

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DENIED
Deborah Brock Durden
Deborah Brock Durden
Administrative Law Judge
5/11/18
Date

Five Points Roost, LLC)
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Petitioner,)
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vs.)
)
South Carolina Department of Revenue,)
)
Respondent)
)
Thomas Gottshall and April Lucas,)
)
Intervenors.)

FIVE POINTS ROOST, LLC's
MOTION FOR RECONSIDERATION
DOCKET NO. 18-ALJ-17-0005-CC

RECEIVED
JUN 07 2018
SC Court of Appeals

To: The Honorable Deborah Durden, Presiding Judge:

The Petitioner, Five Points Roost, LLC ("Roost"), pursuant to Rule 59(e), SCRPC, moves that the Court alter, amend or otherwise reconsider its Order denying the issuance of permits/licenses filed April 3, 2018. Petitioner's motion for reconsideration is based upon the following issues, some of which are discussed more specifically in the body of this motion:

1. The Court's finding that Daniel Wells is an undisclosed principal is bereft of factual support. The General Assembly defined "Principal" is defined in *S.C. Code Ann. §61-2-100 (H)(2)*. There are no facts in the record from which a reasonable trier of fact could find that Wells can be categorized in any of the eight classifications enumerated in the statute. Moreover, the Court denied Petitioner due process when it deviated from long-standing rulings both deferring to the determination of the Agency and remanding such a finding to the agency for investigation and determination. The fact that no evidence supports this finding also means that the Court's finding that there was a

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misstatement or concealment of fact pursuant to *S.C. Code Ann. §61-2-100(J)* is without a legal basis.

2. The Court made numerous findings of fact relating to the location without evidence supporting those findings. The Court's findings about the neighborhood are inapplicable in that they fail to include any finding that the proposed location will have a negative impact as it is proposes and has been operating, instead relying in error on issues with the previous operator. Additionally, the Court's findings fail to recognize that no witness attributed any problem with the location to the current operation.
3. The Court made findings of fact based upon conclusions that Petitioner would not operate its business in the future in a legal manner. Such findings are antithetical to applicable law.
4. The Court made credibility determinations based upon an error of law when it determined that Mr. Bland's credibility was adversely affected by his corrections to his deposition testimony. Mr. Bland corrected his testimony pursuant to Rule 30(e), SCRPC. Such a correction is not evidence of anything other than a desire to ensure that the deposition is correct. Correcting a deposition using the errata sheet pursuant to the rule is not a proper basis for a finding that the Court reporter "had not accurately transcribed his answers at the deposition" as the Court concluded here. To the extent that the Court weighed Mr. Bland's credibility based upon this action, the Court should reconsider its findings.
5. The Court made no findings relating to the *prima facie* case presented by the Petitioners and improperly shifted the burden of proof in requiring the Petitioner to disprove

Intervenor's claims rather than requiring the Protestants/Intervenors to prove their allegations and disprove Petitioner's prima facie case.

6. The Court failed to recognize the findings and recommendations of the Agency (South Carolina Department of Revenue ("DOR")) and failed to afford the deference to the Agency's interpretation and management of the statutes and regulations in its realm of responsibility.
7. The Court made numerous findings of fact that are not supported by testimony and in fact, are contrary to all of the testimony in the record.
8. The Court accepted and relied upon survey evidence and testimony which was not scientifically validated and appropriate over the objections of Petitioner.
9. The Court qualified and accepted the testimony of an expert who was not qualified in the area he was allowed to testify.
10. The Court exceeded its authority in ignoring statutes enacted by the General Assembly and reverting to common law predating those statutes in finding that the Petitioner was not *bona fide* engaged primarily and substantially in the preparation and serving of meals. In doing so, the Court, *de facto*, declared the legislative act creating the definitions upon which the Agency has made those determinations unconstitutional or legally invalid in violation of the Court's authority.
11. The Court was arbitrary and capricious in its findings applying improper evidentiary standards and making findings based on argument, emotion, and factors other than evidence in the record before it.
12. The Court improperly denied the Beer and Wine permit based upon its erroneous restaurant findings which are not applicable to the Beer and Wine Permit.

INTRODUCTION

Petitioner purchased the operating assets and equipment of a business located at 800 Harden Street, Columbia, SC. As the Court found, businesses at that location have been permitted to serve beer, wine, and alcoholic beverages by the drink for more than forty years. After reviewing Petitioner's applications, the South Carolina Department of Revenue ("DOR") determined that Petitioner meets the criteria to have both liquor by the drink and beer and wine permits issued for this location. This matter was before the Court only because of public protests of the application pursuant to *S. C. Code Ann.* §61-6-1825.

After a two-day trial, the Court issued its Order on April 3, 2018. The Court made findings of fact adverse to Petitioner including:

- That the ownership was not of acceptable moral character because it intentionally failed to disclose Principals;
- That Daniel Wells, rather than Petitioner is still controlling the business;
- That Daniel Wells, Erin Thompson, and Colin Ellidge are all undisclosed principals of the business;
- That the business was not suitable for the location: the Court made findings about the Pour House (prior owner's practices) that is "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." The Court made all of these conclusions about the prior operator, although there was no evidence to indicate that Five Points Roost is guilty of or has been guilty of any of the alleged infractions. For example, the Court found (and apparently based its ruling on facts like: "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.” These findings of fact have no relationship to Five Points Roost but were improperly relied upon to make findings regarding the operation of Five Points Roost.

