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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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

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 (Respondent), 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 Respondent's application because it determined that an applicant with a financial interest in a business that holds a brewpub permit, like the Respondent, is not eligible to also a hold a Brewery permit pursuant to S.C. Code Ann. § 61-4-940(D). (R. pp. 13-14).

The parties filed joint Stipulations of Fact on February 11, 2016. (R. pp. 59-60). The Respondent 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 Respondent 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

[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. (Order 1; R. p. 1). At the hearing, no witnesses were called and the hearing consisted of legal arguments from both sides.

of Appeals on May 23, 2016.

STATEMENT OF FACTS

The Stipulation of Facts notes that "The Hunter-Gatherer, LLC holds a South Carolina Brewpub License and a Business Liquor by the Drink License at the 900 Main Street facility. The facility also has a current federal Brewery License. The brewpub manufactures approximately 1000 gallons of beer per month. In addition to manufacturing beer, the existing facility is a DHEC approved eating and drinking establishment. The brewpub has retail sales of food, wine, liquor, and the beer manufactured on-site." (Stipulation of Fact No. 1), (R. p. 59). On or about November 19, 2015, the Respondent 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 (microbrewery[2]). (R. p. 59). The Stipulation of Facts states that "The new facility will manufacture approximately 5000 gallons of beer per month to be sold to Southern Wines and Spirits, distributor in South Carolina. The new facility will also have an area within the premises approved by the regulations of the Department of Health and Environmental Control governing eating and drinking establishments. Within the DHEC-approved area, the new facility will have retail sales of food, wine, and beer manufactured on-site (approximately 1000 gallons per month). The new business plans to open in August 2016." (Stipulation of Fact No. 2), (R. p. 59).

After reviewing the Respondent's applications, the Department held that the Respondent was not eligible to hold a Brewery permit and a brewpub permit

[2] We note that while South Carolina law does not use the term "microbrewery," Respondent uses that term in its colloquial sense to describe a brewery which produces relatively small amounts of beer when compared to large scale corporate breweries (e.g. Anheuser-Busch).

simultaneously because it felt such would violate South Carolina's three-tier law. (R. p. 13). In this case, the Department alleged that a Brewery falls on tier one – the manufacturing tier – and a brewpub falls on tier three – the retail tier. (R. p. 14). Accordingly, the Department denied the Respondent's application for a Brewery permit because it alleged the Respondent is already in the beer business on the third tier. (R. p. 14).

ARGUMENTS

I. General

This case involves a single narrow issue: whether the owner of a Brewpub may also own a microbrewery under the state's three tier statute for beer. Respondent has been licensed as a brewpub for many years. He subsequently applied for a Brewery permit for a microbrewery he intended to establish in Columbia. The Department determined that he was not eligible to hold a Brewery permit as it fell in Tier 1 – the manufacturing tier -- whereas the brewpub fell in Tier 3, the Retail Tier.

The ALC correctly held that the General Assembly established Brewpubs as a hybrid form of licensing outside the three tier system. The ALC Order accordingly held that ownership of a brewpub license and a Brewery license accordingly did not violate the three tier statute.

The Department's appeal fails for a second reason. As outlined below, the Department is in error placing Brewpubs in the retail tier. The Department is also in error placing breweries on the manufacturing tier. Using the Department's logic for Brewpubs, microbreweries are also in the retail tier. If the ALC Order erred in holding that Brewpubs are outside the three tier system, the Order should be upheld on the basis that Brewpubs and microbreweries are on the

same tier, whether that is retail *or* manufacturing.

II. Law

A. Standard of Review

> The review of the ALC's order must be confined to the record. The court may not substitute its judgment for the judgment of the ALC 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 of modify the decision if substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2015).

"The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Rent-A-Center West, Inc. v. South Carolina Dept. of Revenue*, _____ S.C. _____, _____ S.E.2d _____ (Ct. App. Op. No 5447 (2016) (quoting *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)).

B. Background

1. Statute at Issue

The Department has denied the taxpayer's permit application based on S.C. Code Ann. § 61-4-940(D), which 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. This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business.

The statute creates three tiers for beer: one for manufacturers, brewers, and importers; one for wholesalers; and one for retailers. As stated below, the three-tier statute was written long before the General Assembly authorized Brewpubs and microbreweries.

2. Three-Tier System

a. Generally

Respondent has been licensed as a Brewpub for many years.

As stated in Geathers & Werner, *The Regulation of Alcoholic Beverages in South Carolina* (SC Bar 2007) (hereinafter "Geathers Treatise"): "South Carolina, like many other states, regulates the commerce in alcoholic beverages through a three-tiered distribution and licensing scheme that separates manufacturing, wholesaling, and retailing interests into distinct tiers of operation in order to prevent 'tied houses' and other forms of vertical integration in the commerce in alcoholic beverages." *Id.* at 241.

> This three-tiered system of regulation, which traces its roots to the alcoholic beverage control acts passed in the wake of the repeal of Prohibition, is intended "to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to [P]rohibition" and is "aimed at two particular dangers: the ability and

> potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns. Accordingly, under this three-tiered system, the licenses issued under Title 61 are generally divided into retail licenses that authorize the sale of alcoholic beverages to the public, wholesale licenses that authorize the purchase of alcoholic beverages from producers for resale to retailers, and manufacturing and importing licenses that authorize the production or importation of alcoholic beverages into the state. *Id.* at 12.

Further, according to the Geathers Treatise: "South Carolina's alcoholic beverage licenses are also generally classified by the type of beverage they regulate. The two principal types of beverages regulated in this state are the beer and wine defined as 'non-intoxicating' and 'nonalcoholic' beverages and full-blooded 'alcoholic liquors.' The manufacture, distribution, and sale of beer and wine are regulated by the Brewery, winery, wholesale, and retail beer and wine permits authorized under Chapter 4 of Title 61, while the manufacture, distribution, and sale of alcoholic liquors are governed by the liquor manufacturers', wholesalers' and retail dealers' licenses and the liquor-by-the-drink licenses authorized under the ABC Act in Chapter 6 of Title 61. These references to tier and beverage type are the principal means by which alcoholic beverage licenses are identified in South Carolina – e.g., 'a retail liquor license,' or 'a wholesale beer permit,' or 'a liquor manufacturer's license.'" *Id.* at 12-13.

