

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE COURT

Ralph King Anderson, III, Chief Administrative Law Judge

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ALC Docket No. 14-ALJ-17-0571-CC  
Appellate Case No. 2015-000733

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Kan Enterprises, Inc., d/b/a A 1 Food  
Stores, ..... Appellant,

v.

South Carolina Department of Revenue, Ellen Fishburne Triplett,  
Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael  
Hill, ..... Respondents.

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**RETURN OF RESPONDENTS ELLEN FISHBURNE TRIPLETT,  
KEITH MCIVER, SAMUEL L. MUNSON, JOCELYN MUNSON, AND MICHAEL HILL  
TO APPELLANT'S PETITION FOR REHEARING**

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AUG 07 2017

SC Court of Appeals

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## ARGUMENT

**1. The Court of Appeals correctly applied the law of South Carolina regarding the suitability of a location for the issuance or denial of a license to sell alcohol.**

Appellant Kan Enterprises, Inc. (“Kan”) contends this Court “disregards, misapprehends and misapplies” the law of South Carolina regarding the issuance or denial of a permit to sell alcohol. Kan argues *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973), and *Byers v. S.C. Alcoholic Beverage Control Com’n*, 281 S.C. 566, 316 S.E.2d 705 (1984), set a different standard for suitability of location in the instance of renewal of a permit to sell alcohol rather than the initial issuance of an alcohol permit. In particular, Kan argues that on an application for renewal of alcohol permit, a party opposing renewal must show that the location of alcohol sales is less suitable than it was at the time of issuance of the original permit for the sale of alcohol. This Court correctly held that these two cases create no such different standard for renewal of an alcohol permit.

In *Taylor*, a lack of showing that the location was any less suitable than it had been in the prior licensing period was one of many deficiencies of the record and not the sole factor that determined the outcome of that case. In *Byers*, this Court upheld the reversal of a denial of a beer and wine permit based upon the finding that the Alcohol and Beverage Control Commission’s conclusions were either irrelevant to a determination of suitability or not supported by substantial evidence. Here again, a change in suitability after initial issuance was not determinative.

The Administrative Law Court (“ALC”) properly acknowledged and considered Kan’s position in its determination to deny Kan’s beer and wine permit, stating:

S.C. Code Ann. § 61-4-520 and 540 (2009) generally set forth the requirements for the issuance of a beer-and-wine permit. Section 61-4-520(5) provides that the location of the proposed business must be a proper one.

Although “proper location” is not statutorily defined, the ALC is vested, as the trier of fact, with the authority to determine the fitness or suitability of a particular location. *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 118 (1981). The determination of a “proper location” is not necessarily a function solely of geography. *Palmer v. S.C. Alcoholic Beverage Control Comm’n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (1985). It involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community within which it is to be located. *Id.* at 327, 338 S.E.2d at 337. It is also relevant to consider whether the proposed location has been previously approved for a permit or permit and whether its suitability has altered over time. See *Smith v. Pratt*, 258 S.C. 504, 508, 189 S.E.2d 310, 302 (1972); *Taylor v. Lewis*, 261 S.C. 168, 171-72, 198 S.E.2d 801, 802 (1973); *Byers v. S.C. Alcoholic Beverage Control Comm’n*, 281 S.C. 566, 569, 316 S.E.2d 705, 707 (1984).

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

In its Opinion, this Court also correctly recognized that *Taylor* “does not articulate a more lenient suitability standard for the renewal of an off-premises permit as opposed to its initial issuance.” The inquiry remains whether the location is suitable. Accordingly, this Court should deny Appellant’s Petition for Rehearing.

**2. This Court correctly held that the ALC’s decision was supported by substantial evidence.**

Appellant contends the “greater weight of evidence” does not support denial of the alcohol permit. Appellant fails to apply the correct standard of review.

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

The review of the administrative law judge’s order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;

- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610 (B) (2014).

Substantial evidence is evidence that allows reasonable minds, considering the whole record, to reach the same conclusion the factfinder reached or must have reached in order to justify its action. *Fast Stops, Inc.*, 276 S.C. at 594, 281 S.E.2d at 119. The fact that two inconsistent conclusions could be drawn from the evidence in the record does not mean that a decision was not supported by substantial evidence. *Id.* A decision must stand if there is “reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” *Palmer*, 282 S.C. at 249, 317 S.E.2d at 478.

The record contains substantial evidence upon which the ALC based its denial of the alcohol permit. Just a few examples are:

- Delores Johnson testified to having observed loiterers “going to the bathroom” and engaging in sexual activity. (R. p. 241.)
- Respondent McIver, testified about observing prostitutes around the store and about being propositioned himself by a prostitute loitering near the store. (R. p. 313.)
- Respondent Lyman Munson testified that every day he collects around his property a grocery bag full of litter that is traceable to the A1 Food Store. (R. pp. 267-271.)
- Sehgal testified that when he or his employees “chase away” those who panhandle or stand with no purpose in front of his store, they “go somewhere, maybe to the post office.” (R. p. 325.)
- Respondent McIver testified that he witnessed minors purchasing alcohol at the A1 Food Store. (R. p. 313.)