- The Court further found that “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.” The Court also found that “Following a violent incident in February 2016, for which Wells is currently facing criminal charges, Holbrook served notice declaring 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.” The Court made these findings despite the cross-examination testimony of Chief Holbrook and the fact that a due process compliant hearing never determined the issue of nuisance. The Court found an allegation as fact and in doing so denied due process rights to Petitioner.
- That the practices instituted by Five Points Roost to detect fraudulent identification and turn away underage patrons failed 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.” The Court also stated, “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.” The Court’s findings on these factual issues lack any evidentiary support in the record and are merely assumptions or conjecture. Nevertheless, the Court improperly relied upon these assumptions in finding that “if the permit and

license were issued the business would contribute to the problem of underage drinking in Five Points.

- The Court also found that the business taxed or would tax Law Enforcement Resources. All this, despite Holbrook's testimony that there had been no increase in law enforcement presence or activity in the Five Points area during his tenure as Chief of Police – more than four years and that since the opening of Five Points Roost, there had been no incidents at the location.
- While there is no evidence of a single violation or complaint relating to Five Point's Roost operation, the Court found that the location was, in essence, forever barred based upon a claim that the location "and Five Points generally, have required an extraordinary amount of police service and have been a constant source of law enforcement problems". The Court made this finding despite the fact that there is no testimony of any kind in the record that the Five Points Roost has been a source of a single problem or incident. In fact, the only testimony in the record is that the establishment was the only one in Five Points that was open not cited for violations in a February SLED raid. The Court (again looking at previous operations, not current ones) also found 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 existing strain on law enforcement resources." This prior reputation has not carried forward to the new operation, and there is no evidence to support this finding, as it relates to Petitioners in the record.
- The Court further found that the business is not a restaurant. It found that "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.” (There was also no evidence that Petitioner advertised at all) This finding is contrary to the finding by the Agency that Five Points Roost met the requirements (which require menus/menu board) and the uncontroverted testimony in the trial.

- The Court’s finding of fact and conclusions of law regarding the need to document a particular undefined percentage of sales violates the applicable statutes and moreover exposes Petitioner to an ambiguous and constitutionally vague “Goldilocks” standard for what the Court would find as adequate. This finding violates Petitioner’s due process rights.

The Court also made several significant conclusions of law. First, the Court found that “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.”

The Court found that the location was unsuitable based upon the Court’s determination that “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.” The Court’s conclusion is unsupported by fact or explained.

The Court also found that “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.”

Here the Court found that a location was unsuitable, not because of the location, as it is currently and prospectively operated – because there is no evidence in the record to support a conclusion that operations as Five Points Roost have ever created, caused or indicated a single problem, have never required law enforcement presence at all. Not a single witness testified, and not a single document was admitted into the record that points to Five Points Roost as the source of any proscribed activity, crime, requirement for law enforcement presence or the originating point of any incident complained about at any time in the record. The Court’s findings suggest that it is impossible for any license to be granted in the Five Points Village because the Court attributed the complaints of the neighbors to every establishment as well as to no establishment. The Court evaluated the neighborhood unfavorably, not the location. The Court needs to reconsider its findings in light of the evidence in the record, applying the appropriate legal standard looking at the location and its prospective effect on the location. Moreover, the Court needs to review and weigh all of the evidence and fact rather than relying on innuendo, argument and unfounded assertion in making its rulings.

This Court has repeatedly held and been upheld by higher courts that:

Unless there is sufficient evidence of an adverse impact on the community, the application must not be denied if the statutory criteria are satisfied. The fact that

a protestant objects to the issuance of a permit is not a sufficient reason by itself to deny the application. See. 48 C.J.S. Intoxicating Liquors, §166 (2013)

Albert Beach, d/b/a The Long Branch, Petitioner, vs. South Carolina Department of Revenue, Respondent, 2014 SC ALJ LEXIS 410. Here, the record lacks any evidence that Five Points Roost has had or will have an adverse impact on the community. Likewise, the evidence in the record supports the fact that the statutory criteria are satisfied.

Once an applicant has made a *prima facie* case for the issuance of a license, the burden of production shifts to the protestant to present evidence to justify denial of the license. *Southland Corporation v. City of Westminster City Council*, 746 P. 2d 1353, 1355 (Colo. Ct. App. 1987).

The Petitioner met its burden of proof that it meets all statutory criteria. The Agency confirmed that all statutory criteria were met and only asked that if the Court requested that if the Court determined that Thompson and Elledge were Principals, that it remand the matter to the Agency so that it could conduct its investigation on them. The Agency decided that Ruonala and Bland were suitable applicants of good moral character. Intervenors offered insufficient evidence to overcome the preponderance of the evidence in this record. The Court should reconsider its prior decision and issue its Order directing DOR to issue the licenses upon approval of Thompson and Elledge. If the Court continues its holding *vis a vis* the issue of food service, it should, at the minimum, order the issuance of the Beer and Wine licenses/permits to Petitioner.

RULE 59

The purpose of Rule 59(e), SCRCPP, to alter or amend the judgment [,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’” *Arnold v. State*, 309 S.C. 157,172, 420 S.E.2d 834,842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed. 2d 178 (1988)). *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). It is proper to view a Rule 59(e) motion not only as a vehicle to request the

trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as a “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *See, e.g., Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a “motion to reconsider” or “Motion for reconsideration”); James Flanagan, *South Carolina Civil Procedure*, 474-475 (2d ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity. *Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004).