Additionally, according to the Geathers Treatise: "Title 61 provides for several types of permits, licenses, and certificates that are required for various activities related to the manufacture, production, and importation of beer and wine in South Carolina. These several permits, licenses, and certificates can be divided into two basic categories: those related to the operation of breweries and wineries within the state, and those related to the importation of beer and wine into the state from out-of-state manufacturers and importers." *Id.* at 125.

"A person must obtain a permit from the Department prior to constructing, maintaining, or operating a Brewery or winery in South Carolina. These Brewery and winery permits allow the holders of the permits to manufacture the beer and wine defined as nonalcoholic and non-intoxicating beverages under Title 61, and to sell the beer and wine they produce to permitted wholesalers in the state. Despite being classified in the manufacturing tier of the three-tiered distribution system, these domestic producers are freed from some of the typical requirements placed upon manufacturers of beer and wine." *Id.* at 126.

3. **Three-Tier Rationale**

The Geathers Treatise goes on to state:

> In addition to broad violation provisions preventing unlicensed activities and enforcing general compliance with the regulatory scheme, Title 61 contains a multitude of more narrow violation provisions and quasi-violation regulatory provisions that target specific, prohibited activities. One category of these specific violation provisions and regulations is that set of provisions designed to ensure the integrity of the alcoholic beverage industry. In contrast to violation provisions primarily focused on protecting public health and morality in retail sales of alcoholic beverages, such as prohibitions upon sales to intoxicated persons and restrictions on Sunday sales, these provisions seek to regulate the business practices of the alcoholic beverage industry so that the industry operates in a manner that best serves the public interest. *These provisions, which trace their roots to the alcoholic beverage control acts passed in the wake of the repeal of Prohibition, are intended "to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to [P]rohibition" and are "aimed at two particular dangers; the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns."*

Id. at 240-241 (emphasis added). It bears repeating: the three tier statutes at issue in this case were not written for the purpose of "protecting public health and morality." The Geathers Treatise states they were written to "ensure the integrity of the alcoholic beverage industry." *Id.*

Commentators and authorities from other states are in accord with the conclusions of the Geathers Treatise. "The three-tier system was intended to prevent two abuses: (1) direct relationship – termed "tied houses" – between breweries and retailers; and (2) coercion and undue influence on retailers outside of the context of financial ownership by breweries." Brian Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 Roger Williams Univ. L. Rev. 162, 191 (2016) (footnotes omitted). "The laws of North Carolina are not much different from any other state in the Union. With the stated purpose of '[m]aintaining stability and healthy competition in the malt beverage industry, the North Carolina legislature has established a three-tier distribution system for the distribution of beer within the state.' 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 Journal of Law and Policy at 417 (2013) (footnotes omitted). "The Michigan Legislature deemed it necessary to provide a statutory 'structure for the business relations between a wholesaler of beer and a supplier of beer.' And expressed three reasons for doing so: (a) To maintain stability and healthy competition in the beer industry in this state; (b) to promote and maintain a sound, stable, and viable 3-tier system of distribution of beer to the public; and (c) to promote the public health, safety, and welfare." *Michigan's New Brewpub License: Regulation of Zymurgy for the Twenty-First Century*, Univ. of Detroit Mercy Law Review (1994) (footnotes omitted). "The three-tier system was enacted in response to the perceived dangers of breweries vertically integrating retail outlets, and the franchise laws were passed in response to perceived disparities in bargaining power between brewers and distributors." Andrew Tamayo, Comment, *What's Brewing In The Old North Stated: An Analysis Of The Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C.L. Rev. 2198, 2207-2224 (2010).

Similarly, "tied house laws were largely written seventy-five or eighty years ago to correct a 150-year-old pre-prohibition problem (the domination by suppliers of retailers by ownership or otherwise,)" Seff and Bonnington, *A General Introduction to Alcohol Beverage Laws and Regulation, Aspatore* (2015). Perhaps because they deal only with competitive practices and market structure, they are replete with exceptions. "The three-tier distribution system is a product of state law, which frequently provides for certain exceptions to the general rule, most common of which is the brewpub exception." Scott, *Brewing Up A New Century of Beer*, 3 Wake Forest J. L. & Pol'y 417 (2013). "While a few states adopted laws that explicitly require a strict division between tiers, many did not. Almost all states have laws requiring the separation between the retailers and the upper tiers; virtually all the states prohibit a supplier or wholesaler from having an interest in a retail license. Winery tasting room and restaurants owned by wineries are common exceptions, as are Brewpubs. But in many states there is no prohibition barring upper tier integration. Several states allow in-state manufacturers to sell directly to retailers or allow the manufacturer to hold wholesale licenses for the same purposes." Sara Schorske and Alex Heckathorn, *Shedding Tears: Exposing the Three Tier Myth*, CSA-Compliance Services of America, 21, 22-23 (2007), available at http://www.csa-compliance.com/PDF/ Shedding Tears.pdf.

As the Geathers Treatise notes: "These prohibitions and regulations related to the three-tiered scheme *are not, however, without exception.* Certain retail interests owned by beer and wine wholesalers are grandfathered into the three-tiered scheme; wineries may retail wine directly to customers in certain circumstances; and it is questionable as to whether domestic manufacturers of alcoholic liquors are prohibited from holding interests in wholesale or retail liquor businesses." *Id.* at 242-43 (emphasis added).

C. Arguments

1. The Brewpub License is a "Hybrid Permit" Outside the Three-Tier System.

Respondent owns and is licensed to operate a brewpub. In 1994, the General Assembly enacted special legislation for Brewpubs. As may be seen in the legislation quoted below, South Carolina followed the national model wherein Brewpubs act as both manufacturers and retailers, see e.g., *Michigan's New Brewpub License, supra.* "Michigan recently aligned itself with the vast majority of states by amending its Liquor Control Act to allow the vertical integration of brewer, distributor, and retailer, in the form of Brewpubs, and microbreweries that serve their own beer." The article points out that "in 1983 California enacted legislation creating special liquor licenses for microbreweries and Brewpubs permitting on premises sale. The Northwestern states, and thereafter the vast majority of others followed California's lead." *Id.* at 659 (footnotes omitted).

As discussed more fully below, South Carolina's Brewpubs statute allows licensees to manufacture 2,000 barrels of beer per year for on-site consumption. One barrel of beer is 31 gallons, which is equal to 248 pints. So Brewpub licensees may produce almost 500,000 pints for on-premises consumption per year.

The South Carolina brewpub legislation follows in part:

> Section 61-4-1700. Definitions.
>
> For purposes of this article:
>
> (1) "Brewpub" means a tavern, public house, restaurant, or hotel which produces [**manufactures**][3] on the permitted premises a maximum of two thousand barrels a year of beer for sale on the premises [**retail**].

