

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Five Points Roost, LLC, d/b/a Five Points
Roost,

Petitioner,

vs.

South Carolina Department of Revenue,

Respondent,

and

Thomas R. Gottshall and April C. Lucas,

Intervenors.

Docket No. 18-ALJ-17-0005-CC

FINAL ORDER

RECEIVED

JUN 07 2018

SC Court of Appeals

APPEARANCES: For the Petitioner: Michael H. Montgomery, Esquire
For the Respondent: Elisabeth W. Shields, Esquire
For the Intervenors: Richard A. Harpootlian, Esquire
For the Protestants: *Pro se*

This matter comes before the Administrative Law Court (ALC or Court) for a contested case hearing pursuant to S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2017), 61-2-260 (Supp. 2017), 61-4-525 (Supp. 2017) and 61-6-1825 (Supp. 2017). Five Points Roost, LLC, d/b/a Five Points Roost (Petitioner) seeks an on-premises beer and wine permit, and restaurant liquor by the drink license for its location at 800 Harden Street, Columbia, South Carolina (location). Polly Felton Morrison, April C. Lucas, John J. Stucker, James M. Daniel, III, Luther J. Battiste, III, Michael Drennen, Marilyn E. Gartley, Matt Kisner, Karen R. Belser, Kathryn Fenner, Richard and Rory Ackerman, and Thomas R. Gottshall (Protestants)¹ filed a protest to the application. On January 9, 2018, Respondent South Carolina Department of Revenue (Department) denied the application on the following grounds: 1) the receipt of the Protestants' valid public protests pursuant to S.C. Code Ann. § 61-6-1825; 2) the suitability of the proposed location pursuant to S.C. Code Ann. § 61-4-520 (2009); and 3) failure to meet the restaurant

¹ On February 16, 2018, counsel for Intervenors filed with this Court a Notice of Withdrawal of Protest for Polly Felton Morrison, John J. Stucker, Luther J. Battiste, III, Michael Drennen, Matt Kisner, Karen R. Belser, Kathryn Fenner, and Richard and Rory Ackerman.

FILED

April 3, 2018

SC ADMIN. LAW COURT

requirements set forth in S.C. Code Ann. § 61-6-20(2) and S.C. Ann. Regs. 7-401.3 (Supp. 2017). On January 10, 2018, Petitioner requested a contested case hearing.

On February 1, 2018, this Court issued an Order Granting Motions to Intervene for Protestants Thomas R. Gottshall and April C. Lucas. After proper notice, a hearing was held on February 20 and 21, 2018, at the ALC in Columbia, South Carolina. The parties and Protestants appeared at the hearing. Evidence was introduced and testimony was given. After carefully weighing all the evidence, I find that Petitioner's request for an on-premises beer and wine permit, and restaurant liquor by the drink license should be denied.

ISSUES

- 1) Is the location a suitable one for the sale of on-premises consumption of beer and wine, and liquor by the drink?
- 2) Is the business engaged primarily and substantially in the service of meals?
- 3) Are Petitioner's Principals of good moral character?
- 4) Did Petitioner fail to disclose all principals on its Consent and Waiver form?

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passing upon their credibility, and taking into consideration the burden of persuasion by the parties, the Court makes the following Findings of Fact by a preponderance of the evidence.

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

Five Points Roost, LLC seeks an on-premises beer and wine permit, and restaurant liquor by the drink license for Five Points Roost, LLC, d/b/a Five Points Roost, located at 800 Harden Street, Columbia, South Carolina. Five Points Roost, LLC has entered into a lease agreement with 800 Harden, LLC for use of the location. The proposed location is in Richland County, and is within the municipality of the City of Columbia. On January 9, 2018, the Department denied Petitioner's application for the permit and license based on the receipt of the Protestants' valid public protests, the suitability of the proposed location, and Petitioner's failure to meet the restaurant requirements.²

² Respondent stated that, upon further investigation, South Carolina Law Enforcement Division (SLED) has determined the location meets the building and restaurant requirements stated as one ground for the Department's denial of the liquor by the drink license.