- Kan illegally sold alcohol to a minor without asking for any form of identification. (R. pp. 188–189.)
- Deputy Police Chief Kelly testified that the police responded to many calls concerning loitering, vagrancy, panhandling, and acts of violence at the A1 Food Store. (R. p. 159.) Among the convenience stores in the area, A1 Food Store generated the overwhelming majority of the calls for service. (R. p. 162.)
- Deputy Police Chief Kelly testified that there were significantly higher calls for service and arrests at the A1 Food Store than for other convenience stores selling beer and wine in the area. (R. p. 183.)
- Officer Hass echoed Deputy Chief Kelly’s testimony and testified to the continued vagrancy, drunkenness, trespassing, and other violations related to alcohol consumption at and around the A1 Food Store. (R. p. 215.)
- The one hundred percent owner of Kan, Nadiya Alibhai did not even appear at all at the hearing.

These examples along with the additional evidence presented to the ALC constitute substantial evidence to support the determination that the A1’s location was no longer suitable for the sale of alcohol. Accordingly, this Court should deny Appellant’s Petition for Rehearing.

**3. The Administrative Law Court did not improperly rely upon unsubstantiated opinion evidence.**

Kan argues that the ALC based its decision upon unsubstantiated opinion evidence. This is incorrect. The ALC’s finding that Kan “poses a constant and increasing burden on law enforcement” is supported by specific crime statistics for the store’s location, and other comparable stores in the area, which were submitted into evidence through the testimony of three law enforcement officers. (R. pp. 157–213, 213–222, 222–232; Am. Final Ord., R. p. A–13.) The

documentary evidence in the record demonstrates that since 2011 there has been not only an increase in arrests at the A1 Food Store but also an increase in calls for service during the period between 7 p.m. and 7 a.m., which is when the majority of calls for service at the A1 Food Store are received by the Columbia Police Department.

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

The finding that "Petitioner . . . does not provide any formal training for the sale of alcohol and tobacco to minors," even though SLED has cited Kan for sale of alcohol to an underage patron, was based on the store manager's own fact testimony. (R. p. 107; Am. Final Ord. 4, R. pp. 6-9.)

It was also Sehgal's own testimony upon which the ALC based its conclusion that the amount of effort required to pick up litter on the property is a "reflection of the litter problem that the Store spawns." (Am. Final Ord., R. p. A-13.) Thus, the evidence upon which the ALC based its decision constituted facts known to the witnesses and not opinion testimony. Accordingly, this Court should deny Appellant's Petition for Rehearing.

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

Kan incorrectly asserts that it could have had a vested interest in obtaining an alcohol permit simply because it had been granted a permit several times in the past. This does not comport with the law regarding vested interests. Kan could not have been deprived of a vested property interest because it never had one.

A potential permittee cannot have a property interest in an alcohol permit because, under S.C. Code Ann. § 61-2-140 (B) (1976), alcohol permits are the property of the DOR. According to our Supreme Court, permits for sale of alcohol are:

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

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

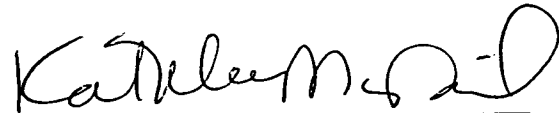
Kan argues, citing *Pure Oil Division, et al. v. The City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970), that the ALC's decision was a deprivation of a vested property right without cause. The facts of *Pure Oil*, however, are a poor analog for Kan's situation. That case involved a right to build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

As a matter of law, Kan could not have had a vested right in the renewal of its alcohol permit. Accordingly, this Court correctly held that Kan was deprived of no vested right and should deny Kan's Petition for Rehearing.

**CONCLUSION**

This Court should deny Kan's Petition for Rehearing because this Court properly determined that the ALC's denial of the alcohol permit was supported by substantial and competent evidence in the record and Kan had no vested right to such permit.

Respectfully submitted,



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August 7, 2017

Columbia, South Carolina

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APPEAL FROM ADMINISTRATIVE COURT

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v.

South Carolina Department of Revenue, Ellen Fishburne Triplett,  
Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael  
Hill, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served a copy of the **Return of Respondents Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill to Appellant's Petition for Rehearing** on the following parties by causing a copy to be placed in the United States Mail, first-class postage affixed, addressed as follows on August 7, 2017:

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August 7, 2017

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AUG 07 2017

**SC Court of Appeals**

**Re: Kan Enterprises, Inc. d/b/a A 1 Food Stores v. South Carolina  
Department of Revenue, et al.  
ALC Docket No. 14-ALJ-17-0571-CC  
Appellant No. 2015-000733  
Our File No.: 1530.039**

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Return of Respondents Ellen Fishburne Triplett, Keith McIver, Samuel L. Munson, Jocelyn Munson, and Michael Hill to Appellant's Petition for Rehearing along with a Proof of Service in the above-referenced matter. Please file the originals, clock-in one copy, and return to me via our courier.

By copy of this letter, I am serving the enclosed document on opposing counsel. If you should have any questions, please contact me at your earliest convenience.

With kindest personal regards, I am

Sincerely yours,

BURNETTE SHUTT & MCDANIEL, PA

Kathleen McDaniel

KMM/jrw

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