Discussion and Argument.

The Court has made factual determinations not supported by any evidence in the record or contrary to the only evidence in the record.

In this case, the Court made numerous findings of fact that are not supported by evidence in the record.

- A. There is no evidence in the record that Daniel Wells is a Principal, much less an “undisclosed principal.”

The Court found that Daniel Wells was an undisclosed principal without regard to the direction of the General Assembly as to what constitutes a “Principal.” *S.C. Code Ann.* §61-2-100(2) defines “Principal” of a business or entity. The statutory definition includes eight categories that an individual can fall into and be a “Principal” under the Act. These categories are

clear, unambiguous and specific. The Court can and should determine whether or not a party is a principal based solely on the language of the statute and the documents submitted with the application. There is no evidence in the record that Mr. Wells falls into any of these categories nor do the Court's findings or basis for its conclusions meets the statutory definition. There is no evidence that Mr. Wells is an officer of the business or entity which owns the business. In fact, there is no evidence that Mr. Wells name is attached to any document, letter, contract or instrument of any kind related to the business. Mr. Wells is not a partner, and his mother's status, upon which the Court seems to rely is one of a member of a company or limited partner who cannot exercise any management control; Mr. Wells is not a manager of any limited liability company, he is not a member of any limited liability company, which is not managed by managers; he is not a fiduciary who manages, holds, or controls title to or who is otherwise in direct or indirect control of the business, he is not a person who owns 25 percent or more of the value of the business nor is he an employee who has day-to-day operational management responsibilities for the business or entity. Mr. Wells does not meet any statutory definition of being a Principal, and the Court found no facts that meet such a definition. Moreover, no evidence was offered by the Protestants or Intervenors that Mr. Wells¹ was a principal. The Petitioner had no legal obligation to prove the negative. To the extent that the Court imposed this burden on the Petitioner, it denied petitioner due process. The Court's apparently based its findings on an apparent dissatisfaction with the consideration paid to purchase the assets from Mr. Wells. There is no statutory or case law to support such a finding or supposition. Such a conclusion is arbitrary, capricious and inappropriate.

Additionally, the Court deviated from longstanding practice where issues arose relating to allegedly undisclosed principals. Applicable case law demonstrates that generally where the ALC

¹ Mr. Wells has previously held Alcoholic Beverage licenses and has never had a license revoked.

has denied licenses based on undisclosed principals, DOR raised the issue in its denial. Where issues relating to undisclosed principals arose in hearings, the Court has universally remanded the case to the DOR to investigate and make a determination.²

B. The Court applied improper standards to the evidence and testimony considered in making its factual findings.

The Court based its findings of fact and conclusions of law on speculation and evinced an opinion and bias that regardless of the Petitioner's current actions and actions under their temporary license, they were going to act differently in the future. The record does not contain any factual basis for such a conclusion, and the determination is legally improper. A significant portion of the Court's findings of fact and conclusions of law are based upon the Court's apparent belief that despite Petitioner's record on the temporary license, upon receipt of a regular license, it would begin acting in a less careful, cautious and appropriate manner creating future violations. These conclusions are unsupported by evidence attributable to the actions of Petitioner. Many of

² See e.g. *A La Fontana, Inc. d/b/a La Fontana, Petitioner vs. South Carolina Department of Revenue*, 11-ALJ-17-591-CC, "The department further denied the application based on the moral character of the Petitioner's undisclosed principal. . . . *OTR Club, d/b/a On the Rocks, Petitioner, vs. South Carolina Department of Revenue, Respondent*, 17-ALJ-17-0222-CC "The Department determined that the applicant had not disclosed all its principals and that the undisclosed principal had their beer and wine permit . . . revoked on April 1, 2016."; *Taleb A. Abudayya d/b/a/ Swamp Fox Tobacco & Grocery, Petitioner; vs. S.C. Department of Revenue, Respondent* 14 ALJ-17-0404-CC "The Department based its denial on . . . failure to disclose all principles[sic]. See also *Greenville Bistro, LLC d/b/a Dream Girls, Petitioner, v. South Carolina Department of Revenue, Respondent*. 17-ALJ-17-0142-CC where the Court recognized that principals are as defined in 61-2-100(2) a-h and finding that "Petitioner shall amend its application to include any individual qualifying as one of its principals who are not currently listed in its applications as such Petitioner shall also complete and submit to the Department a consent-and-waiver form for a SLED background check on its undisclosed principals. The Court ordered that the Department issue the permit and license upon completion of the requirements and payment of the proper costs. This is consistent with the finding in *Hemmingways's Partnership d/b/a Hemmingway's Partnership, Petitioner, v. South Carolina Department of Revenue, Respondent, John E. North and Pamela S. North, Intervenors*, 17 ALJ-17-0070-CC

these conclusions appear to be based on argument, supposition, unsupported claims and speculation. All controvert the facts presented as to the activity at the location under the temporary license and the previous operations. In *Circus Disco, Ltd. v. New York State Liquor Authority*, 51 NY2d 24, 409 N.E. 963, the Court addressed the common law on this issue. There the Court held “The likelihood of future violation can furnish a basis for denial only when there are facts in the record which rationally support doing so.” As was the case in *Circus Disco*, here there are none. The only facts here, as it regards Mr. Bland and Mr. Ruonala’s operation of the location is that there has been no requirement of law enforcement involvement within or without the location. Neither the Respondent, the Intervenors nor any protestant offered a single instance. This was clear from the testimony of every single witness. “Denial of a license on the speculation that it will be operated in violation of law is impermissible” *Matter of Sled Hill Café v. Hostetter*, 22 NY2d 607, 612-613; *Matter of Santini Rest. v. State Liq. Auth.*, 32 AD2d 514). The Court should reconsider and alter all of its findings of fact based upon assumptions and argument about future misconduct by Petitioner.

