THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-17-0031-CC
Appellate Case No. 2016-001082

The Hunter-Gatherer, LLC, d/b/a The Hunter-Gatherer Brewery,....................Respondent,

v.

South Carolina Department of Revenue,...Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN RULING THAT A HOLDER OF A BREWPUB PERMIT MAY SIMULTANEOUSLY HOLD A BREWERY PERMIT?

STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) in accordance with the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 et seq. (Supp. 2015) for a contested case hearing. The Hunter-Gatherer, LLC, d/b/a The Hunter-Gatherer Brewery (Petitioner), filed for a contested case hearing with the ALC on February 4, 2016, to challenge a Department Determination (Determination) issued by the South Carolina Department of Revenue (Department/Appellant) on January 28, 2016, denying its application for a brewery permit. (R. pp. 12 – 14.) Specifically, the Department denied the Petitioner's application because an applicant with a financial interest in a business that holds a brewpub permit, like the Petitioner, is not eligible to also a hold a brewery permit pursuant to S.C. Code Ann. § 61-4-940(D). (R. pp. 12 – 14.)

The parties filed joint Stipulations of Fact on February 11, 2016. (R. pp. 59 – 60). The Petitioner then filed a Pretrial Brief on March 7, 2016. On March 9, 2016, the ALC held a motions hearing.[1] The ALC issued its Order on May 2, 2016, finding that a brewpub permit is "a 'hybrid permit' outside the three-tier system" and, therefore, the Petitioner can hold a brewery permit and brewpub permit simultaneously. (R. pp. 1 – 11.) The Department filed its appeal of the ALC's decision to the South Carolina Court of Appeals on May 23, 2016.

STATEMENT OF FACTS

The Petitioner holds a brewpub permit for its business located at 900 Main Street, Columbia, South Carolina (hereinafter, the "brewpub"). (R. p. 59, ¶ 1.) The Petitioner has held this brewpub permit since October of 1995. (R. p. 59, ¶ 1.) The Petitioner sells food, beer, wine,

[1]Although neither party filed a formal motion for summary judgment, the parties agreed no material facts were in dispute and only questions of law existed. (R. p. 3; Order 1.) At the hearing, no witnesses were called and the hearing consisted of legal arguments from both sides.

and liquor and also manufactures approximately 1000 gallons of beer per month at its brewpub. (R. p. 59, ¶ 1.) On or about November 19, 2015, the Petitioner applied for a brewery permit and an on-premises beer and wine permit for its proposed brewery located at 1402 Jim Hamilton Boulevard, Columbia, South Carolina (hereinafter, the "brewery".). (R. p. 59, ¶¶ 2 – 3.) The Petitioner plans to manufacture approximately 5000 gallons of beer per month at its brewery, which will be distributed to retailers via a local wholesaler. (R. p. 59, ¶ 2.)

After reviewing the Petitioner's applications, the Department determined that the Petitioner was not eligible to hold a brewery permit and a brewpub permit simultaneously because such would violate South Carolina's three-tier law. (R. p. 59, ¶ 3.) As explained in detail herein below, South Carolina law creates a three-tier system, with limited statutory exceptions, wherein manufacturers, wholesalers, and retailers are each on a separate tier and cannot have any interest in a business on another tier. See § 61-4-940.[2] In this case, the Department determined that a brewery falls on tier one – the manufacturing tier – and a brewpub falls on tier three – the retail tier. (R. pp. 12 – 14, 61 – 62.) Pursuant to § 61-4-940(D), "a person or an entity in the beer business on one tier . . . may not have ownership or financial interest in the beer business operation on another tier." Accordingly, the Department denied the Petitioner's application for a brewery permit because the Petitioner is already in the beer business on the third tier. (R. p. 12 – 14.) Additionally, the Department held the Petitioner's application for an on-premises beer and wine permit at the brewery in abeyance pending a determination from the ALC regarding the brewery permit application. (R. p. 59 – 60, ¶ 3.)

[2]For example, § 61-4-940(D) allows a retailer that held an interest in a wholesale business to be "grandfathered" in as an exception provided the wholesale business is not operated at the same location as the retail business and the retailer's interest in the wholesale business existed prior to July 1, 1980.

ARGUMENTS

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (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). S.C. Code Ann. § 1-23-610(B) (Supp. 2015) provides the applicable standard:

> The review of the administrative law judge's order must be confined to the record. 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 Appellant has been prejudiced because of 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.

Additionally,

> When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005) (internal citation omitted).