The Protestants are residents who live in the neighborhoods surrounding Five Points. They have raised several concerns and objections to granting the permit and license for the location. Their primary concerns are:

1. Whether the business and its patrons will be a nuisance to nearby businesses and residences;
2. Whether the location is suitable because they contend the Five Points district is overserved with alcohol;
3. Whether the business will attract or enable illegal activity in the form of underage drinking;
4. The strain the business is expected to place upon law enforcement resources; and
5. Whether the proposed business is a bona fide restaurant.

The location is the former site of the Carolina Pour House bar (Pour House) and Frank's Hot Dog restaurant. Permits to sell beer and wine, and licenses to sell liquor have been issued to various businesses at the location for many years. The most recent previous business at the location was the Pour House which was owned and operated by Daniel Wells. The Pour House was a source of significant and constant problems for law enforcement, and regularly operated in a manner that was not in compliance with alcohol laws. For example, the Pour House routinely sold liquor after 2:00 a.m., allowed underage patrons to drink alcohol by turning a blind eye to fraudulent identification, and engaged in price discounting that encouraged overconsumption of alcohol by patrons. William Holbrook, Columbia Chief of Police, testified that there have been 623 arrests or citations issued at this specific location over the past ten years by the Columbia Police Department. Following a violent incident in February 2016, for which Wells is currently facing criminal charges, Holbrook served notice declaring the Pour House a nuisance. Thereafter, a hearing was held to determine if the business license for the Pour House should be revoked. Wells agreed to surrender his business license for the location.

Ownership and Control of Five Points Roost

Petitioner Five Points Roost, LLC seeks to distance itself from Wells and the Pour House. The applicant's principals purport to be new management who have purchased the business assets from Wells in an arms-length transaction to establish a new bar that will be operated in conformity with the law, best practices and high standards. The application was submitted by Stephen Bland on behalf of Five Points Roost, LLC. The owners of Five Points Roost, LLC are

listed in the application as D.E.O Investments, LLC/ Stephen Bland; BG Holdings, LLC/ Stephen Bland Manager; and Mongo, LLC/ Adam Daniel Ruonala. BG Holdings' only member is Brenda Wells; she is Daniel Wells' mother. BG Holdings owns 65% of Five Points Roost, LLC. Bland and Ruonala are the only two principals for the business disclosed in the application. Ruonala is a longtime friend of Wells' with no previous relationship to Bland prior to this business venture undertaking. Bland was a longtime employee and manager of the Pour House when it was operated by Wells. Bland testified that he has only managed the Pour House since the February 2016 incident at the bar. However, his LinkedIn social media profile, and at least some resumes he distributed, state that he has been the General Manager of the Pour House since August 2014. In his testimony, Bland denied managing the Pour House prior to the period from February to September 2017, but also testified that Wells knew he was representing to potential employers that he was the General Manger. He also testified that Wells owed him \$125,000 in lieu of a salary for work he did at the Pour House.

The testimony and evidence of the financial dealings related to the ownership and capital contributions for establishing Five Points Roost, LLC are conflicting. Bland testified to one set of facts about the ownership, control and capital investments of the business at his deposition and then to materially different facts at the hearing in this case. Moreover, he submitted an errata sheet to his deposition making many of the same materially substantive changes to his story, claiming that the court reporter had not accurately transcribed his answers at the deposition. I find neither Bland nor Ruonala to be credible witnesses, and the facts they testified to concerning the ownership and control of the business are unreliable.

In addition to BG Holdings' 65% ownership interest in Five Points Roost, LLC, an LLC owned solely by Daniel Wells holds a \$150,000 promissory note from Five Points Roost, LLC. Furthermore, Bland testified that Wells owed him \$125,000 that he discounted to \$20,000 as part of the negotiations leading to the formation of Five Points Roost, LLC. The debt was related to Bland's previous employment at the Pour House. That \$20,000 was counted as Bland's part of the capital contribution to obtain his share of the business with no money exchanged, thus absolving Wells of the disputed debt. Bland testified that he values the business at \$450,000. Assuming that value and the discounted value of the debt to Bland, Brenda and Daniel Wells received approximately \$462,500 of value in Five Points Roost, LLC. Bland and Ruonala were unable to identify contributions made by either Brenda or Daniel Wells to justify the promissory

