervene as a party Respondent. To show good cause existed to grant the motion, Reverend Cordero asserted that the Department was merely a neutral party in these matters and that he would like to appeal if the Court granted Petitioner's license. The Department had no

¹ The Applicant filed his original application for an 'on-premises' beer & wine permit with the Department of Revenue on December 8, 2015. However, Counsel for Applicant informed the Court upon the commencement of the hearing, on March 8, 2016, that the application was modified as an 'off-premises' beer & permit, which is the type of permit that was intended all along, as the Applicant operates a convenience store.

objection to Reverend Cordero's motion. However, Petitioner argued that the motion was untimely and that Reverend Cordero also had an opportunity to testify as a Protestant.

Despite Reverend Cordero's articulate argument and his courtesy toward the Court and the parties, the Court found that the motion was untimely. Ruling from the bench, the Court denied the motion to intervene. See SCALC Rule 20 (stating in part that, "Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing. Any later motion shall contain a statement of good cause for the failure to intervene earlier.").

FINDINGS OF FACT

Having observed the testimony of the witnesses and exhibits presented at the hearing and closely passed upon their credibility, I make the following Findings of Fact by a preponderance of evidence:

1. Notice of the time, date, place and subject matter of the hearing was timely given to all parties and to all Protestants.

2. This case involves an application for a seven day off-premises beer and wine permit submitted by Fnu Satish Kumar d/b/a Piney Xpress, located at 1001 Piney Woods Road, Columbia, SC, 29210.

3. Applicant is twenty-one years of age or older, is a legal resident of the United States and has been a legal resident of South Carolina for at least thirty (30) days before the date of the application. Applicant has not had a license suspended or revoked within two years of the date of the application.

4. The South Carolina Law Enforcement Division (SLED) report indicates that the location meets all of SLED's requirements for issuance of the permit.

5. Respondent South Carolina Department of Revenue also averred that the Petitioner and the business location meet the statutory qualifications to hold a seven day off-premises beer and wine permit and that it would have granted the application but for the timely filed protest.

6. The subject location is a general convenience store for one-stop shopping that is located in Richland County outside the municipal limits of Columbia, S.C. The business has been open since January 23, 2016. The area surrounding the subject location is mostly

residential, but the subject location is zoned neighborhood-commercial (NC). There are no churches, schools or playgrounds located within 500 feet of subject location.

7. Puneet Kumar ("Kumar") will be managing the day-to-day operations of the business with his father, Fnu Satish Kumar, who is the owner and the Applicant. Mr. Kumar is thirty-one years old and has previous experience owning and operating a business licensed to sell alcohol. From 2009 to 2013, Mr. Kumar operated a convenience store in Marion, S.C., that was permitted to sell beer and wine for off-premises consumption. Additionally, from 2011 to 2013, Mr. Kumar operated an adjoining business that was licensed to sell liquor. Mr. Kumar does not owe any outstanding taxes to the state of South Carolina, and he does not have a record of any violations or complaints related to his prior experience selling alcohol.

8. The subject location will operate seven days a week during the hours of 6:00 a.m. until 10:00 p.m. The Kumars intend to I.D. all customers, and they will not sell to patrons that appear to be intoxicated. Neither loitering nor on-premises consumption will be allowed.

9. The subject location has eight parking spots with additional space to add parking spots. The location also has security cameras and regularly scheduled trash pickup by ASI, a local service. The Kumars will also do a general trash pickup on the property on a daily basis.

10. Protestant Reverend Dr. Johnnie Cordero ("Protestant") filed a protest on his behalf and for the general concern of local residents. The Protestant lives within close walking distance of the subject location. The basis for the protest is the suitability of the location, which the Protestant contends is an entirely residential area. The Protestant contends that the subject location does not suit the daily needs of the residents. Furthermore, the Protestant contends that the subject location abuts a multi-family dwelling and the location is not suitable because it will invite criminal activity.