Resolution of the issues in this case depends upon the rules of statutory construction and when construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-

Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Id. at 23, 579 S.E.2d at 336. The words of the statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted). Finally, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examin'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

As will be explained more fully herein, the ALC failed to properly construe S.C. Code Ann. §§ 61-4-940(D) and 61-4-1700 (2009). Instead of concluding that a brewpub is a hybrid permit outside the three-tier system, the ALC should have concluded that a brewpub is a retail business that falls on the third tier – the retail tier. The ALC should have then concluded that the Petitioner is not eligible for a brewery permit because the Petitioner operates a business on the retail tier by virtue of the fact that the Petitioner owns a brewpub. In making its ruling, the ALC committed errors of law and abused its discretion by failing to give the Department's Determination deference. Thus, pursuant to §§ 1-23-610(B)(d) & (f), this Court should reverse the ALC's decision.

I. THE ADMINISTRATIVE LAW COURT ERRED IN RULING THAT A HOLDER OF A BREWPUB PERMIT MAY SIMULTANEOUSLY HOLD A BREWERY PERMIT.

A. South Carolina Has Had A Three-Tier System Since The Enactment Of The Twenty-First Amendment.

In 1919, Congress ratified the Eighteenth Amendment to the United States Constitution, creating the era known as Prohibition. T.A.C. Hargrove, II, Note, Stone Didn't Come But We Got The Bill: An Analysis Of South Carolina Laws Affecting Craft Breweries, 9 Charleston L. Rev. 335, 347 (2015). Prior to Prohibition, the country was plagued by problems relating to the overconsumption of alcohol. Id. at 347-348. Specifically, because no laws existed prior to Prohibition that prevented the integration of manufacturers and retailers, also known as "tied houses," manufacturers could control retailers. Id. That control resulted in the overconsumption of alcohol. Id. On December 5, 1933, Congress ratified the Twenty-First Amendment to the United States Constitution and repealed Prohibition. Thomas H. Walters, Michigan's New Brewpub License: Regulation Of Zymurgy For the Twenty-First Century, 71 U. Det. Mercy L. Rev. 621, 644 (1994). Thereafter, regulation of the sale of alcohol went to the states. David R. Scott, Brewing Up A New Century Of Beer: How North Carolina Laws Stifle Competition In The Beer Industry And How They Should Be Changed, 3 Wake Forest J. L. & Pol'y 417, 418 (2013). Prior to ratification of the Twenty-First Amendment, however, John D. Rockefeller, Jr. commissioned a study in order to develop plans for states to use to regulate alcohol. Id. at 421. "The study concluded that the best option would be state-run monopolies over the sale and distribution of alcohol." Id. The study also set forth an alternative to state-run monopolies – a licensing plan utilizing a three-tier system. Id. at 422. Most states, including South Carolina, implemented a three-tier distribution system requiring manufacturers to sell to wholesalers, wholesalers to sell to retailers, and retailers to sell to consumers. Id. at 418; Hargrove, supra, at

351. South Carolina's current three-tier law regarding beer can principally be found in § 61-4-940(D) (hereinafter referred to as the "Three-Tier Law").[3] Pursuant to the Three-Tier Law, the three tiers are as follows: tier one – manufacturers, tier two – wholesalers, and tier three – retailers.

Additionally, many states, including South Carolina, created "tied house" statutes. See § 61-4-940. "Tied house" statutes are aimed at preventing the integration of manufacturing, wholesale . . . and retail outlets in the [alcohol] industry. It has been a fear . . . that economic power at one level in this three-tiered system . . . could be transferred to another level in order to gain control at the second level." Walters, supra, at 661-662. Simply stated, tied house laws prevent a business on one tier from controlling a business on another tier. For example, tied house laws prevent the integration one can find in Great Britain's alcohol industry and could once find in America's alcohol industry. Id. at 670. "In Great Britain, breweries exert control over retailers through ownership of outlets," resulting in manufacturers having the ability to dictate prices and availability of its product. Id. In South Carolina, and many other states, a beer business on one tier cannot have an interest in a beer business on another tier. See § 61-4-940(D). This serves to prevent a business on one tier from controlling a business on another tier.

B. The South Carolina General Assembly Made A Limited Exception To The Three-Tier Law And Permitted Brewpubs in 1994.

In general, American brewpubs could be considered a limited statutory exception to three-tier laws as they allow limited integration – namely a combination of both a restaurant and

[3]This statute was originally passed in 1980 as S.C. Code Ann. § 61-9-315. See Act No. 335, 1980 S.C. Acts. The statute was amended periodically and ultimately recodified by Act No. 415, 1976 S.C. Acts to § 61-4-940, but the statute always provided for a three-tiered distribution system and prohibited a beer business on one tier from having an interest in a beer business on another tier.