note, debt forgiveness, and the majority share of ownership of the business. Five Points Roost, LLC did not keep the same business name to acquire business goodwill; it did not assume the lease of the building but negotiated a new lease at roughly twice the rent amount paid by the Pour House; the Pour House had no ongoing business license, and alcohol licenses cannot be sold. The only assets Bland or Ruonala testified they acquired from the Wellses were \$45,000 for renovations, some tables, chairs, TVs, coolers, and the "first mover advantage" to move ahead with forming the business. The lack of value given in exchange for Brenda Wells' significant ownership interest in the business is the predominant fact that leads me to find that Daniel Wells is an undisclosed principal of Five Points Roost, LLC. Other relevant facts that suggest that Wells is actually exercising control over the business include:

- the longstanding personal relationships between Daniel Wells and both Bland and Ruonala and the lack of prior relationship between the two men who purport to be managing the business together;
- the admission by Bland that he never negotiated directly with Mrs. Wells but relied upon the advice of accountants and lawyers in establishing the business; and
- Bland's testimony that the same lawyer represented both Daniel Wells and himself in drafting the documents and advising how to structure ownership of the business.

Even with the astonishing differences in Bland's deposition and hearing testimony concerning the organization and financing of the business, on neither occasion did he or Ruonala offer any credible explanation as to why they agreed to the financial terms reflected in the documents. The only plausible explanation is that Daniel Wells is still controlling the business and has simply reorganized it and transferred his majority ownership interest into an LLC controlled by his mother.

Furthermore, Bland testified at the hearing that Erin Thompson and Colin Ellidge are general managers at the location, and are responsible for the day to day operations. Neither of those individuals was identified as a principal of the business in the application. Therefore, I find that Daniel Wells, Erin Thompson and Colin Ellidge are all undisclosed principals of the business.

Underage Students and Five Points

Several witnesses testified concerning the environment in the Five Points hospitality district where the proposed location is situated. Nearby residents, law enforcement, and a

professor and administrator from the University of South Carolina (USC) all testified to the prevalence of crowds of college students congregating in the area, underage drinking, and illegal or obnoxious behavior by intoxicated students driving or walking through nearby neighborhoods. Anna Edwards, USC Associate Vice President for Student Life, testified that in 2017 254 students were transported to medical facilities for alcohol-related incidents. Of those, 40% had over-imbibed in Five Points and most were under the age of 21. Criminology Professor Leslie Wisner, who has studied alcohol-related student behavior, testified that the number of freshmen (typically 18 or 19 years old) who self-report drinking in bars has increased from 14% in 2012 to 39% in 2014. His study reflects that 77% of the students riding the USC shuttle bus to Five Points report that they intend to drink in bars. Of those students interviewed, 69% were too young to drink legally.

Protestant April Lucas, who resides in the nearby University Hills neighborhood, describes the concentration of bars in Five Points as an "attractive nuisance," observing that the bars are an attraction for students, many of whom are too young to drink legally. The inebriated students then commit crimes such as vandalism, but are also periodically the vulnerable victims of more serious crime. She and Protestant Tom Gottshall described chaotic scenes where steady streams of students driving and walking through the neighborhoods between USC and Five Points sideswipe or vandalize parked cars, trespass, and litter. They vomit, urinate, defecate, and engage in sexual acts in public. Nearby resident William Lamb testified that he avoids driving through Five Points in the evening because of large groups of young people congregating and milling about on the sidewalks and street in front of alcohol establishments. He is fearful of a student walking out in front of his car.

Based on the overwhelming evidence and testimony of these witnesses, I find that Five Points is an area where underage college students congregate and loiter. Many of them have falsified identification and are entering the bars and drinking to excess. These students and their drunken, unruly behavior become a nuisance to the surrounding neighborhoods. Of even greater concern, they are vulnerable to being victims of crime as they congregate in Five Points and travel back to their residences in an impaired state. I am cognizant of the testimony of Bland and Ruonala that they have instituted practices to detect fraudulent identification and turn away underage patrons. However, that testimony is insufficient to convince me that if the permit or license were issued, those practices would be faithfully observed or, if observed, they would be

effective in identifying all of the false identification cards. Bland testified that if all the resources available were collectively used, they would have "a really good chance of catching fake IDs." I find it improbable that while 200 people wait in line outside the bar, a doorman would scan every single ID with a black light, a separate second scanner, and reference it in a guidebook before allowing a patron to enter. Thus, I find that if the permit and license were issued the business would contribute to the problem of underage drinking in Five Points.