[3] Throughout this brief, Respondent has attempted to identify in bold and brackets the activities normally classified as manufacturer, retailer or wholesaler where applicable in the statutes (e.g., [**retailer**], [**manufacturer**], [**wholesaler**]).

Section 61-4-1720 (Permit in Lieu of Certain Other Permits) states:

> The brewpub permit provided for in this article *is in lieu of a permit required for the manufacture of beer [***manufactures***] or sale of beer and wine [***retail***] including, but not limited to, a brewer's and retailer's permit.* The sale of alcoholic liquors for consumption on the premises [**retail**] by the drink requires an appropriate license which may be issued to the holder of a brewpub permit who meets all other qualifications for the license under this title. (emphasis added).

Section 61-4-1740 (Authority of Permittee) states:

> A brewpub permit authorizes the holder to:
>
> > (1) produce on the permitted premises a maximum of two thousand barrels a year of beer for sale [**manufacturer**]:
> >
> > > (a) on draft for consumption on the premises [**retail**];
> > >
> > > (b) in a sanitary container brought to the premises by the purchaser and filled at the tap by the permittee at the time of sale; and
> > >
> > > (c) in bottles for consumption by the purchaser off the premises [**retail**];
> >
> > (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;
> >
> > (3) serve food or otherwise be qualified as a public eating establishment. [**retail**] This provision may not be construed to exempt a permittee or licensee from the requirement that food must be served in order for a license for the consumption of alcoholic liquors on the premises to be issued.

The obvious purpose of this legislation is to foster the growth of Brewpubs by allowing them to lawfully engage in both manufacturing and retail activity which would otherwise run afoul of the state's three-tier statute. The Geathers Treatise describes the enabling legislation as follows:

> *In addition to the basic hierarchy of beer and wine permits described above – i.e., retailers', wholesalers', and manufacturers'*

> *permits – Title 61 provides for a hybrid permit* that authorizes the operation of a brewpub in which a permittee may both manufacture and retail beer as part of the same business on the same licensed premises.
>
> A person wishing to operate a brewpub must obtain a permit from the Department to do so. As defined by the licensing statutes, a brewpub is a tavern, public house, restaurant, or hotel that produces and sells beer on the permitted premises. A brewpub permit authorizes its holder to produce a maximum of two thousand barrels of beer per year on the permitted premises, to sell the beer it produces and other beers and wines on the premises, and to serve food or otherwise be qualified as a public eating establishment.
>
> Given the nature of the activities authorized under these brewpub permits, the permits are declared to be "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.
>
> Moreover, the brewpub statutes specifically acknowledge that, although the *brewpub permit is a distinct permit under Title 61*, it authorizes activities that would ordinarily be covered by a retail beer and wine permit.

Id. at 131-32 (Emp. Added).

According to S.C. Code Ann. § 61-4-1720: "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" (emphasis added). The ALC Order plainly states "According to Section 61-4-1720: '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.' The Court concludes that this sentence means the holder of a brewpub permit needs only one permit, whereas normally their actions would require two separate permits: a brewer permit and a retailer permit." (ALC Order, page 8, R. p. 8).

Nothing in Article 17 directly addresses whether a person may own a brewpub and a separate interest elsewhere in any one of the three tiers. The issue does not seem to implicate

Section 61-4-940(D), for Brewpubs constitute an exception allowing one to essentially straddle two tiers, rather than identifying themselves with any one tier.

The ALC Order states: "Based on the foregoing, a brewpub appears to be neither a manufacturer, nor a wholesaler, nor a retailer for purposes of the three-tier system. The three-tier prohibition does not refer to "Brewpubs." And nowhere in Article 17 does the South Carolina Code define a brewpub as either a retailer or a manufacturer. Because the three-tier system does not identify a brewpub within the three-tier system, and because Section 61-4-1720 acknowledged that Brewpubs both manufacture and conduct retail sales of beer, the Department appears to have incorrectly determined that a brewpub operates in the retail tier." (ALC Order, page 8, R. p. 8).

The three-tier prohibition does not refer to 'Brewpubs.' And nowhere in Article 17 does South Carolina Code define a brewpub as either a retailer or a manufacturer. Because the three-tier system does not specifically identify a brewpub within the three-tier system, and because Section 61-4-1720 acknowledges that Brewpubs both manufacture and conduct retail sales of beer, the Department appears to have arbitrarily determined that a brewpub fits exclusively in the retailer tier. This interpretation appears unfounded in statute, regulation, or guidance.

The ALC Order notes: "Brewpubs are, by definition, simultaneously manufacturers and retailers. Instead of altering the three-tier system in 1994, Article 17 creates an exception to the normal three-tier system; allowing a brewpub to manufacture and retail beer as an exception to, and outside of, the normal three-tier system in South Carolina. There is no language in Article 17 that states or implies that a brewpub operates in the retail tier." (ALC Order, page 8, R. p. 8).

Wikipedia, in its discussion of *Three-tier system (Alcohol distribution)* describes Brewpubs as the most common exception to the three tier rule:

> States have various exceptions to this three tier rule, the most prevalent one being the case of a brewpub, which is simultaneously a producer and retailer, and has no requirement to sell to a distributor. Some states allow an entity to have a part in two of the tiers, letting small breweries act as their own distributor, for example. Many states permit wineries to sell bottles of wine on-site to customers.

See also 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) ("The three-tier distribution system is a product of state law, which frequently provides for certain exceptions to the general rule, most common of which is the brewpub exception.") (*citing* Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. Rev. 2198, 2201 (2010)). "Brewpubs run against the grain of tied house regulation, because they are manufacturers acting like retailers (or, if you prefer, retailers acting like manufacturers)." Sara Schorske, *Brewpubs: Caught in the Regulatory Crossfire*, CSA-Compliance Services of America, http://www.csa-compliance/html/CSA-Articles/brewpubs-caught-in-the-regulatory-crossfire.html "Individual states have also written legislation to accommodate brewpubs, which, in many respects, belong to all three tiers. A brewpub makes its own beer, may make it available to other retailers and also sells it directly to the consumer. This is why specific legislation had to be enacted to allow brewpubs to operate." Julie Johnson, *How Beer Gets to You: Clarifying the three-tier System*, Indy Week, http://www.indyweek.com/indyweek/how-a-beer-gets-to-you-clarifying-the-three-tier-system/Content?oid=2626478.