brewery that can participate in both manufacturing and retail activities.[4] See Walters, supra, at 670; Justin M. Welch, The Inevitability Of The Brewpub: Legal Avenues For Expanding Distribution Capabilities, 16 Rev. Litig. 173, 176 (1997). Without a legislative exception to tied house laws, brewpubs would be prohibited entirely as brewpubs "collaps[e] the manufacturing and retail tiers into one operation owned by a single entity, totally bypassing the wholesale function." Welch, supra, at 176. Laws regulating brewpubs vary by state, as do most alcohol laws. See James M. Seff and Carrie L. Bonnington, Wine and Beer Law Leading Lawyers On Navigating The Three-Tier System And Other Regulations On Alcoholic Beverages, Aspatore, 2015 WL 9875439 *2 (Dec. 2015); Welch, supra, at 176. Unlike a brewery, which is in the business of brewing/manufacturing beer to be sold to wholesalers and then distributed to retailers, a brewpub is typically a combination of a restaurant and a small brewery that serves food and beverages, to include beer it brews on the premises as well as other manufacturers' beer. Welch, supra, at 175. Most states limit a brewpub's barrel production and often restrict to whom and where a brewpub's beer can be sold. Id. at 176. States also often prohibit brewpub owners from owning other beer or alcohol businesses and sometimes other brewpubs. Id.

In South Carolina in 1994, the General Assembly made a legislative exception to the Three-Tier Law and permitted brewpubs to operate in our State. See Act No. 445, 1994 S.C. Acts. South Carolina defines a brewpub as a "a tavern, public house, restaurant, or hotel which produces on the permitted premises a maximum of two thousand barrels a year of beer for sale on the premises." Section 61-4-1700. Unlike most states, which allow a business owner to obtain a brewpub permit in addition to some other permit (usually a brewery or retail permit),

[4]In South Carolina, wineries, breweries, brewpubs, and micro-distilleries can participate in manufacturing and retailing activities and, thus, could all be considered limited exceptions to the three-tier statute. See S.C. Code Ann. §§ 61-4-720 (Supp. 2015), 61-4-730 (Supp. 2015), 61-4-1515 (Supp. 2015), 61-4-1700 et seq. (2009), and 61-6-1095 et seq. (Supp. 2015).

South Carolina allows a brewpub to operate using just a brewpub permit. Compare S.C. Code Ann. § 61-4-1720 (2009) (brewpub permit) with Minn. Stat. Ann. § 340A.101 (West 2016) (brewer permit plus retail permit) and Tex. Alco. Bev. Code Ann. § 74.01(c) (West 2016) (brewpub license plus retail permit). In other words, instead of obtaining a brewery permit and an on-premises beer and wine permit (retail permit), a brewpub only needs one permit – a brewpub permit. See § 61-4-1720. Unlike the term "brewpub", the term "brewery" is not defined in Title 61, but the term is included in the definition of "producer." See S.C. Code Ann. § 61-4-300 (2009). In the dictionary, brewery is defined as "a plant where malt liquors are produced." Brewery, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/brewery (last visited Aug. 11, 2016). Thus, a brewery in South Carolina could be defined strictly as a producer of beer. However, as of 2010, § 61-4-1515 (hereinafter the "brewery law") provided that a brewery could sell beer that it brews on its premises at retail only if that retail sale was made in conjunction with a tour. Act No. 231 § 2, 2010 S.C. Acts. Moreover, in 2013, the General Assembly amended the brewery law to allow breweries to, among other things, sell beer it brews for on premises consumption and apply for a retail beer and wine permit to sell its own beer as well as other manufacturers' beer and wine for on premises consumption provided certain conditions are met. Act No. 36 § 1, 2013 S.C. Acts.

Regarding the regulation of a brewpub's and brewery's retail activities, a brewpub can sell beer and wine for on or off premises consumption, and a brewpub must comply with the Department of Health and Environmental Control's (DHEC) regulations regarding eating and drinking establishments in order to sell beer for on or off premises consumption. See S.C. Code Ann. § 61-4-1750 (2009). A brewery, on the other hand, only has to comply with DHEC's regulations regarding eating and drinking establishments if it wants to sell its beer for on

premises consumption within a designated eating area, or apply for a retail beer and wine permit to sell other manufacturers' beer and wine for on premises consumption within a designated eating area. See § 61-4-1515(B). A brewery does not have to comply with DHEC's regulations regarding eating and drinking establishments if it only brews beer to be sold to wholesalers. See § 61-4-1515. Moreover, a brewery can sell beer it brews on the premises for off premises consumption only in conjunction with a tour of the brewery. See § 61-4-1515(D)(2). Additionally, a brewpub, unlike a brewery, may obtain a license to sell alcoholic liquor by the drink if it meets the qualifications for such license. See S.C. Code Ann. § 61-4-1740(3) (2009).