Law Enforcement Resources

The Five Points district, and this proposed location in particular, have been the site of significant and constant law enforcement problems in addition to problems associated with public intoxication. As the findings above demonstrate, the Pour House flouted applicable alcohol laws when it operated in this location by routinely selling liquor after 2:00 a.m., serving underage patrons, and allowing overconsumption of alcohol by patrons. Chief Holbrook testified that there were 623 arrests or citations issued **at this location** over the past ten years by the Columbia Police Department culminating in a declaration by Holbrook that the location was a nuisance. Holbrook testified that this location, and Five Points generally, have required an extraordinary amount of police service and have been a constant source of law enforcement problems. He attributes the strain on police services in part to the concentration of bars in a small area. I find that the proposed location has a reputation for lawless behavior under previous management and that granting the license and permit sought here would likely exacerbate and perpetuate the problems with public intoxication and the existing strain on law enforcement resources.

Restaurant

Petitioner does not claim that it intends to operate a restaurant at the location. It characterizes the business as a bar. There is no evidence that any menus or a menu board are available to notify customers of the food offerings. There is no evidence that the food offerings are advertised by Petitioner in any way. The food items offered for sale include hot dogs, chips and pizza. The pizza is purchased from a nearby pizza parlor and re-warmed to serve customers who request it. The hot dogs are warmed in a microwave oven. The kitchen equipment consists of a refrigerator, microwave oven and a preparation table; there is no oven or stove. Bland testified at his deposition that the kitchen is extremely limited and that it would take costly

renovations to make the kitchen suitable to do more than reheat prepared food to serve.³ Therefore, the plan is to offer hot dogs and partner with the pizza restaurant and a food truck to prepare food off-site that can be reheated and served to customers. I find that only 5% of the location's revenues are from food sales.

CONCLUSIONS OF LAW

Jurisdiction and Legal Standards

Based upon the foregoing findings of fact, the Court concludes the following as a matter of law:

Jurisdiction over this case is vested with the South Carolina Administrative Law Court pursuant to South Carolina Code Sections 61-2-260 (2009), 1-23-310 et seq. (Supp. 2017), 61-4-525 (2009), and 61-6-1825 (2009). The standard of proof in an administrative proceeding such as this is a preponderance of the evidence, unless otherwise specified. Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1988); see also S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2017). "A 'preponderance of the evidence' is evidence which convinces as to its truth." Gorecki v. Gorecki, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010) (citation omitted). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. See, e.g., Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

Alcohol Licenses and Permits

S.C. Code Ann. § 61-2-260 (2009) grants the Administrative Law Court the responsibility to determine contested case matters governing alcoholic beverages, including beer, wine and liquor. The factual determination of whether an application is granted or denied is usually the sole prerogative of the executive agency charged with rendering that decision. Palmer v. S.C. ABC Comm'n, 282 S.C. 246, 317 S.E.2d 476 (Ct. App. 1984). As the trier of

³ I find Bland's deposition testimony as transcribed by the court reporter to be more credible than his testimony at the hearing or the deposition errata sheet. At the hearing, he testified that the location also has special equipment to keep the pizzas warm and that the percentage of revenue from food was 10%. It is apparent that he made these material changes to his story after he learned more about the legal requirements for obtaining the liquor license.

fact, an administrative law judge is authorized to determine the fitness of an applicant for alcohol permits and licenses using broad, but not unbridled, discretion. Byers v. S.C. ABC Comm'n, 281 S.C. 566, 316 S.E.2d 705 (Ct. App. 1984). The requirements for a beer and wine permit are set forth in South Carolina Code Section 61-4-520 (2009). The requirements for a liquor by the drink license are contained in South Carolina Code Section 61-6-1820 (2009 and Supp. 2017).

Undisclosed Principals

Before an alcohol license or permit may be issued, this Court must determine whether the applicants meet all of the statutory requirements for licensure. In order to do that, the identity of all of an applicant's principals must be disclosed.