C. The Court used an overly broad definition of “the Location” in making its determination of suitability

The Court made findings of fact and conclusions of law based on evidence not specific to the location. Moreover, the Court ignored the only testimony in the record that the location, as operated by the Petitioner under the temporary license had not had a single incident or issue requiring law enforcement resources. The Court acknowledged that numerous licenses and renewals had previously been issued to the location. The Court made no finding that the suitability

of the location had changed since the last renewal – or even since the State issued the first license at the location.

The Court made its findings about the Five Points area in general and not about the specific location and most importantly, the particular operation within that location. The Court misapprehended the law in doing so. The body of jurisprudence regarding suitability is indeed broad. However, the Court made its findings here on items outside of the control of Petitioner and most importantly facts without any causal connection to the location. The Court found that the location would be a nuisance based upon the following statement “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.”

In deciding whether a location is a proper one, the fact-finder may consider any evidence showing adverse circumstances. *Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984). Thus, “[t]his determination of suitability is not solely a function of geography but involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community.” [emphasis added] *Id.* The court should weigh evidence of the location's burden on law enforcement in deciding its suitability [emphasis added]. See *Moore v. S.C. Alcoholic Beverage Control Comm'n*, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); *Fowler v. Lewis*, 260 S.C. 54, 57, 194 S.E.2d 191, 192 (1973). In this instance, the Court should reconsider its findings because rather than dealing with the applicant business location and its impact upon the community, the Court essentially decided that the community was bad and because of that, the business would make it worse. Those findings are wholly inconsistent with the testimony of the

Intervenor's witnesses that the type changes that the Petitioners were making to the operation of the business are the changes needed to improve the operation of similar establishments and help alleviate problems as opposed to increasing them. By failing to consider the impact of this business (and the likely positive one at that) the Court misapprehends the law and facts in this case. It should reconsider its findings. As it is, the Court made findings which essentially blackballed the location because of a single incident – which the Court mischaracterized in the Order – and in doing so, made that incident a basis to deny the Petitioner its licenses. It also created a test which essentially makes the issuance of any license in an entertainment district unlikely. The Court's decision does not target problem operators – but makes it impossible for any operator to be licensed. The Court should consider the guidance in the Statutes which prohibits the department from, for example, requiring a subsequent licensee to pay a fine where a previous licensee fails to pay a fine and ceases doing business on the premises where the violation occurred. *See, e.g., S. C. Code Ann. §61-2-150.* The Court should reconsider all of its findings attributing misconduct in the past to the current business – again, the evaluation should be prospective and address the nature and operation of the proposed business.

D. The Court should reconsider its finding of suitability because there was no showing that conditions in Five Points are worse than they were, require more police presence or that the situation has deteriorated.

Whether the location has been licensed in the recent past and whether the location is now more or less suitable than it was in the past is a relevant factor. *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973). Furthermore, in considering the suitability of a location, “it is error to find a location unsuitable when the relevant testimony of those opposing the requested permit or license consists entirely of opinions, generalities, and conclusions not supported by the facts.” *Id.*

Findings may never be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 443, 458 S.E. 2d 76, 83 (S.C. App. 1995)

The Court adopted the Intervenor's theory that USC students are dangerous, causing problems and that the reason for this is the number of establishments in Five Points. All of the evidence presented was conjecture or speculation. No scientific evidence was offered to show a correlation between the actions of the Petitioner and any incident in the area. Notably, the Intervenor cannot direct their complaints at activities engaged in by Petitioners or incidents at Petitioner's business. The Petitioner objected to the report, survey and statistics presented as not being scientifically accurate. The testimony at the hearing affirms the suitability of the location. Moreover, both the Court and Intervenor refuse to acknowledge or consider the state of the art safeguards undergirding the operation of Five Points Roost, each as Petitioner's proposed licensee testified is designed to ensure a safe, smooth and neighborly operation.

The record reflects that Petitioner implemented and will continue to utilize state of the art safeguards relating to Underage drinking, overserving, security, avoiding nuisance and other problems. The Court could have conditioned the license on one or more of these safeguards. Instead, the Court dismissed them and found, without any evidence in the record whatsoever to support the conclusion, that Five Points Roost would cause and increase problems in the Five Points area.

While the Court relied on Chief Holbrook's testimony to make its findings, it seems to have ignored his statement that there had been no calls for services at 800 Harden Street during its operation under the temporary permit. As well as his inability to offer any evidence to support a position that granting a license at this location would specifically or directly have an adverse

impact on the community. The facts established in Chief Holbrook's testimony contrast markedly from the testimony which led to the specific findings in the *Kan Enterprises* case³ where the evidence showed that there were 324 problems at that location in 2014 alone and that law enforcement officers were injured at the *Kan* location while making arrests. Neither Chief Holbrook nor any other witness was able to produce evidence linking the Petitioner's location with increased demand for law enforcement. Nor was any able to provide a scintilla of evidence that Petitioner's establishment created a "constant and increasing undue burden on law enforcement or had become a detriment to the surrounding community" which would be the legal requirement set up in *Kan* for the Court to deny the permits. The Court seems to have arrived at this conclusion absent facts in the record and should reconsider its findings.