Regarding the regulation of a brewpub's and brewery's manufacturing activities, a brewpub, unlike a brewery, cannot sell its beer to wholesalers to be distributed to other retailers. See §§ 61-4-940, 61-4-1515(D), and 61-4-1740. Furthermore, a brewpub has a production limit of 2,000 barrels per year while a brewery has no production limit. Compare § 61-4-1700 with S.C. Code Ann. §§ 61-4-1500 et seq. (Supp. 2015). Thus, a reading of the brewpub statutes compared to the brewery statutes demonstrates that South Carolina's brewpub is a limited exception to the Three-Tier Law that allows a retail business to participate in limited manufacturing activities.

C. A Brewpub Is A Retail Business And Falls On The Third Tier of South Carolina's Three-Tier System.

In South Carolina, a brewpub is a retail business. As discussed above, a brewpub is defined as "a **tavern, public house, restaurant, or hotel** which produces on the permitted premises a maximum of two thousand barrels a year of beer for sale on the premises." Section 61-4-1700(1) (emphasis added). Per the rules of statutory construction, the words of a statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp., 309 S.C. at

178, 420 S.E.2d at 846. A tavern, public house, restaurant, and hotel are all ordinarily retail businesses. The fact that the General Assembly chose to define a brewpub as a retail business that can participate in limited manufacturing activities is telling as the General Assembly *could have* defined a brewpub as a manufacturing business that can participate in limited retail activities like some other states have done.[5] Thus, a plain reading of the statutory definition of "brewpub" indicates that a brewpub is a retailer. See § 61-4-1700(1). Pursuant to the Three-Tier Law, a retailer is on the third tier. Thus, a brewpub is a retail business that falls on the third tier of South Carolina's three-tier system.

The South Carolina Constitution serves as further evidence that a brewpub is a retail business. Specifically, Article VIII-A of the South Carolina Constitution provides:

> [L]icenses may be granted to sell and consume alcoholic liquors and beverages on the premises of businesses which engage primarily and substantially in the preparation and serving of meals [restaurants] or furnishing of lodging [hotels] or on the premises of certain nonprofit organizations with limited membership not open to the general public [private clubs] . . . .

S.C. Const. art VIII-A. All of the businesses that are permitted to obtain a license to sell alcoholic liquor by the drink are retail businesses – restaurants, hotels, and private clubs – and those are the *only* three types of businesses that can obtain a liquor by the drink license. Section 61-4-1720 states that a brewpub may obtain a liquor by the drink license as long as it meets all of the other requirements for licensure. If a brewpub is eligible for a liquor by the drink license,

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[5]Compare W. VA. Code Ann. § 11-16-3 (West 2016) (defining a brewpub as "**a place of manufacture** of nonintoxicating beer . . . a portion of which premises are designated for retail sales of nonintoxicating beer . . . .") (emphasis added) with GA. Code Ann. § 3-1-2 (West 2016) (defining brewpub as "**any eating establishment** in which beer or malt beverages are manufactured or brewed") (emphasis added) and LA. Stat. Ann. § 26:241(12) (West 2016) (defining "microbrewery" as "a **retail establishment** wherein beer and other malt beverages are brewed in small quantities . . . .") (emphasis added).

then it must be one of the three aforementioned retail businesses, and thus, a retailer.[6] To hold otherwise would lead to the sections of §§ 61-4-1700 et seq. (hereinafter, the "brewpub statutes") that authorize a brewpub to apply for a liquor by the drink license being rendered unconstitutional. Since "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid," the only constitutional construction of the brewpub statutes is that a brewpub is a retailer. Davis v. County of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996).

The ALC failed to recognize that a brewpub is a retailer and instead held that a brewpub is "neither a manufacturer, nor a wholesaler, nor a retailer . . . ." (R. p. 8; Order 8.) This is, in itself, an error in that all businesses that engage in the manufacturing, distribution, or retail of beer must necessarily fall into one, and only one, of the three tiers. The ALC based its ruling on § 61-4-1720, which provides: "The brewpub permit . . . is in lieu of a permit required for the manufacture of beer or sale of beer and wine including, but not limited to, a brewer's and retailer's permit." (R. p. 8; Order 8.) However, § 61-4-1720 does not change the definition of brewpub nor does it state that a brewpub is not a manufacturer, wholesaler, or retailer. Instead, all § 61-4-1720 states is that a person who wishes to operate a brewpub only needs one permit as opposed to two, whereas some states require a person to obtain a brewpub permit and an additional permit. See e.g. Tex. Alco. Bev. Code Ann. § 74.01(c) (providing "[a] holder of a brewpub license must also hold a wine and beer retailer's permit, a mixed beverage permit, or a retail dealer's on-premise license."). Thus, the ALC's reliance on § 61-4-1720 for the proposition that a brewpub is not a manufacturer, wholesaler, or retailer was in error, and should be reversed.