Licenses and permits may be issued only to the person who is the owner of the business seeking the permit or license.... If application is made for a license or permit under this title by a person other than an individual, all principals are deemed to be the applicant.... The department may not issue a license or permit to any person unless the person and all principals are of good moral character.

S.C. Code Ann. § 61-2-100 (2009). Furthermore, an applicant's failure to disclose all of its principals is a misstatement or concealment of fact and a ground for denial of an alcohol license. S.C. Code Ann. § 61-2-100(J) (2009).

Daniel Wells is involved in the ownership and control of Five Points Roost, LLC and Petitioner has intentionally misrepresented Mr. Wells' role in the business. Consequently, the application for the permit and license must be denied. In addition, Erin Thompson and Colin Ellidge, as general managers in charge of day to day operations, are principals of the business who were not disclosed in the application. While the omission of Thompson and Ellidge may not have been an intentional misstatement in the application, nevertheless the permit and license may not be issued in light of that omission.

Suitability of Location

For the issuance of a beer and wine permit, Section 61-4-520 includes the criteria that the location be a proper and suitable one:

(5) The location of the proposed place of business of the applicant is in the opinion of the department a proper one.

(6) The department may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches. This item does not apply to locations licensed before April 21, 1986.

S.C. Code Ann. § 61-4-520(5)-(6) (2009). Case law provides that a liquor license may be denied if the location is not suitable. See generally Schudel v. S.C. Alcoholic Beverage

Control Comm'n, 276 S.C. 138, 276 S.E.2d 308 (1981). “Proper location” is not statutorily defined, but broad discretion is vested in the trier of fact to determine the fitness or suitability of a particular location for the requested permit and license. See generally Fast Stops, Inc. v. Ingram, 276 S.C. 593, 281 S.E.2d 118 (1981). In determining whether a location is suitable, it is proper for this tribunal to consider any evidence that shows adverse circumstances of location. Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985).

This determination “involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community wherein it is to be situated.” Id. A liquor license or permit may be refused on the grounds that the “location of the establishment would adversely affect the public interest, that the nature of the neighborhood and . . . premises is such that the establishment would be detrimental to the welfare . . . of the inhabitants, or . . . the manner of conducting the establishment would not be conducive to the general welfare of the community.” 48 C.J.S. Intoxicating Liquors § 196 (Sept. 2016 update). Thus, the decision as to whether the proposed location is improper for a beer and wine permit or liquor license must be made on a case-by-case basis resting upon the peculiar facts of each application. After carefully weighing the evidence and applying the law as discussed above, the Court finds the location to be unsuitable for the type of business Petitioner intends to operate for several reasons discussed below.

Underage Students

The presence of crowds of underage USC students, many armed with sham identification and intent upon drinking in Five Points bars, is an important factor indicating that the proposed location is not suitable for the type of business Petitioner intends to operate. This is especially true in light of the fact that Petitioner’s business model is a bar intended to attract and serve students and young adults. Proximity to a place “where young people congregate and loiter” has been recognized by our Court of Appeals as a factor demonstrating that a particular location is unsuitable for the sale of beer and wine. Palmer, 282 S.C. at 250, 317 S.E.2d at 478. Here, the evidence demonstrates that crowds of young people gather in Five Points. Many of them become intoxicated, putting their own safety at risk as well as causing problems for law enforcement and disturbing the peace of the nearby residents. Granting the permit and license for such a business at this location would exacerbate this significant existing problem.

Law Enforcement Resources

In determining if a location is suitable for an alcohol license or permit, consideration must be given to the impact the issuance of the permit or license will have on law enforcement. Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973); Roche v. S.C. Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975). Evidence that the granting of a permit will place a strain upon police to adequately protect the community must be weighed. Moore v. S.C. Alcoholic Beverage Control Comm'n, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992). Denial is appropriate where the public areas surrounding the proposed location have been the source of constant law enforcement problems or significant problems with public intoxication. Roche, 263 S.C. at 451, 211 S.E.2d at 243. Another pertinent factor is whether police have been summoned to the scene on prior occasions when licensed to another party. Schudel, 276 S.C. at 141-42, 276 S.E.2d at 309-10. It is relevant whether the location is near other locations that have either been a constant source of law enforcement problems or are locations where young people congregate and loiter. Palmer, 282 S.C. at 250, 317 S.E.2d at 478.