Moreover, 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. For example, the Texas statute provides:

> (d) The holder of a brewpub license may not hold or have an interest either directly or indirectly, or through a subsidiary, affiliate, agent, employee, officer, director, or other person, in a manufacturer's or distributor's license or any other license or permit in the manufacturing or wholesaling levels of the alcoholic beverage industry regardless of the specific names given to permits or licenses in Title 3 of this code. *The holder shall be considered a "retailer" for purposes of Section 102.01 of this code.*

Tex. Code Ann. § 74.01 (emphasis added). "Instead of abolishing tied house statutes, legislation legalizing Brewpubs creates a narrow exception to them. Brewpub statutes allow for limited production of beer with varying and sometimes severe restrictions on where and to whom the beer can be sold. Depending on the state statute, the brewpub is generally severely limited in its yearly barrel production. Owners are *sometimes prevented* from possessing interests in other Brewpubs or other alcohol-related endeavors." Welch, *The Inevitability of the Brewpub*, 16 Rev. Lit. 173, 176 (1997) (Emp. Added.). South Carolina has no such provision. Based on the foregoing, it is reasonable to conclude that the General Assembly intended on keeping a brewpub as an exception separate and apart from the three-tier system.

2. If Not a Hybrid, the Brewpub is a "Brewer" on the Manufacturing Tier.

a. The Plain Language of the Statute Compels the Conclusion that a Brewpub is a "Brewer" on the Manufacturing Tier.

In order for Respondent to be denied a Brewery license, the Court is going to have to find (1) that a brewpub is in the retail tier; and (2) that a microbrewery is in the manufacturing tier. S.C. Code Ann. § 61-4-940(D) provides that "[a] manufacturer, *brewer*, and importer of beer are declared to be in business on one tier...." As described above, a "brewpub" is "a

tavern, public house, restaurant, or hotel [1] which *produces* on the permitted premises a maximum of two thousand barrels a year of beer [2] for sale on the premises." The three-tier statute specifically groups all producers of beer (i.e., those engaged in the business of brewing beer) into the same tier. As described above, 200 barrels of beer amounts to nearly half a million pints of beer – which by any measure is substantial manufacturing activity.

The Department's attempt to identify a brewpub as a "retailer" due to its sales to on-site consumers is unfounded in statute, regulation, or policy document. The Department relies on the dictionary definition of "retail" to conclude that because a brewpub sells beer, wine, and food directly to customers, a brewpub must constitute a "retailer" for purposes of the three-tier statute. While the on-premises sales surely connote retail activity, the Department completely ignores the first and the most fundamental factor identifying a brewpub – it must *produce or manufacture* beer. A brewpub's production of beer, and its associated DHEC permitting requirements, is a unique activity shared only with "manufacturer[s]" and "brewer[s]" of beer.

Moreover, as discussed in more depth below, the 2014 law changes for breweries allow significantly more retail activity for businesses on the manufacturing tier. For example:

> (B) In addition to the sampling and sales provisions set forth in subsection (A), a *brewery licensed in this State is authorized to sell beer produced on its licensed premises to consumers on site for on-premises consumption [**retail**] within an area of its licensed premises approved by the rules and regulations of the Department of Health and Environmental Control governing eating and drinking establishments and other food service establishments.* These establishments also may apply for a retail on-premises consumption permit for the sale of beer and wine of a producer that has been purchased from a wholesaler through the three-tier distribution chain set forth in Section 61-4-735 and Section 61-4-940 [**retail**].

§ 61-4-1515. In addition to on-premises consumption of food, beer, and wine (just like a brewpub), under the 2014 legislation, breweries now can sell beer on its licensed premises for

off-premises consumption, which surely is a retail function. § 61-4-1515(C). This means both breweries and Brewpubs can lawfully engage in retail activities, including the sale of beer and wine for on-premises consumption, and both can lawfully sell food. Just as a Brewery is now able to operate, a brewpub is a manufacturer/producer of beer that also is allowed to make sales of beer and food at retail. Accordingly, the changes in law demonstrate that a manufacturer/brewer/producer of beer is allowed to conduct retail activity and still be considered placed in the manufacturing tier.

Other states addressing this issue have classified Brewpubs as "manufacturers." For example, Alabama uses a substantially similar three-tier system with an exception for Brewpubs. See Ala. Code Ann. § 28-3-4. When summarizing alcohol regulation in Alabama, the Alabama Law Institute[4] categorized a brewpub as an exception *within the manufacturing tier*. *See* Alabama Law Institute, General Background on Alabama Alcohol Regulation, at p. 3 (May 14, 2015), *available at* http://ali.state.al.us/documents/ABSCMHmemo.pdf.

Moreover, federal law treats a brewpub as a "brewer" for purposes of federal licensure requirements, thereby requiring Brewpubs to obtain the identical licenses as breweries for the brewing of beer. Under 27 U.S.C. 25.11, federal regulations define "brewer" broadly to include "[a]ny person who brews beer . . . and any person who produces beer for sale." In other words, before opening the Brewpub, Respondent filed for and received Brewery permits from the Alcohol and Tobacco Tax and Trade Bureau ("TTB") as a brewer. As demonstrated in the TTB Tutorial, "Getting Started in the Beer Industry":

[4] From its website: "The Alabama Law Institute, created by an act of the Legislature in 1967, is a legislative agency that operates with volunteers. Our purpose is to clarify and simplify the laws of Alabama, to revise laws that are out-of-date and to fill in gaps in the law where there exists legal confusion. Our diverse membership includes members of the Alabama State Bar Association, the judges of the Alabama Supreme Court, courts of appeals, and circuit courts, federal judges domiciled in Alabama, full-time law faculty members of law schools and lawyer members of the Legislature.

Step 2 – Identify Your Desired Type of Beer Operations

The next important step in getting started in the beer industry is deciding which type of beer operation(s) you intend to conduct. Most products classified as "beer" under the Internal Revenue Code are "malt beverages" under the Federal Alcohol Administration Act. For ease of reference, this tutorial will refer to both "beer" and "malt beverages" as "beer."

Types of Beer Operations

- Brewery/*Brewpub*/Alternating Proprietorship
- Pilot Brewery

Other Beer Operation Types

- *Retail* Dealer in Beer
- Wholesale Dealer in Beer
- Importer of Beer

While the application procedures among the various operations might have similarities, there are significant differences between them that will affect how you become qualified to operate.