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[6]This holds true regardless of whether a brewpub actually applies for and obtains a liquor by the drink license.

The ALC also stated that "nowhere in Article 17 does the South Carolina Code define a brewpub as either a retailer or a manufacturer." (R. p. 8; Order 8.) While this statement is accurate, it is important to note that nowhere in Title 61 is a restaurant, hotel, or private club defined as a retailer, yet those businesses are considered and treated as retail businesses. Furthermore, nowhere in Title 61 does the Code define "retailer."[7] So while the term "retailer" is not defined in Title 61 and no specific businesses are defined as "retailers" in Title 61, the fact remains that the statutorily permitted activities of a brewpub are predominantly retail in nature and clearly represent a type of business that falls on the retail tier.

Though Title 61 does not define "retailer," the term "retailer" and other corresponding terms are defined in Title 12 for sales tax purposes. When reading S.C. Code Ann. §§ 12-36-70, 12-36-110, and 12-36-120 (2014) together, a "retailer" is clearly a person who sells tangible personal property to the end user or consumer. Moreover, the dictionary defines "retail" as "to sell in small quantities **directly to the ultimate consumer**." Retail, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/retail (last visited Aug. 11, 2016) (emphasis added). A brewpub clearly falls within those definitions of "retailer" because a brewpub sells food, beer, wine, and liquor directly to consumers while being able to produce a limited amount of beer on its premises. Manufacturers and wholesalers, on the other hand, do not sell beer directly to consumers (except for in the limited circumstances discussed above). Thus, the ALC's failure to recognize that a brewpub is a retailer is clearly erroneous.

Moreover, the ALC improperly rejected the Department's construction of the statute

[7]"Retail licensee" is defined in Article 19 (Keg Registration) of Chapter 4 as "the holder of a retail beer or wine license issued by the Department of Revenue." S.C. Code Ann. § 61-4-1910(2) (2009). The term "retail dealer" is defined in Article 1 of Chapter 6 as "a holder of a license issued under the provisions of Article 3 of this chapter, other than a manufacturer or wholesaler." S.C. Code Ann. § 61-6-20(11) (Supp. 2015).

defining "brewpub", and thus, abused its discretion. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and **will not be overruled absent compelling reasons**." Brown, 348 S.C. at 515, 560 S.E.2d at 414 (emphasis added). The Department construed § 61-6-1700(1) to mean that a brewpub is a retail business and, thus, on the third tier pursuant to the Three-Tier Law. Despite the Department's construction, the ALC held that a brewpub is neither a retailer, wholesaler, nor manufacturer and, thus, not on a tier. (R. p. 8; Order 8.) In so holding, the ALC failed to identify a compelling reason to overrule the Department's construction of the statute. (R. pp. 1 - 11; Order). Moreover, the Department's application is not "patently erroneous." See Richland County School Dist. Two v. S.C. Dept. of Educ., 335 S.C. 491, 498, 517 S.E.2d 444, 448 (1999). Thus, absent a compelling reason, the ALC's decision overruling the Department's construction of the statute defining "brewpub" constitutes an abuse of discretion and should be reversed.

D. A Holder Of A Brewpub Permit Cannot Simultaneously Hold A Brewery Permit Because It Violates South Carolina's Three-Tier Law – S.C. Code Ann. § 61-4-940.

The ALC erred as a matter of law in holding that a brewpub *permit* is not on any tier and that a business can simultaneously hold a brewpub permit and a brewery permit. (R. pp. 1 - 11; Order.) The ALC should have held that a brewpub is a *business* on the third tier, and that because the Petitioner already owns a brewpub, it is not eligible to also hold a brewery permit. See §§ 61-4-940(D) and 61-4-1700. The ALC appears to have based its ruling, in part, on its misunderstanding of exactly what the Three-Tier Law regulates. The Three-Tier Law regulates the different tiers on which a *business* can operate. This statute does not regulate permits.[8] Our

[8]For example, a brewery is a business on the first tier – the manufacturing tier – but can participate in both manufacturing and retail activities. Additionally, a brewery can hold a brewery permit and retail permit despite the fact it is on the manufacturing tier.