Here, the facts demonstrate conclusively that the Five Points district, and this location in particular, have been a constant and significant strain on law enforcement resources to the point that the location was declared a nuisance by the Chief of Police. The granting of the permit and license sought here, along with the crowds it would attract, would re-create the circumstances and environment that led to the significant law enforcement challenges this location has created in the past. I conclude that the proposed business is likely to place a strain on law enforcement resources.

Nuisance

Furthermore, I conclude that the proposed business is likely to be a nuisance to the community. S.C. Code Ann. § 61-4-580(5) (Supp. 2017) prohibits a permittee from knowingly allowing "any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this state" to occur on the licensed premises. The term "licensed premises" includes not only the interior of the licensed business but also the areas immediately adjacent to the entrance and exit, as well as the parking areas. See 23 S.C. Code Ann. Regs. 7-700 ("Licensed premises shall include those areas normally used by the permittee or licensee to conduct his business and shall include but are not limited to the following: selling areas, storage areas, food preparation areas and parking areas."). "[O]ne who holds a license to

sell alcoholic beverages is responsible for supervising the conduct of his clientele, both within the licensed premises and in the immediate vicinity, in order to ensure that his operations do not create a nuisance for the surrounding community.” Dayaram Krupa, LLC v. S.C. Dept. of Revenue, 06-ALJ-17-0929-CC, 2007 WL 1219343 (S.C. Admin. Law Ct., March 19, 2007) (citing § 61-4-580(5) and A.J.C. Enters., Inc. v. Pastore, 473 A.2d 269, 275 (R.I. 1984)). The court in A.J.C. Enterprises held that a liquor licensee “assumes an obligation to supervise the conduct of its clientele so as to preclude the creation of conditions within the surrounding neighborhood which would amount to a nuisance to those who reside in the area.” A.J.C. Enters., Inc., 473 A.2d at 275. In the event that a licensed location becomes a public nuisance to the surrounding community, the Department may revoke or refuse renewal of the license for the location. See S.C. Code Ann. § 61-4-580(5) (Supp. 2017).

A nuisance is a substantial and unreasonable interference with another individual’s use and enjoyment of his property. Where a business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with lawful use and enjoyment of their property, it will constitute nuisance. O’Cain v. O’Cain, 473 S.E.2d 460 (S.C. App. 1996).

In this case, it is abundantly clear that the Pour House was a nuisance to residents who live nearby and to the community at large. Petitioner argues that it plans to operate its business differently and that there is no evidence of a causal connection between the Petitioner’s proposed business activities and the conduct complained of by the Protestants. In light of all the evidence, however, I conclude that even if Petitioner makes the operational improvements it has promised, it is likely that the bar it plans to operate would continue to contribute to and encourage the late-night revelry of underage USC students and the illegal and obnoxious behavior that ensues.

Suitability of Location Previously Licensed

Petitioner points to the fact that the proposed location has been the locale of businesses with alcohol licenses for many years in support of its position that the location is a suitable one for the sale of alcohol. The case relied upon by Petitioner, Taylor v. Lewis, is distinguishable from the instant situation. In Taylor, the South Carolina Supreme Court held:

We agree with the lower court that the relevant testimony of those who oppose the requested permit consists entirely of opinions and conclusions which are not supported by any facts. The claimed detriment to the wellbeing of the community or the lack of adequate police protection are without factual support.

* * * *

Respondent began the operation of a business at the present location after the building was constructed in 1967. The State issued to him a retail permit for the sale and consumption of beer on the premises and he operated under such license at this location for about three (3) years. He then sold the business to a third party who also was issued a retail permit to sell beer at this location for a period of two years. Respondent recently repurchased the business and made the present application. It is undisputed that beer had been sold at the location in question under permits issued by appellant for approximately five (5) years prior to the present application. The record is devoid of any showing that the location is any less suitable for the sale of beer now than during the prior five (5) year period.

Taylor v. Lewis, 261 S.C. 168, 171-72, 198 S.E.2d 801, 802 (1973).