See Getting Started in the Beer Industry, *available at* http://www.ttb.gov/industry-startup/ref-guide/start.html (Emp. added). This means the federal regulatory body governing beer manufacturers, distributors, and retailers specifically differentiates and classifies Brewpubs as manufacturers (akin to breweries), and not as retailers.

Finally, this interpretation is consistent with the industry's position regarding the definition of "brewpub." The Brewers Association, the federal industry group for brewers, has defined Brewpubs as "breweries that brew and sell beer on their own premises...." David R. Scott, *Brewing Up a New Century of Beer*, 3 Wake Forest J. L. & Pol'y at 417 (citing Number of Breweries, Brewers Ass'n, available at http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/number-of-breweries (visited Apr. 1, 2013)).

b. All of the Exceptions Provided by Statute Allow Manufacturers to Operate on the Retail Tier.

By way of background beer, wine and liquor all have their own three-tier statutes, and perhaps because three-tier statutes are written for competitive, market reasons, and not public health and safety, they are replete with exceptions. As outlined above, South Carolina Code has developed exceptions for Brewpubs, which operate both on the retail and the manufacturing tier, as well as breweries, which now are explicitly allowed to conduct retail activities. Additionally, the Code has developed a number of exceptions which allow manufacturers to conduct significant retail operations. As summarized below, all of the exceptions below relate to *manufacturers* that are allowed to operate on the retail tier only by explicit statutory exception. None of **the** exceptions allow an entity classified as a retailer to also manufacture the types of products they are selling at retail. Therefore, to classify a brewpub as a *retailer* that operates by exception on the manufacturing tier would be inconsistent with all of the other exceptions provided by law, which allow *manufacturers* to also operate on the *retail* tier.

It bears repeating, here is the basis for the DOR's Determination that a brewpub is on the retail tier:

> "While 'retailer' is not defined in Title 61, 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 12-36-12- (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 "the sale of goods or commodities in small quantities **directly to consumers**." *American Heritage Dictionary of English Language* 1487 (4th ed. 2000) (emphasis added). 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**." S.C. Code Ann. § 61-4-1700 (2009) (emphasis added). Thus, because a brewpub sells beer, wine, food, and sometimes alcoholic liquor, all of which are goods, directly to consumers, a brewpub constitutes a retailer for purposes of the three-tiered distribution and licensing

scheme."

Final Agency Determination 3, R. p. 14. As seen below, such retail activity is allowed on several manufacturing tiers.

(i) WINE

S.C. Code Ann. § 61-4-735 (Regulation of Practices Between Wine Manufacturers, Importers, Wholesalers, and Retailers) is the three-tier statute for wine manufacturers, wholesalers and retailers. The three-tier statutes for wine have numerous exceptions. Section 61-4-735 states:

> (D) A producer, *winery*, vintner, and importer of wine are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. For the purpose of this section, a manufacturer or producer of wine is declared to be a tier one business, a wholesaler or an importer owned solely by a wholesaler is declared to be a tier two business, and a retailer is declared to be a tier three business. Except as provided in Sections 61-4-720 and 61-4-730, a person or entity in the wine business on one tier or a person acting directly or indirectly on his behalf may not have ownership or financial interest in a wine business operation on another tier. [**Exception 1:**] This limitation does not apply to the interest held on July 1, 1993, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. [**Exception 2:**] For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, [**Exception 3:**] or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business. Notwithstanding this prohibition or the prohibition contained in Section 61-4-940(D), [**Exception 4:**] a manufacturer or importer of beer or wine may own in whole or in part a business that holds an on-premises retail beer and wine permit provided that:
>
> > (1) All beverages to be handled or sold by the retail dealer must be purchased from licensed wholesalers and purchased on the same terms and conditions as do other retail dealers.
> >
> > (2) Sales of any product produced or distributed by the manufacturer or importer must not exceed ten percent of the annual gross sales of beer or wine by the retail permit holder.

> (E) A manufacturer, producer, importer, or wholesaler of wine may discount product price based on quantity purchases if all discounts are on price only, appear on the sales records, and are available to all retail customers.
>
> (F) Nothing in this section affects or prohibits the ownership or the operation of a licensed winery in this State that produces, provides taste samples, sells, delivers, or ships domestic wine as authorized and in accordance with the provisions of Sections 61-4-720 and 61-4-730 [**which authorize retail**] (Emp. added.)

Section 61-4-720 (Sale of Wine by Winery Located in State) states:

> Notwithstanding another provision of law, a licensed winery [**a manufacturer**] located in this State is authorized to [**retail**] sell wine on the winery premises and [**retail**] deliver or ship this wine to consumer homes in or outside the State so long as the wine is produced on its premises and contains an alcoholic content of sixteen percent or less. These wineries are authorized to provide, [**retail**] with or without cost, wine tasting samples to prospective customers.

Section 61-4-730 (Sales by Permitted Wineries) states:

> (A) Permitted wineries that produce and sell wine produced on its premises [**manufacturer**] with at least sixty percent of the juice from fruit and berries that are grown in this State may sell the wine at retail, [**retail**] wholesale, [**wholesale**] or both, and deliver or ship the wine to licensed retailers in this State [**wholesale**] or to consumer homes [**retail**] in and outside the State. Wine must be delivered between 7:00 a.m. and 7:00 p.m.
>
> (B) Permitted wineries that produce and sell wine produced on their premises with less than sixty percent of the juice from fruit and berries that are grown in this State may retail from the winery and ship the wine directly to consumer homes in and outside the State [**retail**], but these wineries are not wholesalers of the wine. These wineries shall use a licensed South Carolina wholesaler to deliver or ship the wine to licensed retailers in this State.

A licensed winery (a manufacturer) is accordingly outside the normal three-tier prohibition, based on statute. The manufacturer of wine is permitted to (1) manufacture; (2) retail, and (3) wholesale its own products. The obvious purpose of the legislation is to foster the growth of South Carolina wineries by allowing them to operate on all three tiers.

Section 61-4-745 (Transporting into and out of State for Personal Consumption) states:

> (A) Subject to the provisions of Section 61-4-747, a person who is at least twenty-one years of age and who is a legal resident of this State, may cause to be shipped or transported from a manufacturer [**manufactures**] of wine up to twenty-four bottles of wine each month for his own consumption or use [**retail**], and not for resale, into and out of this State without the necessity of acquiring any permits or licenses or other forms of public or private authorization except for the payment of appropriate taxes.