Likewise, the Court seems to have ignored the testimony of Ms. Edwards and Mr. Wiser which supports the petitioners. Ms. Edwards was unable to present direct evidence that Five Points Roost was a cause of or involved in any of the alcohol-related incidents about which she testified. She acknowledged student growth at USC over the last ten years. Her numbers indicated a 2% reduction in the number of students who reported a last drink at a Five Points establishment in 2017-18 over 2016-17. The numbers of incidents originating at on and off-campus residences exceeded Five Points establishments, and 9% of the incidents occurred at the stadium or tailgate. This fact is particularly telling since it demonstrates that 9% of the episodes occurred on 6 or 7 days of the year – a far higher statistical frequency than any of the other sources -- which are available 365 days a year. Like Chief Holbrook, Ms. Edwards acknowledged that Five Points Roost's state of the art practices ought to limit overconsumption and underage drinking.

³ *Kan Enterprises Inc. v. South Carolina Department of Revenue*, 14-ALJ-17-0571-CC, March 19, 2015. This case was affirmed by the Court of Appeals in *Kan Enters v. S.C. Dep't of Revenue*, 420 S.C. 596, 803, S.E.2d 882 (S.C. App. 2017).

Leslie G. Wiser, Jr. also testified for the intervenors. The Court qualified him as an expert in that field over the objection of Counsel for the Petitioner. In opposing Mr. Wiser's qualification, Counsel argued that Mr. Wiser had no educational background in criminology, had never been qualified as an expert in Criminology by any Court, and among other factors had no published work or specialized training in the area. Counsel also argued that his report "A Time for Change" failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) because it was not peer-reviewed, there were no survey control groups or known potential error rates and that its conclusions had not attracted acceptance within a relevant scientific community. For example, while Mr. Wiser testified that there was a correlation between the density of establishments serving alcohol and crime⁴, he admitted that his source studies reflected a much higher correlation between the use and availability of illegal drugs to crime than alcohol. Mr. Weiser, like Chief Holbrook and Ms. Edwards, agreed that Five Points Roost's practices relating to ID checking, service, security, and training were the kinds of practices that would likely reduce these type problems. Mr. Weiser was unable to provide any evidence that this location was explicitly unsuitable or that there was any causal link between this location and requirements for additional law enforcement in the area. His opinion was based on the concentration of locations and disregarded questions or practices at the establishments. Likewise, he failed to consider alcohol consumption in off-campus residences, on campus and their effects on the neighborhoods. Naturally, given Chief Holbrook's testimony that he had not increased law enforcement presence in the Five Points area during his tenure – Mr. Wiser confirmed the Holbrook testimony. It is clear that there has been no demand for increased law enforcement presence, no stress to law enforcement and that the Intervenors were unable to adduce testimony that the location is

⁴ Which he could not link other than as a generality to Five Points.

unsuitable as a matter of law, however much they do not like Five Points as a student-focused area. Unfortunately, the Protestants and Intervenors do not like the businesses that operate in their neighborhood. They are trying to use this Court to affect the marketplace improperly. The Court should reconsider its findings on these facts given the lack of substantial evidence other than speculation or surmise to support them. Neither Ms. Edwards, Mr. Wiser nor Chief Holbrook offered any scientifically proven evidence linking Petitioner to any problem identified in Five Points.

The Intervenors presented general complaints about problems that they contend are the result of activities in by Five Points and the number of licensed establishments therein. The Court accepted those general complaints, such as vandalism, drunkenness and the like often nothing more than repeating what a neighbor heard or said. After it accepted those complaints, the Court found that Petitioner's business was the genesis of those complaints without any testimony in the record to substantiate that Petitioner's location was the source of a single incident reported or that Petitioner's business would in any way increase the likelihood that such incidents occurred. Neither the Intervenors nor the Protestants were able to demonstrate an increase in any problem during the last ten years by any means in evidence. The Court simply adopted their argument and made findings and suppositions based thereon which are unsupported in the record. The Court should apply proper standards and require the presentation of evidence which is relevant to the location and the Petitioner. Instead, the Court relied on generalities, conclusions, and arguments not supported by facts.

The evidence submitted by the Intervenors consists entirely of factually unsupported opinions and conclusions. Essentially, the Intervenors contended that all of their complaints result from the presence of licensed establishments in Five Points that overserve underage and naïve

University Students. At one point it was suggested that these students were coerced by establishments in Five Points to come to the village and misbehave. The Court erroneously adopted these assertions and allegations as findings of fact and conclusions of law. The overwhelming evidence that Petitioner has in place and follows enhanced policies regarding admission and serving patrons designed to address those concerns should have weighed heavily against the credibility of these general, unsubstantiated allegations.

E. The Court misconstrued the law as it relates to restaurant requirements and impliedly overturned applicable statutes in violation of the law.