Three-Tier Law specifically provides:

> A manufacturer, **brewer**, and importer of beer are declared to be in business **on one tier**, a wholesaler on another tier, and a **retailer on another tier. A person or an entity in the beer business on one tier**, or a person acting directly or indirectly on his behalf, **may not have ownership or financial interest in the beer business operation on another tier.**

Section 61-4-940(D) (emphasis added). Therefore, a plain reading of the statute demonstrates that our three-tier system clearly regulates businesses not permits. Because a brewery is a manufacturer and, therefore, a business on the first tier and a brewpub is a retailer and, therefore, a business on the third tier, a person cannot lawfully operate both businesses. In other words, a brewpub owner cannot simultaneously own a brewery because to allow such violates South Carolina's Three-Tier Law. Thus, this Court should reverse the ALC's ruling that the Petitioner is eligible for a brewery permit because a brewpub *permit* is outside the three-tier system.

Moreover, rather than recognizing that a brewpub is a retailer, or placing a brewpub on either of the other two tiers, the ALC instead held that a brewpub is not on any tier based on the following: 1) The Three-Tier Law does not refer to "brewpubs;" 2) "[s]ection 61-4-1720 acknowledges that brewpubs both manufacture and conduct retail sales of beer; 3) no language exists in "Article 17 that states or implies that a brewpub operates in the retail tier," and 4) a review of other jurisdictions suggest brewpubs are outside the three-tier system. (R. p. 8; Order 8.) First, the ALC is correct that the word "brewpub" is not found in the Three-Tier Law. However, the words restaurant, hotel, convenience store, or bar, for example, are not found in the Three-Tier Law either. Instead, the Three-Tier Law uses the term "retailer," which, as discussed above, encompasses businesses like restaurants, hotels, convenience stores, bars, and brewpubs. If the ALC's logic is upheld then none of the aforementioned businesses would be considered retailers and none of these businesses would be on a tier since they are not specifically

mentioned in the Three-Tier Law.[9] Instead, the ALC should have given deference to the Department's interpretation and held that the term "retailer" includes brewpubs just like it includes restaurants, hotels, convenience stores, and bars.

Second, while brewpubs both manufacture and conduct retail sales of beer, that does not mean that a brewpub is not on a tier. For example, the brewery statute acknowledges that a brewery can both manufacture and conduct retail sales of beer. Despite such statutory acknowledgement, the ALC agrees that a brewery is on a tier. (R. pp. 9 - 10; Order 9-10.) The ALC attempts to distinguish a brewpub from a brewery by saying that "while the amendment [to the brewery statute] increased retail activities of breweries on the manufacturing tier, it did not go so far as to create a hybrid permit which is required 'instead of or in place of' a permit on the three-tier system." (R. p. 9; Order 9.) Again, the ALC incorrectly focuses on the phrase "hybrid permit" in the brewpub statutes. As explained above, the fact that a brewpub permit is a hybrid permit does not remove a brewpub from the three-tier system. Instead, it simply means that a business owner only has to pay for one permit instead of two in order to participate in retail activities and limited manufacturing activities. Moreover, using the ALC's logic that a brewpub is not on a tier because it can participate in activities from multiple tiers, then a brewery would no longer be on a tier for the same reason.

Similarly, micro-distilleries are another example of a business that can both manufacture and conduct retail sales of alcoholic liquor. See §§ 61-6-1095 et seq. Despite conducting manufacturing and retail activities, micro-distilleries are not outside of the three-tier system the way the ALC determined brewpubs are outside the three-tier system. The ALC attempted to distinguish a micro-distillery from a brewpub by stating that while the owner of a micro-

[9]That begs the question – what businesses would be considered retailers and how would one make that determination in light of the ALC's analysis?

distillery or a brewpub only needs one license or permit,[10] "micro-distillery" is clearly defined as a manufacturer[11] and, thus, "there can be no confusion as to whether a micro-distillery is outside the three-tier system." (R. p. 10; Order 10.) The ALC goes on to incorrectly state that "[t]he General Assembly could have similarly classified brewpubs within the three-tier system but did not." (R. p. 10; Order 10.) To the contrary, the General Assembly did classify brewpubs within the three-tier system when it defined them as "a tavern, public house, restaurant, or hotel." Section 61-4-1700. Here again, using the ALC's logic that a brewpub is not on a tier because it holds a hybrid permit that allows it to participate in retail and manufacturing activities, then a micro-distillery would also no longer be on a tier.