Section 61-4-747 (Direct Shipment to Residents for Personal Consumption") states:

> (A) Notwithstanding any other provision of law, rule, or regulation to the contrary, a manufacturer [**manufacturer**] of wine located within this State or outside this State that holds a wine producer and blenders basic permit issued in accordance with the Federal Alcohol Administration Act and obtains an out-of-state shipper's license, as provided in this section, may ship [**retail**] up to twenty-four bottles of wine each month directly to a resident of this State who is at least twenty-one years of age for such resident's personal use and not for resale.

These two statutes alone, "notwithstanding any other provision of law, rule or regulation to the contrary," authorize a wine manufacturer to sell wine to South Carolina consumers (i.e. retail trade). These examples illustrate a statutory intent to provide exceptions for manufacturers to also operate on the retail tier. According to the Department's position in this case, a winery would be considered on the retail tier!

(ii) LIQUOR

The liquor three-tier statute is found in Section 61-6-100. It states:

> Except as otherwise provided, the department has sole and exclusive power to suspend and revoke all licenses provided for in the ABC Act. The department may issue, subject to revocation, the following licenses under this article:
>
> > (1) manufacturers' licenses which authorize the licensees to manufacture alcoholic liquors and to sell and deliver or ship them, in accordance with regulations, in bottles or in similar closed containers to a person in this State who has a wholesaler's license issued under this article, and in barrels, bottles, or other closed containers to persons outside this State. However, no

> deliveries or shipments may be made into another state whose laws prohibit the consignee from receiving or selling alcoholic liquors;
>
> (2) wholesalers' licenses which authorize the licensees to purchase, store, keep, possess, import into this State, transport, sell, and deliver alcoholic liquors in bottles or similar closed containers, in accordance with regulations, to a person having a manufacturer's or retail dealer's license issued under this article; and
>
> (3) retail dealers' licenses which authorize the licensees to purchase alcoholic liquors from wholesalers having licenses issued under this article, and to store, keep, possess, and sell alcoholic liquors at retail for consumption in compliance with the provisions of the ABC Act and regulations not in conflict herewith.

In 2009, the General Assembly authorized micro-distilleries. This legislation is similar to the recently passed microbreweries law. Section 61-6-1095 (Definitions) states:

> For the purposes of this sub-article:
>
> (A) "Micro-distillery" means a manufacturer [**manufacturer**] who distills, blends, and bottles alcoholic liquors on the licensed premises in this State with an alcohol content greater than seventeen percent and who produces a maximum quantity of one hundred twenty-five thousand cases per year at the licensed premises.
>
> (B) "Licensed premises" means a location where the micro-distillery or manufacturer is licensed pursuant to this subarticle for the manufacture, [manufacturer] tasting, and retail [**retail**] sales of alcoholic liquors produced at the licensed location and includes those areas normally used by the licensee to conduct his business, and includes the producing areas, storage areas, tasting areas, selling areas, and parking lots.

Section 61-6-1120 (Micro-Distillery Licenses) states:

> (A) The department may issue a micro-distillery license to a person to operate one micro-distillery in the State subject to the requirements of this chapter and payment of a biennial micro-distillery license fee of five thousand dollars.

(B) A micro-distillery is not required to obtain an additional *manufacturing* and *retail* liquor license required pursuant to this title. (Emp. added)

Section 61-6-1150 (Tastings and Retail Sales) states:

> Authorization by this section of sales and tastings at licensed premises of a micro-distillery or manufacturer is expressly intended for the promotion of education regarding production of alcoholic liquors in the State and not to create competition between producers and retailers. A holder of a valid micro-distillery or manufacturer license issued by the State may:
>
> (1) sell in any quantities [**manufacturer**] the alcoholic liquors produced at the licensed premises to a wholesaler licensed by the State;
>
> (2) transport in any quantities the alcoholic liquors produced at the licensed premises out of state for sale outside of the State;
>
> (3) sell at retail [**retail**] at the licensed premises only in quantities of 750-milliliter bottles the alcoholic liquors produced at the licensed premises, but only if the labels for the bottles are marked "not for resale";
>
> (4) sell at retail [**retail**] no more than three 750-milliliter bottles of alcoholic liquors to a consumer in one business day;
>
> (5) not allow consumption on the licensed premises of alcoholic liquors sold by the bottle [**retail**] at the licensed premises;
>
> (6) maintain pricing of the alcoholic liquors sold at the licensed premises at a price approximating retail prices generally charged for identical alcoholic liquors in the county where the on-site premises is located;
>
> (7) in addition to the sale of alcoholic liquors as authorized by this section, sell items promoting the brand or brands of alcoholic liquors produced at that location in a room on the licensed premises separate from the locations of the tastings [**retail**]; and
>
> (8) not sell or store goods, wares, or merchandise in or from the room in which alcoholic liquors are sold or tasted.

This legislation allows micro-distilleries (Firefly on Wadmalaw Island is the most famous) to lawfully engage in both manufacturing and retail activity which would otherwise be

prohibited by the liquor three-tier statute. The micro-distilleries are manufacturer/producers, which by statute are authorized to operate within the retail tier. The obvious purpose is to promote the growth of small "micro" distilleries. According to the Department's logic in this case, a micro-distillery would be considered on the retail tier!

(iii) BEER

This case involves the beer three-tier statute.

Section 61-4-940 (Practices between Manufacturer, Wholesaler, and Retailer) is the beer three-tier statute. It states:

> (D) 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. [**Exception 1:**] This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. [**Exception 2:**] For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or [**Exception 3:**] a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business.

On its face, the three-tier statute has three exceptions. In addition, Section 61-4-735(D) states:

> Notwithstanding this prohibition or the prohibition contained in Section 61-4-940(D), *a manufacturer* or importer *of beer* or wine *may own in whole or in part a business that holds an on-premises retail beer* and wine *permit* provided that:
>
> > (1) All beverages to be handled or sold by the retail dealer must be purchased from licensed wholesalers and purchased on the same terms and conditions as do other retail dealers.

> (2) Sales of any product produced or distributed by the manufacturer or importer must not exceed ten percent of the annual gross sales of beer or wine by the retail permit holder.

Subsection (D), which was written prior to the Brewery legislation (above), accordingly explicitly allows a beer manufacturer to own a business that holds a retail beer license. The other exceptions, which are discussed more fully above, include Brewpubs and Breweries, which operate on both the retail and manufacturing tiers.

3. Because the Microbrewery Will Make Direct Sales to Consumers, it Should Be Treated as a Retailer for Purposes of the Three-Tier Statute.