The Court found that Petitioner is not bona fide engaged primarily and substantially in the preparation and serving of meals. Petitioner would submit that the Court should reconsider this finding as it failed to properly consider the applicable law, applied a case that has been overturned by express legislative action and failed to afford proper deference to the findings of DOR. The General Assembly charged DOR with determining as to whether the Petitioner complies with the statutory requirements. In this case, DOR found that Five Points Roost, LLC met the statutory requirements.

"Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court) (internal quotation marks omitted).

Here, DOR followed the clear and unambiguous legislative directive as to the requirements for an entity to be determined to be bona fide engaged primarily and substantially in the preparation and serving of meals. Those requirements are enumerated explicitly in *S.C. Code Ann.* §61-6-20(2). The statute contains three specific conditions. DOR found that Petitioner met each of those requirements. The Court afforded no weight to the Agency's proper determination – one that is applied hundreds of times each year and which the Court has heretofore respected.

Intervenors question whether or not Five Points Roost is engaged primarily as a Restaurant. None of their protests raised this ground as a reason for denial. However, the facts are that the business fulfills the statutory criteria established by the General Assembly to be determined to be “bona fide engaged primarily and substantially in the preparation and serving of meals.”

Here, despite the finding by the Agency and the evidence supporting the Agency's conclusion, the Court added additional requirements to be evaluated (the percentage of revenue related to food sales) based on a 1979 case, *Brunswick Capitol Lanes v. South Carolina Alcoholic Beverage Control Comm.*, 273 S.C.782, 260 S.E. 2d 452 which found that ten percent revenue from food sales was inadequate for an entity to be a bona fide restaurant.

In that case, the Alcoholic Beverage Control Commission (predecessor to DOR as the licensing agency) denied Brunswick a license on the ground that it was not engaged “primarily and substantially in the preparation and serving of meals.” A Circuit Court Judge reversed this finding and ordered the issuance of the license. Our Supreme Court reversed the Circuit Court. In its brief opinion, the Court relied and ultimately decided the case on a definition of “primarily.” It held that “The word ‘primarily’ means ‘of first importance or ‘principally’ *Brunswick, supra* at 273 S.C. 783, 260 S.E.2d 453. The Court then acknowledged that “the legislature has stated that

the critical test is whether the business is engaged 'primarily and substantially in the preparation and serving of meals.'" *Brunswick, supra* at 273 S.C. 783, 260 S.E.2d 453.

The Constitution afforded the General Assembly exclusive and broad powers to regulate the retail sale of alcoholic liquors and beverages in the state⁵. The only limitation in the Constitution is that licenses may be granted to sell and consume alcoholic liquors and beverages on the premises of businesses which engage primarily and substantially in the preparation and serving of meals, during such hours as the General Assembly may require. The Constitution leaves this determination to the Legislature.

Before 2008 *S.C. Acts 287* the General Assembly codified the definition of 'Bona fide engaged primarily and substantially in the preparation and serving of meals' at *S.C. Code Ann.* §61-3-20⁶. That definition was the one the Court used in *Brunswick*. The definition provided that

⁵ Article VIII(A) of the Constitution provides:

SECTION 1. Powers of General Assembly.

In the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State. The General Assembly may license persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State under the rules and restrictions as it considers proper, including the right to sell alcoholic liquors or beverages in containers of such size as the General Assembly considers appropriate. The General Assembly may prohibit the manufacture, sale, and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it considers expedient. However, a license must not be granted to sell alcoholic beverages in less quantities than one ounce in licensed retail stores, or to sell them between seven o'clock p.m. and nine o'clock a.m., or to sell them to be drunk on the premises; however, the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell alcoholic liquors or beverages. However, licenses may be granted to sell and consume alcoholic liquors and beverages on the premises of businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging or on the premises of certain nonprofit organizations with limited membership not open to the general public, during such hours as the General Assembly may provide [emphasis added]

⁶ In 1979, this section was codified at §61-5-10(1).

the term: “means a business which has been issued a Class A restaurant license prior to issuance of a license under Article 5 of this chapter, and in addition provides facilities for seating not less than forty persons simultaneously at tables for the service of meals.” When the Court decided Brunswick, the Code did not contain a definition of “Primarily”.

In 2008 S.C. Acts 287, the General Assembly Amended S. C. Code Ann. §61-6-20(2) to further define that constitutional term. The Title of the Act reflected the legislative intent. Act 287 was titled:

“An Act to . . . Amend Section 61-6-20, as amended, relating to definitions for purposes of the Alcoholic Beverage Control Act, so as to revise the definition for an establishment serving meals; and to Amend Section 61-6-1610, As Amended, relating to food service establishments licensed for on-premises consumption of liquor by the drink, so as to provide additional requirements relating to food service.⁷

The Act changed the definition to read as follows:

(2) 'Bona fide engaged primarily and substantially in the preparation and serving of meals' means

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;

⁷ The full text of the Legislative synopsis reads: [emphasis added]