The third basis for the ALC's conclusion that a brewpub is not on a tier is that no language exists in "Article 17 that states or implies that a brewpub operates in the retail tier." (R. p. 8; Order 8.) Such statement is incorrect and an error of law. First, a reading of § 61-4-1740, which provides in part that "[a] brewpub permit authorizes the holder to: . . . (2) sell the beer of a producer which has been purchased from a wholesaler **through the normal three-tier distribution chain** set forth in Section 61-4-940," (emphasis added) clearly indicates that a brewpub is part of the three-tier system. Moreover, the General Assembly's inclusion of taverns, public houses, restaurants, and hotels in the definition of brewpub inherently demonstrates that the General Assembly considers brewpubs to be retailers. Thus, the ALC's finding that no language in Article 17 implies that a brewpub operates on the retail tier is patently incorrect and

[10]S.C. Code Ann. § 61-6-1120(B) (Supp. 2015) provides: "A micro-distillery is not required to obtain an additional manufacturing and retail liquor license required pursuant to this title." In other words, a micro-distillery license is in lieu of a manufacturer's and retailer's license.

[11]S.C. Code Ann. § 61-6-1095(A) (Supp. 2015) defines "micro-distillery" as "a manufacturer who distills, blends, and bottles alcoholic liquors on the licensed premises."

an error of law.

Finally, the ALC stated it reviewed other jurisdictions and determined that "many other states treat brewpubs as an exception **outside** the three-tier system." (R. p. 8; Order 8 (citing Scott, supra, at 418) (emphasis added). The ALC also stated that "to the extent other states using the three-tier system identify a brewpub within the three-tier system, there is a statute which explicitly makes that designation." (R. p. 8; Order 8.) The ALC then cites only one state – Texas[12] – to support its assertion that all other states statutorily designate brewpubs as being on a tier. (R. pp. 8 – 9; Order 8 – 9.) Contrary to the ALC's first statement, no state treats brewpubs as an exception *outside* the three-tier system. Rather, as explained above, a brewpub is a limited exception to the three-tier system. Walters, supra, at 670; Welch, supra, at 176. While a brewpub can participate in activities that traditionally take place on different tiers, a brewpub is still part of the three-tier system, and thus, on a tier. The ALC did not cite, and the article it relies on does not cite, any state that places a brewpub *outside* the three-tier system. Moreover, a review of other state's laws that have something resembling a brewpub and a three-tier system did not reveal any state that places brewpubs outside the three-tier system.

Similarly, the ALC's assertion that any state that puts a brewpub on a tier does so by a specific statute is inaccurate. Many states did not have to create a specific statute placing a brewpub on a tier because, like South Carolina, their three-tier statute already included brewpubs by virtue of them being retail businesses. See e.g. Del. Code Ann. tit. 4, § 512B (West 2016) (providing that a brewery-pub is a restaurant that can manufacture a limited amount of beer and providing for a specific exception to its three-tier statute, which would be unnecessary if a

[12]As cited earlier in this brief, Texas requires the holder of a brewpub license to obtain a separate retail permit. See Tex. Alco. Bev. Code Ann. § 74.01(c). Additionally, Texas does not have a definition for brewpub. Therefore, without a statute explicitly placing Texas' brewpub on a tier, one would not be able to determine on which tier Texas' brewpub fell.

brewery-pub did not fall on a tier). Furthermore, the ALC's reliance on other jurisdictions is misplaced because, as stated previously, laws regulating brewpubs vary greatly by state making it difficult to compare South Carolina's brewpub statutes with those of another state. Seff and Bonnington, supra, at *2; Welch, supra, at 176. Thus, to the extent the ALC relied on other jurisdictions in concluding that a brewpub is outside the three-tier system, the ALC's conclusion is based on an error of law and should be reversed.

In sum, the ALC improperly reversed the Department's Determination that a brewpub is on the third tier of South Carolina's three-tier system. The ALC's ruling is based on an error of law – specifically its misinterpretation of the relevant statutes. Moreover, the ALC abused its discretion by failing to give the Department's Determination deference. Therefore, the ALC's ruling that a brewpub is outside the three-tier system should be reversed.

E. The ALC's Ruling That A Brewpub Is Outside The Three-Tier System Leads to Absurd Results.

Our Supreme Court has stated that it "will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). Here, the ALC's interpretation leads to absurd results in light of several other statutes in Title 61. First, if a brewpub is outside the three-tier system, the ALC effectively held that § 61-4-940 does not apply to brewpubs. Section 61-4-940 imposes restrictions on the three tiers beyond just ownership and financial interest. Section 61-4-940 also regulates how each of the three-tiers can interact with each other. Specifically, manufacturers and wholesalers cannot provide equipment, fixtures, free beer, or services to retailers. See § 61-4-940(B). But if the ALC's ruling stands, manufacturers and wholesalers could provide equipment, fixtures, free beer, and services to brewpubs but no other retailer. In addition, by not placing brewpubs on the