Third, and in the alternative, the Department made clear in its Determination that "because a brewpub sells beer, wine, food, and sometimes alcoholic liquor, all of which are goods, directly to consumers, a brewpub constitutes a retailer for purposes of the three-tiered distribution and licensing scheme." In 2014, the General Assembly enacted legislation frequently referred to as the "Stone bill" authorizing South Carolina breweries, typically microbreweries, which are larger than Brewpubs. This is the license which Respondent applied for and is the subject of this appeal. (Note that this enabling legislation was passed after publication of the Geathers Treatise so it is not described in that treatise). Based on the Department's test, given the significant leeway provided to breweries in this 2014 legislation, breweries now should be characterized as retailers for purposes of the three-tier statute.

Section 61-4-1515 states:

> (A) A brewery [**manufacturer**] licensed in this State is authorized to offer samples of beer to consumers on its licensed premises [**retail**], provided that the beer is brewed on the licensed premises with an alcoholic content of twelve percent by weight, or less, subject to the following conditions:
>
> > (1) *sales to or samplings by consumers* [**retail**] must be held in conjunction with a tour by the consumer of the licensed premises and the entire brewing process utilized at the licensed premises;

(2) sales or samplings shall not be offered or made to, or allowed to be offered, made to, or consumed by an intoxicated person or a person who is under the age of twenty-one;

(3)(a) no more than a total of forty-eight ounces of beer brewed at the licensed premises, including amounts of samples offered and consumed with or without cost, shall be sold to a consumer for on-premises consumption within a twenty-four-hour period **[retail];** and

(b) of that forty-eight ounces of beer available to be sold to a consumer within a twenty-four-hour period, no more than sixteen ounces of beer with an alcoholic weight of above eight percent, including any samples offered and consumed with or without cost, shall be sold to a consumer for on-premises consumption within a twenty-four-hour period **[retail]**;

(4) a brewery must develop and use a system to monitor the amounts and types of beer sampled or sold to a consumer for on-premises consumption **[retail]**;

(5) a brewery must sell the beer at the licensed premises at a price approximating retail prices generally charged for identical beverages in the county where the licensed premises are located **[retail]**;

(6) a brewery must remit appropriate taxes to the Department of Revenue for beer sales in an amount equal to and in a manner required for excise taxes assessed by the department. A brewery also must remit appropriate sales and use taxes and local hospitality taxes **[retail]**;

(7) a brewery must post information that states the alcoholic content by weight of the various types of beer available in the brewery and the penalties for convictions for:

(a) driving under the influence;

(b) unlawful transport of an alcoholic container; and

(c) unlawful transfer of alcohol to minors.

And, the information shall be in signage that must be posted at each entrance, each exit, and in places in a brewery seen during a tour;

(8) a brewery must provide DAODAS approved alcohol enforcement training for the employees who serve beer on the licensed premises to consumers for on-premises consumption, so as to prevent and prohibit unlawful sales, transfer, transport, or consumption of beer by persons who are under the age of twenty-one or who are intoxicated **[retail]**; and

(9) a brewery must maintain liability insurance in the amount of at least one million dollars for the biennial period for which it is licensed. Within ten days of receiving its biennial license, a brewery must send proof of this insurance to the State Law Enforcement Division and to the Department of Revenue, where the proof of insurance information shall be retained with the department's alcohol beverage licensing section.

(B) In addition to the sampling and sales provisions set forth in subsection (A), a *brewery licensed in this State is authorized to sell beer produced on its licensed premises to consumers on site for on-premises consumption **[retail]** within an area of its licensed premises approved by the rules and regulations of the Department of Health and Environmental Control governing eating and drinking establishments and other food service establishments.* These establishments also may apply for a retail on-premises consumption permit for the sale of beer and wine of a producer that has been purchased from a wholesaler through the three-tier distribution chain set forth in Section 61-4-735 and Section 61-4-940 **[retail]**.

(C) The sale of beer that is brewed on the licensed premises for on-premises consumption pursuant to subsection (B) **[retail]** must comply with the following provisions:

(1) all provisions of subsection (A) shall apply to sales under subsection (B) and this subsection, except subsection (A)(1), (3), and (4);

(2) the brewery must comply with all state and local laws concerning hours of operation applicable to eating and drinking establishments and other food service establishments holding permits to sell beer and wine for on-premises consumption **[retail]**;

(3) the brewery must comply with the discount pricing provisions of Section 61-4-160, applicable to persons holding permits to sell beer and wine for on-premises consumption **[retail]**;

(4) the brewery must sell the beer at a price approximating retail prices generally charged for identical beverages by on-premises retailers in the county where the licensed premises are located **[retail]**; and

(5) a wholesaler must not provide and a brewery must not accept services, equipment, fixtures, or free beer prohibited by Section 61-4-940(B), except those items authorized by Section 61-4-940(C). Changes to the brewery laws pursuant to subsection (B) and this subsection do not alter or amend the structure of the three-tier laws of this State, and the wholesalers and the breweries must not discriminate in pricing at the producer or wholesaler levels. [**manufacturer and retail**]

(D) A brewery located in this State is authorized to sell beer on its licensed premises for off-premises consumption, provided that the sealed beer was brewed on the licensed premises with an alcohol content of fourteen percent by weight or less, subject to the following conditions **[retail]**:

(1) the maximum amount of beer that may be sold to an individual per day for off-premises consumption shall be equivalent to two hundred eighty-eight ounces in total **[retail]**;

(2) the beer only shall be sold in conjunction with a tour by the consumer of the licensed premises and the entire brewing process utilized at the licensed premises;

(3) the beer sold is for personal use only and cannot be resold **[retail]**;

(4) the beer cannot be sold to anyone holding a retail beer and wine license for the purpose of resale in their establishment **[retail]**;

(5) the brewery must sell the beer at the licensed premises at a price approximating retail prices generally charged for identical beverages in the county where the licensed premises are located **[retail]**; and

(6) the brewery must remit taxes to the Department of Revenue for beer sales in an amount equal to and in a manner required for taxes assessed by Section 12-21-1020 and Section 12-21-1030. The brewery also must remit appropriate sales and use taxes and local hospitality taxes **[retail]**.