AN ACT TO AMEND SECTION 12-33-245, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE FIVE PERCENT EXCISE TAX ON THE SALE OF ALCOHOLIC LIQUORS FOR ON-PREMISES CONSUMPTION AND THE DISTRIBUTION OF THE REVENUES OF THE TAX, SO AS TO PROVIDE THAT THE MINIMUM DISTRIBUTION TO STATE AGENCIES, COUNTIES, AND LOCAL ENTITIES MUST BE BASED ON REVENUES RECEIVED IN FISCAL YEAR 2004-2005, RATHER THAN REVENUES ALLOCATED AND TO IMPOSE ADDITIONAL PENALTIES FOR TAX VIOLATIONS; TO AMEND SECTION 61-6-20, AS AMENDED, RELATING TO DEFINITIONS FOR PURPOSES OF THE ALCOHOLIC BEVERAGE CONTROL ACT, SO AS TO REVISE THE DEFINITION FOR AN ESTABLISHMENT SERVING MEALS; AND TO AMEND SECTION 61-6-1610, AS AMENDED, RELATING TO FOOD SERVICE ESTABLISHMENTS LICENSED FOR ON-PREMISES CONSUMPTION OF LIQUOR BY THE DRINK, SO AS TO PROVIDE ADDITIONAL REQUIREMENTS RELATING TO FOOD SERVICE.

(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."

That legislation also added S.C. Code Ann. §61-6-1610(I) further defining these terms

That section provides

(1) For purposes of this section:

(3) "Primarily" means 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 plain reading of the Act and Amendments make it clear that the language placed in the statute responded to the Court's points in *Brunswick*. The General Assembly defined "Primarily" in a way that would change the outcome of *Brunswick*⁸. Moreover, it added additional requirements for clarity. The Agency has followed this licensing scheme and granted licenses according to these requirements ever since. The Court failed to acknowledge this change or afford proper deference to DOR's interpretation thereof⁹.

The Court ignores traditional rules of statutory construction that apply here. It is well-settled law that "specific laws prevail over general laws, and later legislation takes precedence over earlier legislation" *Lloyd v. Lloyd*, 295 S.C. 55,57-58, 367 S.E.2d 153, 155(1988) (citing *Duke*

⁸ Had the Court simply adjusted the findings to address the change in S.C. Code Ann. §61-6-1610(I)(3) in analyzing *Brunswick* it would have not looked at whether the purpose of the business was principally the sale of food but whether the sale of food was "a regular source of business, meals were served upon the demand of patrons during the normal mealtimes that occur when the licensed business establishment is open to the public and whether or not the business had an adequate supply of food". Those criteria being met, the business meets the primary test. It is also of interest to note that the Act repeatedly refers to the establishment as a "business" rather than as a "restaurant".

⁹ DOR's regulations affirm the interpretation as we assert herein.

Power Company v. South Carolina Public Service Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985)). See also *Wooten v. Wooten*, 333 S.C. 357,372, 688 S.E. 2d 355,355 (1999) ("A specific statutory provision prevails over a more general one.") There can be little doubt that the legislative intent of 2008 Act 287 was to amend the law such that the definitions used to decide *Brunswick* were obsolete and the outcome, applying the identical analysis would be different. Had that not been the case, setting criteria and changing the definition of "primary" would lead to the conclusion that the Legislature changed the statute for no purpose and that the change in language was without effect. Here the Court has ignored those statutory changes and made them of no effect. In doing so, the Court ignored the will of the Legislature. It should reconsider this holding. Our Supreme Court's comments in *Weston v. Board of Commissioners*, 196 S.C. 491, 494, 13 S.E.2d 600 (SC, 1941), are equally applicable here. There the court stated "there is no ambiguity in the act before us. It is perfectly plain, and there is no room or occasion for interpretation or construction other than the ordinary meaning of the words employed". "Primarily" means what the Legislature says it means, not what the Court found in *Brunswick*.

In *Beaty v. Richardson*, 56 S.C. 173, 180, 34 S.E. 73, 76, 46 L. R. A. 517, (SC 1899) Chief Justice McIver quoted with approval the following: "The legislature must have intended to mean what it has plainly expressed, and consequently there is no room for construction. Where the words of a statute are plainly expressive of intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be."

Here, the Court's failure to apply the definitions enacted by the General Assembly amounts to a finding that the Statute is unconstitutional or a ruling on the legality of the statute which is outside the legal jurisdiction of this Court. The General Assembly intended the consequences of

2008 Act 287 to alter the requirements for licensing. This Court's Order ignores that plain and unambiguous legislative intent.

The Court also failed to demonstrate compelling reasons in overruling the construction of the statute by the Department. First, the Court must determine whether the language of a statute or regulation directly speaks to the issue. Here, there is no question that the definitions of "Bona fide engaged primarily and substantially in the preparation and serving of meals" and "Primarily" are defined by the General Assembly after *Brunswick* and directly speak to the issue. If so, the court must utilize the clear meaning of the statute or regulation. *See, e.g., Chevron, U.S.A., Inc. v. Nat Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 Sc.D. 2778, 81 L. Ed. 2d 694 (1984), *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."); *Hiawa Dev. Partners, II*, 411 S.C. at 355, 766 S.E.2d at 719 ("We defer to an agency interpretation unless it is 'arbitrary, capricious or manifestly contrary to statute.") In this instance, it appears that the Court erred in its statutory interpretation by disregarding the statute and reverting to the Common law.¹⁰

¹⁰ The likely effect of the Court's holding as expressed in a recent news article demonstrates not only the value of the act of the Legislature but the substantial and significant negative economic impact on the State of South Carolina as well as numerous businesses within the State imposed by the effects of this Court's Order.

"A South Carolina administrative law judge's ruling that a Five Points late-night college bar didn't serve enough food to get a liquor license could shutter bars and clubs across the Palmetto State, experts say.