Unlike here, there was no factual evidence in the record in the Taylor case showing that the location was unsuitable. The denial of the license was based solely on the testimony of the Protestants concerning their fears. The Supreme Court found that, "the relevant testimony of those who oppose the requested permit consists entirely of opinions and conclusions which are not supported by any facts." Id. at 170. There was no evidence that the location had been the scene of problematic behavior under the former licensee, or that crowds that would likely be attracted to the business would strain local law enforcement resources. That lack of evidence led the Supreme Court to conclude that, "a determination of unsuitability ... is wholly unsupported by any competent evidence." Id. Moreover, the Taylor case presented a situation where the formerly licensed business had not created problems in the community and had been in virtually continuous operation selling beer and wine for off-premises consumption. In this case, the formerly licensed business was closed due to the fact that illegal, violent and nuisance behavior was taking place at the location.

After carefully weighing the evidence and applying the law as discussed above, the Court finds the location is unsuitable for the type of business that would be operated by Petitioner. Evidence that illegal and nuisance behavior occurring at the location when licensed to another party could not be effectively controlled by local law enforcement leads me to conclude that it is unlikely that Petitioner could operate a bar in the proposed location in a manner that would not constitute a nuisance to the community, put additional strain on law enforcement resources, and contribute to existing problems with underage drinking in Five Points.

Restaurant

S.C. Code Ann. § 61-6-1820(1) (2009) provides that an applicant may receive a license upon the finding that “[t]he applicant is a bona fide nonprofit organization or the applicant conducts a business bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging.” This requirement mirrors the language of the mandate of our state’s constitution. S.C. Const., art. VIII-A § 1. Code Section 61-6-1610(I) defines “primarily” to mean that “the serving of the meals by a business establishment is a regular source of business to the licensed establishment, that meals are served upon the demand of guests and patrons during the normal mealtimes that occur when the licensed business establishment is open to the public, and that an adequate supply of food is present on the licensed premises to meet the demand.” A “meal” is defined as “prepared foods available to guests...during the normal mealtimes that occur when the licensed business establishment is open to the public. Sandwiches, boiled eggs, sausages, and other snacks prepared off the licensed premises but sold there are not a meal.” S.C. Code Ann. § 61-6-1610 (I)(2) (Supp. 2012). Section 61-6-20(2) defines “bona fide engaged primarily and substantially in the preparation and serving of meals” to mean:

A business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals and that:

- (a) is equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals upon customer request at normal meal times;
- (b) has readily available to its guests and patrons either menus with the listings of various meals offered for service or a listing of available meals and foods, posted in a conspicuous place readily discernible by the guest or patrons; and
- (c) prepares for service to customers, upon the demand of the customer, hot meals at least once each day the business establishment chooses to be open.

A. Any business establishment that applies for or holds a sale and consumption license pursuant to Section 61-6-1610 of the Code and is not engaged in the furnishing of lodging, must:

1. Be equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals; and
2. Have readily available to its guests and patrons either “menus” with the listings of the various meals offered for service or a listing of available meals and foods, posted in a conspicuous place readily discernible by the guest or patrons; and
3. Prepare for service to customers hot meals at least once each day the business establishment chooses to be open.

4. If such establishment advertises, a substantial portion of its advertising must be devoted to its food services.

B. The following definitions shall be used in conjunction with Section 61-6-1610 of the Code and this Regulation:

1. "Meal" means an assortment of various prepared foods which shall be available to guests on the licensed premises during the normal "mealtimes" which occur when the licensed business establishment is open to the public. Sandwiches, boiled eggs, sausages and other snacks prepared off the licensed premises but sold thereon, shall not constitute a meal.

2. "Kitchen" means a separate and distinct area of the business establishment that is used solely for the preparation, serving and disposal of solid foods that make up meals. Such area must be adequately equipped for the cooking and serving of solid foods, and the storage of same, and must include at least twenty-one cubic feet of refrigerated space for food and a stove.

3. "Primarily" means that the serving of meals by a business establishment constitutes a regular and substantial source of business to the licensed establishment and that meals shall be served upon the demand of guests and patrons during the normal "mealtimes" which occur when the licensed business establishment is open to the public and that an adequate supply of food is present on the licensed premises to meet such demand.