11. I find that the testimony of the Protestant, though very earnest and articulate, does not present facts of sufficient gravity to warrant denial of the permit.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude the following as a matter of law:

1. S.C. Code Ann. § 1-23-600 (Supp. 2014) grants jurisdiction to the Administrative Law Court to hear contested cases under the Administrative Procedures Act. Additionally, S.C. Code Ann. § 61-2-260 (2009) grants the Administrative Law Court the responsibilities to determine contested matters governing alcoholic beverages, beer and wine.

2. “[T]he issuance or granting of a license to sell beer or alcoholic beverages rests in the sound discretion of the body or official to whom the duty of issuing it is committed[.]” Palmer v. S.C. Alcoholic Beverage Control Comm’n, 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984); see also Wall v. S.C. Alcoholic Beverage Control Comm’n, 269 S.C. 13, 235 S.E.2d 806 (1977).

3. The weight and credibility assigned to evidence presented at the hearing of a matter 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).

4. S.C. Code Ann. § 61-4-520 (2009) establishes the criteria for the issuance of a beer and wine permit. Included in the criteria is the requirement that the proposed location be a proper and suitable one. S.C. Code Ann § 61-4-520(6)-(7) (2009).

5. Although “proper location” is not statutorily defined, broad discretion is vested in the trier of fact to determine the fitness or suitability of a particular location for the requested permit. See Fast Stops, Inc. v. Ingram, 276 S.C. 593, 281 S.E.2d 118 (1981).

6. The determination of suitability of location is not necessarily a function solely of geography. Rather, it involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community within which it is to be located. Kearney v. Allen, 287 S.C. 324, 338 S.E.2d 335 (1985); Schudel v. S.C. Alcoholic Beverage Control Comm’n, 276 S.C. 138, 276 S.E.2d 308 (1981).

7. In determining whether a proposed location is suitable, it is proper for this tribunal to consider any evidence that shows adverse circumstances of location. Kearney v. Allen, 287 S.C. 324, 338 S.E.2d 335 (1985); Palmer v. S.C. Alcoholic Beverage Control

Comm'n, 282 S.C. 246, 317 S.E.2d 476 (Ct. App. 1984) (citing Smith v. Pratt, 258 S.C. 504, 189 S.E.2d 301 (1972)).

8. The factual determination of whether or not an application is granted or denied is usually the sole prerogative of the executive agency charged with rendering that decision. Palmer v. S.C. Alcoholic Beverage Control Comm'n, 282 S.C. 246, 317 S.E.2d 476 (Ct. App. 1984). As the trier of fact, an administrative law judge is authorized to determine the fitness or suitability of the proposed business location of an applicant for permits and licenses to sell alcoholic beverages using broad but not unbridled discretion. Byers v. S.C. Alcoholic Beverage Control Comm'n, 281 S.C. 566, 316 S.E.2d 705 (Ct. App. 1984).

9. Without sufficient evidence of an adverse impact on the community, the application must not be denied if the statutory criteria are satisfied. The fact that a Protestant objects to the issuance of a permit is not a sufficient reason by itself to deny the application. See 45 Am.Jur. 2d Intoxicating Liquors § 162 (Supp. 1995); 48 C.J.S. Intoxicating Liquors § 119 (1981).

10. I conclude that the Petitioner has met its burden of proof in showing that he meets all of the statutory requirements for holding a seven day off-premises beer and wine permit. Although cognizant of the Protestant's concerns, I conclude that the proposed location is a proper one for granting the permit. The location is suitable for Petitioner's operation and it will not be detrimental to the welfare of the surrounding community.

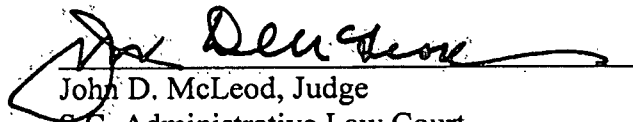
ORDER

Based upon the above Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that Respondent shall continue to process Petitioner's application and issue the permit upon the satisfaction of all administrative requirements.

AND IT IS SO ORDERED.

March 14, 2016
Columbia, S.C.


John D. McLeod, Judge
S.C. Administrative Law Court