The closures could have a rippling effect on the state's tourism and hospitality industries and put a big dent in the state's tax base, Robin DiPietro, a professor of hospitality at the University of South Carolina, said.

"This is going to create havoc in many areas of South Carolina," she said. "There are probably a hundred of these bars within driving distance of my house (in Columbia) . . . And this could change the whole landscape of places like Myrtle Beach."

Hundreds of SC Bars might close if Five Points liquor ruling is upheld, experts say. The State, April 5, 2018.

The Department of Revenue determined that Petitioner's establishment met the applicable criteria. Both Mr. Bland and Mr. Ruonala testified that their business was open for lunch from 12:00 PM until 5:00 PM and serves food during all business hours. There is no contrary evidence in the record. Petitioner's witnesses testified that they were looking for ways to increase its food sales by developing new menu items and offering new and different foods. They also testified (moreover, the Intervenors never argued to the contrary¹¹) that serving meals was a daily source of business to the establishment. Petitioner not only serves upon the demand of guests and patrons during the regular mealtimes but that Petitioner offers meals and food during all hours that the business establishment is open to the public. The establishment maintained an adequate supply of food on the premises to meet the demand. The location maintains a separate and distinct area used solely for the preparation of the solid foods that make up meals and that the area is adequately equipped and includes more than twenty-one cubic feet of refrigerated space and a steamer, commercial oven and other cooking items available for food preparation. Meals include a recreation of the famous "Frank's" hot dog and sandwiches prepared and served on premises, pizza, and other menu options. Intervenors argued that the Court should adopt a definition of "Primarily" different than the one adopted by the General Assembly in the applicable law. To them, "Primarily" should mean the items sold that generate the largest or greatest share of revenue. That is not the definition adopted by the General Assembly. The Court should construe the plain language of the law as written and disregard Intervenors argument as to the proper definition of "Primarily."

¹¹ The Intervenors never denied that Five Points Roost provided meal service, their only argument was that the amount of food sales was insufficient and that the business did not meet their view of what a "restaurant" should be.

Five Points Roost is a *bona fide* restaurant that meets the statutory criteria. The Intervenor has not presented any facts that demonstrate otherwise. Their argument to the contrary is a meritless one based on case law superseded by legislative action. This Court has held that a snack bar can meet the restaurant criteria, *see, e.g., Be Mi, Inc. v. S.C. Dep't of Revenue*, 408 S.C. 290, 758 S.E. 2d 737 where the Court affirmed the Administrative Law Court's decision regarding seating requirements based upon the Applicant's testimony and SLED's final report that *Be Mi* met the statutory requirements.

The General Assembly has statutorily defined what is required to meet the restaurant requirement. The DOR has verified that Five Points Roost meets this requirement. The evidence before the Court confirms that Petitioner fulfills the statutory restaurant requirements. SLED and the DOR have independently made this determination. The Petitioner satisfies the statutory condition that it is *bona fide* engaged primarily and substantially in the preparation of meals. The Court's reliance on *Brunswick* is both erroneous and misplaced. The Court should reconsider its determination that *Brunswick* applies and that Five Points Roost does not meet the statutory requirements to hold an on-premises liquor by the drink license.

CONCLUSION

The Court should reconsider its factual findings and conclusions of law based upon appropriate statutory standards and should apply the applicable law to the facts in accord with rules articulated in Statute and the Common Law. It should recast its decision based upon the properly weighed facts and the plain and unambiguous statutory language affecting the licensing process.

Moreover, the Court should give deference to the Agency interpretation of the legislation and its findings that Petitioner met the criteria for the issuance of a license.

Petitioners operated safe, clean, well-managed business at the location. They were taking and have agreed to continue implementation of state of the art safeguards to guard against problems at the location including providing enhanced security, state of the art identification screening, engaging in practices to prevent overserving and striving in every way to provide a safe, secure, and complaint location. The Petitioners acknowledged the validity of the Intervenor's concerns and expressed a remarkable willingness to work with the Intervenors and the community to make their location better and to help address the communities' concerns. Petitioners submit that the nature of their business is likely to improve the operations of competing enterprises in the area which will further help alleviate the Intervenor's concerns.

Intervenors did not present evidence sufficient to overcome Petitioner's *prima facie* case for the issuance of a license because they were unable to present evidence that the Petitioner's business has or is likely to engage in or permit conduct that is illegal or otherwise unsafe or deleterious to the community. Moreover, Intervenors have not demonstrated an increase in crime, problems, arrests or that the location does or will create or increase a burden on law enforcement.

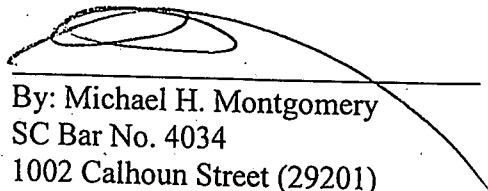
The fact that the Petitioner operated the business for months without incident diminishes the Intervenors' arguments that the Petitioner's establishment will create the problems about which the Intervenors complain. If Bland and Ruonala operate the location as they testified they intend to and have, the business should not create any problems which might make the location unsuitable.

Upon reconsideration, the Court should confirm the Agency's findings that Bland and Ruonala are of good moral character, that the location is suitable and meets the statutory

requirements for the issuance of the license and issue its Order directing the DOR to issue the license.

Respectfully Submitted,

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