retail tier, the ALC removed brewpubs from the protections of § 61-4-940(E). This section requires that manufacturers and wholesalers treat all retailers equally when it comes to discounting product price. See § 61-4-940(E). This restriction protects retailers by ensuring that all retailers have access to the same discounts. Because the ALC did not place brewpubs on a tier, such protection does not exist for brewpubs. Therefore, wholesalers do not have to offer discounts to brewpubs, which means brewpubs could have to pay more for their beer compared to other retailers. Finally, § 61-4-940(F) prevents a business on one tier from forcing a business on another tier to participate in certain activities, namely advertising and participating in discounts or special promotions. This serves to further prevent coercion and tied houses. Because the ALC determined brewpubs fall outside the three-tier system, brewpubs would not be afforded this protection from coercion, and manufacturers and wholesalers could require brewpubs to advertise and participate in discounts and special promotions. In other words, the evils that three-tier laws were intended to eliminate could return with brewpubs under the ALC's interpretation. It is unlikely that the General Assembly intended for manufacturers to be able to control brewpubs; however, under the ALC's interpretation, the protections put in place by § 61-4-940 do not apply to brewpubs.

Next, S.C. Code Ann. § 61-4-160 (2009) (hereinafter, the "discount pricing law") would not apply to brewpubs under the ALC's interpretation that a brewpub is not a "retailer." The discount pricing law provides in part:

> No person who holds **a biennial permit to sell beer or wine for on-premises consumption** may advertise, sell, or dispense these beverages for free, at a price less than one-half of the price regularly charged, or on a two or more for the price of one basis. Beer or wine may be sold at a price less than the price regularly charged from four o'clock p.m. until eight o'clock p.m. only.

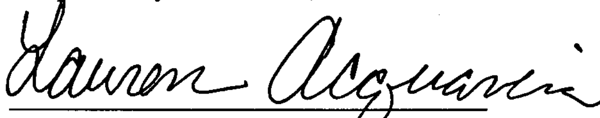
(Emphasis added). The ALC's decision implies that a brewpub permit is not a permit to sell beer or wine for on-premises consumption. Rather, a brewpub permit is a hybrid permit issued in lieu of a manufacturer's and retailer's permit. Since the discount pricing law only applies to permits to sell beer and wine for on-premises consumption and not hybrid permits in lieu of a manufacturer's and retailer's permit, then brewpubs can give away free drinks and can discount drinks at any time of the day. The discount pricing law limits retailers' ability to discount drink prices in an attempt to avoid the overconsumption problems that plagued the country prior to Prohibition. If retailers could give away free drinks or drastically reduce prices at any time, consumers would be able to purchase more drinks resulting in overconsumption. Under the ALC's interpretation, the protections to the public welfare created by the discount pricing law do not apply to brewpubs and consumers can obtain free drinks or drastically reduced drink prices at any time of day. There is no rational reason why the General Assembly would apply these restrictions to all other businesses that sell beer to consumers but not apply such to brewpubs. Thus, once again, the ALC's interpretation leads to absurd results.

Similarly, S.C. Code Ann. § 61-4-200 would not apply to brewpubs if a brewpub is not considered a retailer. Section 61-4-200 provides that "a holder of a **retail** permit to sell beer and wine may transfer beer and wine to other businesses" with certain limitations. (Emphasis added). However, if a brewpub is not a "holder of a retail permit" then brewpubs cannot transfer beer and wine to any other business. No reason exists to prevent a brewpub from transferring beer and wine while allowing other retailers to make such transfers. Therefore, it is absurd to believe that the General Assembly intended to prevent brewpubs from transferring beer and wine to other businesses. Thus, because the ALC's interpretation leads to such absurd results that could not have been intended by the General Assembly, this Court should reject the ALC's interpretation.

CONCLUSION

The Administrative Law Court erred in determining that a holder of a brewpub permit can simultaneously hold a brewery permit because a brewpub is a hybrid permit outside the three-tier system. The ALC's decision was based on errors of law and its failure to give the Department's Determination proper deference. Instead, the ALC should have held that a brewpub is a retailer, it falls on the third tier, and as a holder of a brewpub permit the Petitioner cannot simultaneously hold a brewery permit. Therefore, this Court should reverse the ALC's decision.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-17-0031-CC
Appellate Case No. 2016-001082

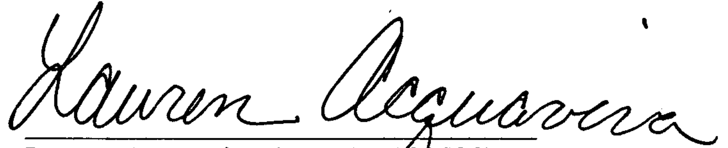
The Hunter-Gatherer, LLC, d/b/a The Hunter-Gatherer Brewery, ...Respondent,

v.

South Carolina Department of Revenue, ... Appellant.

CERTIFICATE OF COUNSEL

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



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