S.C. Code Ann. Regs. 7-401. S.C. Code Ann. Reg. 7-401.3 provides that an establishment holding a restaurant liquor by the drink license must have menus readily available to its patrons or posted in a conspicuous place on the premises and must prepare and serve hot meals at least once each business day the establishment is open. S.C. Code Ann. § 61-6-1610(I)(1) (Supp. 2017) defines "kitchen" as a separate and distinct area used solely "for the preparation, serving, and disposal of solid foods that make up meals." The kitchen must be adequately equipped for the cooking, serving and storage of solid foods and must include at least twenty-one cubic feet of refrigerated space for food, and a stove.

The statutes set forth above provide detailed definitions and requirements concerning what constitutes "bona fide engaged primarily and substantially in the preparation and serving of meals." Petitioner presented testimony that it meets the minimal requirements defined in the statute, while simultaneously acknowledging that its business is a bar, is not equipped to cook meals from scratch, and that the overwhelming emphasis of its business is to be the sale of beer, wine and liquor. Petitioner argues that it meets the technical requirements of the statutes by maintaining all of the physical accouterments required by statute to meet the statutory definitions (having food on hand, having a small area set aside for a "kitchen," having seating for 40 people

at tables, etc.). I must conclude that Petitioner fails to meet the requirements of the statute. The proposed location does not have an oven or a stove other than a microwave, and there is no evidence that menus are provided to customers.

Intervenors argue that Petitioner cannot be found to be a restaurant because the sale of food contributes only five to ten percent of revenue to the business. In Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Comm'n., 273 S.C. 782, 260 S.E.2d 452 (1979), our Supreme Court held that where only ten percent of a business' gross revenues were attributed to food sales the business was not primarily and substantially engaged in the preparation and serving of meals. Petitioner argues that the South Carolina General Assembly has amended the statute defining "bona fide engaged primarily and substantially in the preparation and serving of meals" several times since the Brunswick case was decided, rendering the percentage of sales attributable to food an irrelevant test of a restaurant's bona fides. While it is true that the language and code section number of the definition has changed since Brunswick was decided, a specific definition of "bona fide engaged primarily and substantially in the preparation and serving of meals" was codified in statute and considered by the Brunswick court. The court held that despite a specific definition of "bona fide engaged primarily and substantially in the preparation and serving of meals" (found in Code Section 61-6-20(2) at that time) a business must not only meet the technical requirements outlined in the statute, but must also actually be "primarily" engaged in the preparation and serving of meals. Id. In this case Bland testified at his deposition that food sales make up only five percent of revenue to Petitioner's business and I have found that estimate to be more credible than his hearing testimony that food sales constitute ten percent of their business. Given all the circumstances and facts in this case, I conclude that the Petitioner is not a business that is bona fide engaged primarily and substantially in the preparation and serving of meals.

Conclusion

After carefully weighing the evidence and applying the law as discussed above, the Court finds the location to be unsuitable for the permit and license sought by Petitioner. The proposed business would strain available law enforcement resources in the area and contribute to an existing problem with underage drinking. The proposed business is likely to continue to be a nuisance to the community. Further, the application should be denied because of material misstatements and the concealment of Daniel Wells as a principal of the business. Moreover,

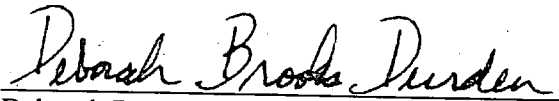
Petitioner is not primarily and substantially engaged in the preparation and serving of meals and thus does not qualify for the liquor license. Petitioner's application for an on-premises beer and wine permit, and liquor by the drink license should be denied for all these reasons.

ORDER

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

IT IS HEREBY ORDERED that the application for a beer and wine permit, and restaurant liquor by the drink license by Five Points Roost, LLC, d/b/a Five Points Roost at 800 Harden Street, Columbia, South Carolina is **DENIED**.

AND IT IS SO ORDERED.

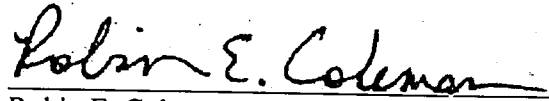


Deborah Brooks Durden
Deborah Brooks Durden, Judge
S.C. Administrative Law Court

April 3, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

April 3, 2018
Columbia, South Carolina

FILED

April 3, 2018

SC ADMIN. LAW COURT