Id. (emphasis added). The obvious purpose of this law was to aid in the recruitment of larger beer manufacturers. The vast majority of beer consumed in South Carolina is produced in other states and the purpose of this legislation was to help recruit beer manufacturers to South Carolina who are typically much larger than Brewpubs. The legislation accomplishes this by authorizing both manufacturing and retail activity on site which would otherwise run afoul of the three-tier beer statute. And the bill has been a success:

> June 2, 2014 marked a great day for South Carolina brewers. On that date, South Carolina Governor Nikki Haley signed what is commonly known to South Carolinians as "the Stone Bill" into law. In signing the bill, § 61-4-1515 of the South Carolina Code of Laws was amended, which in turn provided for the biggest change to South Carolina's beer laws since the end of Prohibition in 1933.
>
> One might ask, why the change? Why now? For starters, in the United States the number of breweries and interest in craft beers is growing, and growing fast. From 2012 to 2013, the United States saw a 14.9% increase in the number of breweries, moving from 2.456 to 2,822. Of those 2,822 breweries, 98% were considered craft breweries, which included microbreweries, brewpubs, and regional craft breweries.
>
> When looking at the numbers for South Carolina, the growth is even more impressive. In 2012, there were sixteen breweries housed in the state, and in 2013, the number increased by 25% taking the total to twenty breweries. That 25% growth rate from 2012 to 2013 was 10% higher than the national growth rate.

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).

Based on the foregoing, after the law changes effective 2014, breweries now can sell beer produced on-site for on-site and off-site consumption, as well as sales of food within their licensed premises. This means breweries are now on the retail tier according to the Department's logic. It bears repeating – the basis of the Appellant's conclusion that Brewpubs

are on the retail tier is because as they are selling "beer, wine, food, and sometimes alcoholic liquor, all of which are goods, directly to consumers." Department Determination at 3. *See also* Hargrove, *Stone Didn't Come*, 9 Charleston L. Rev. at, 343-44 ("The passing of the Stone Bill in the summer of 2014 was the biggest win for South Carolina brewers and brewpubs. At the bottom line, brewers such as Holy City Brewing Company and Westbrook Brewery are now able to sell food in the same manner as Brewpubs while still operating as a traditional Brewery. If they choose to sell food and obtain the necessary licensing, these traditional brewers are unrestricted--with the exception of dram shop restrictions--in how much of their own beer they can sell for on-site consumption. *Essentially, this creates the ability for a Brewery to act as a brewpub without limitation on the amount of beer it can produce each year, while also allowing the Brewery to continue to sell its beers through the normal three-tier distribution system.*") (emphasis added) (citations omitted). This is exactly what the new Brewery legislation allows breweries to do! Simply put, if a brewpub is on the retail tier, so than is Respondent's proposed microbrewery!

4. **Impact of ALC Decision on Three Tier System**

The Appellant is understandably concerned about the impact of the ALC decision on the state's Three Tier system. As the ALC Order points out, their concern is misplaced. The ALC Order correctly states:

> The Department has expressed grave concerns about the far-reaching effects of a finding that the General Assembly intended brewpubs to be an exception outside the three-tier system. I find their concerns unfounded based on the extremely limited nature of this Court's ruling. Article 17 is substantively different from other statutes within the three-tier system., which tend to permit off-tier activities. Most importantly, Article 17 specifically identifies the required licensure as a "brewpub permit" which is required "instead of or in place of" a permit within the three-tier regime. (ALC Order, page 9, R. p. 9).

The ALC Order also notes:

> Stated another way, brewpubs are a narrow exception to the three-tier statutes, which otherwise remain in full force and effect. (ALC Order, page 9, R. p. 9).

III. Conclusion

Based on the foregoing, the taxpayer requests the Department determine that Respondent's ownership and operation of a microbrewery and Brewpub does not violate the three-tier system, and that the Respondent thus is entitled to the Brewery permit.

First, the history of Article 17 and subsequent failure to amend the three-tier statute to include Brewpubs demonstrate that these retail/manufacturing hybrids should be treated as an exclusion, and thus separate and apart, from the three-tier structure. Accordingly, Respondent may hold both a brewpub and Brewery license without violating the Three Tier statute.

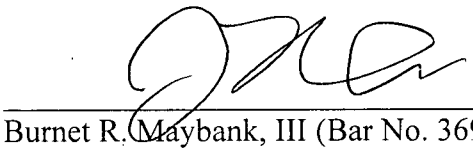
Alternatively, reasonable people can differ on which tier Brewpubs and microbreweries fall. Both engage in manufacturing so perhaps both are manufacturers. Both are authorized to engage in substantial retail activity so perhaps both are in the retail tier. Indeed, the Department Determination states that, "because a brewpub sells beer, wine, food and sometimes alcoholic liquor, all of which are goods, directly to consumers, a brewpub constitutes a retailer for purposes of the three-tiered distribution and licensing scheme." Yet the Brewery bill, Section 61-4-1515, authorizes breweries in some 17 different subsections, to engage in retail activity including the sale of beer, wine and food. Subsection (B) accordingly states:

> (B) In addition to the sampling and sales provisions set forth in subsection (A), a brewery licensed in this State is authorized to sell beer produced on its licensed premises to consumers on site for on-premises consumption *within an area of its licensed premises approved by the rules and regulations of the Department of Health and Environmental Control governing eating and drinking establishments and other food service establishments* [**food**]. *These establishments also may apply for*

> *a retail on-premises consumption permit for the sale of* beer and *wine* [**wine**] of a producer that has been purchased from a wholesaler through the three-tier distribution chain set forth in Section 61-4-735 and Section 61-4-940. (Emp. Added).

Reasonable people, including the ALC, might conclude Brewpubs are exceptions to the three-tier system. Both Brewpubs and microbreweries legislation were passed decades after Section 61-4-940 was passed in its original form. Section 61-4-940 was not amended to include either Brewpubs or breweries after passage of those bills. Indeed, the ABC Act was recodified in 1996 – two years after passage of the brewpub legislation – and no effort was made to amend Section 61-4-940 to include Brewpubs in it. And the General Assembly, in 2014, did not amend Section 61-4-940 to include breweries.

Notwithstanding the foregoing, one thing is certain – allowing the Respondent to own a small brewpub – the Hunter-Gatherer – in downtown Columbia, as well as a small microbrewery, will not lead to "two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." Geathers Treatise at 12. Additionally, "South Carolina, like many other states, regulates the commerce in alcoholic beverages through a three-tiered distribution and licensing scheme that separates manufacturing, wholesaling, and retailing interests into distinct tiers of operation in order to prevent (tied houses) and other forms of vertical integration in the commerce in alcoholic beverages." *Id.* at 241. A microbrewery and a brewpub do not constitute vertical integration.



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Columbia, South Carolina

December 14, 2016

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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