THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, ALC Judge

RECEIVED
OCT 08 2018
SC Court of Appeals

Appellate Case No. 2018-001064
Case No. 18-ALJ-17-0005-CC

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

v.

South Carolina Department of Revenue..Respondent,

and

Thomas R. Gottshall and April C. Lucas.................................Intervenors, Respondents.

RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL AND (ALTERNATIVELY) MOTION FOR FEES AND COSTS FOR FRIVOLOUS APPEAL

Respondents Thomas R. Gottshall and April C. Lucas (Intervenors below) respectfully oppose Appellant Five Points Roost, LLC d/b/a Five Points Roost's (Roost's) motion to dismiss this appeal and, if granted, hereby move for fees and costs for bringing a frivolous appeal in violation of Rule 269 of the appellate rules. The grounds for denying Roost's motion and granting Mr. Gottshall and Ms. Lucas's motion are as follows.

After a contested case hearing, on April 3, 2018, the Administrative Law Court (ALC) entered a Final Order denying Roost a beer and wine permit and liquor by the drink license for

three independent reasons. On April 16, 2018, Roost moved for reconsideration, which was denied on May 11, 2018.

On June 7, 2018, Roost noticed an appeal. On July 2, 2018, Roost moved to extend its deadline to file an initial brief by 30 days. That motion was granted, and, on August 8, 2018, Roost filed an initial brief. Thereafter, Respondent South Carolina Department of Revenue (DOR), requested and received a 30-day extension to file an initial brief. On August 31, 2018, Mr. Gottshall and Ms. Lucas requested and received a 30-day extension, setting all Respondents' deadlines to file an initial responsive brief on or before Monday, October 8, 2018.

On Friday, October 5—just one business day before Respondents' briefs were due—Roost filed a notice of "voluntary withdrawal" purporting to dismiss this appeal "pursuant to Rule 260(c) of the South Carolina Appellate Court Rules." Upon receipt of the notice, Mr. Gottshall and Ms. Lucas's counsel conferred with DOR's counsel and indicated the intervenors intended to file a responsive brief and go forward with the appeal because Rule 260 does not permit unilateral dismissal. Instead, the rule requires either the written consent of all parties or dismissal "upon such terms as may be fixed by the court." <u>See</u> Rule 260(b)–(c), SCACR. Several hours later, Roost filed a motion for voluntary withdrawal claiming it sought dismissal of the appeal because (1) Roost is closed, (2) "the business assets are under contract for sale[,]" (3) Roost has no intention to re-open the business and plans to terminate the entity, (4) its termination of the entity renders it unable to obtain a permit and license, and (5) the appeal is (purportedly) moot. <u>See</u> Roost Mot. Voluntary Withdrawal App., 1. Roost's counsel did not consult prior to either filing.

Mr. Gottshall and Ms. Lucas oppose dismissing this appeal because the matters before the Court are of considerable public importance and a decision in this case will provide important prospective guidance concerning the issuance of liquor licenses to bars. As discussed in the

intervenors' initial brief, South Carolina law neither contemplates, nor allows Roost to run the sort of liquor house described during a two-day plenary hearing before the ALC. Only a business "engage[d] primarily and substantially in the preparation and serving of meals or furnishing of lodging" can be licensed for on-premise sale and consumption of alcoholic liquor (S.C. CONST., art. VIII-A § 1) and Roost is *not* such an establishment. Nor can the location at issue—800 Harden Street in the heart of Columbia's Five Points entertainment district—sustain another establishment predicated on late-night liquor sales to underage University of South Carolina (USC) student without exacerbating well-document public harms and safety threats to residents, local law enforcement, and USC students themselves. This is a matter of great public concern that should go forward.

Moreover, as discussed in the ALC's Final Order and in the intervenors' initial brief, the shady machinations surrounding Roost's financing was central to the ALC's decision to deny a permit and license. See Gottshall Int. Br. 10 (citing testimony by Roost's manager that opposing counsel was the intermediary that brokered the suspect business arrangement between Roost's equity partners and undisclosed principal Daniel Wells). To the extent Roost's attempt to abandon its appeal here is motivated by its purported "contract" to sell its "assets," this dispute as capable of repetition while evading review, a classic exception to the mootness doctrine. See, e.g., Holden v. Cribb, 349 S.C. 132, 138, 561 S.E.2d 634, 638 (Ct. App. 2002).

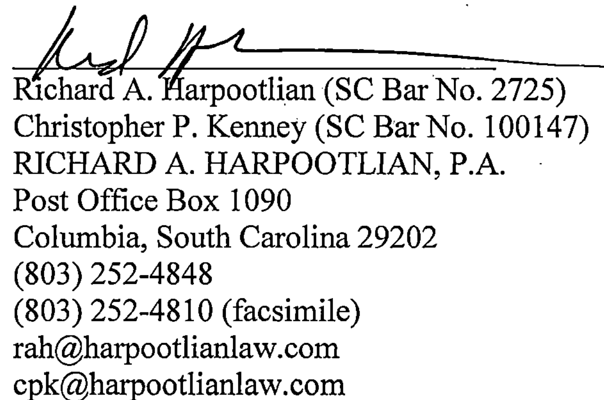
Roost's motion should either be denied, and the appeal should go forward, or Roost should be admonished and sanctioned for the fees and costs incurred by Respondents' counsel.

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 269, SCACR. The undersigned had already spent considerable time reviewing the record and drafting an initial responsive brief when Roost attempted to unilaterally dismiss this appeal in violation of the appellate rules. Through consultation with DOR's counsel, the undersigned learned that DOR *also* spent considerable time (i.e., public resources) preparing a brief to respond to Roost. Roost's decision to wait until the day before the filing deadline to abandon its appeal suggests it either did not bother to consider the efficacy of its position before initiating this appeal or it took appeal solely to burden Respondents with the work of preparing a response. A review of Roost's rambling, error-ridden initial brief further suggests make-work gamesmanship as it is difficult to conclude Roost intended to go forward with such a flawed, incoherent argument. Whichever the case may be, sanctions are warranted.

The Court should either deny Roost's motion to dismiss the appeal or sanction Roost and award fees and costs incurred as a result of Roost's frivolous appeal. To the extent the Court has any questions concerning the facts motivating Roost's conduct here, it should either notice a hearing (see Rule 240(h), SCACR) or refer this matter to a special master.

Respectfully submitted by,



Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

ATTORNEYS FOR
INTERVENORS, RESPONDENTS
THOMAS R. GOTTSHALL AND
APRIL C. LUCAS

October 8, 2018
Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

---

Appellate Case No. 2018-001064
Case No. 18-ALJ-17-0005-CC

RECEIVED
OCT 08 2018
SC Court of Appeals

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

v.

South Carolina Department of Revenue...Respondent,

And

Thomas R. Gottshall and April C. Lucas..................................Intervenors, Respondents.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for Intervenors/Respondents, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 8, 2018, served by placing in the U.S. Mail, first-class postage affixed thereto, the following documents to the below mentioned persons:

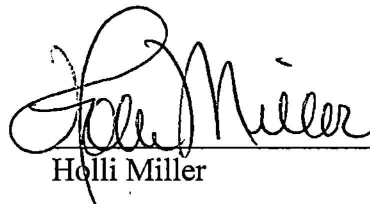
Document:

1. Initial Brief of Intervenors/Respondents Gottshall and Lucas;
2. Intervenors/Respondents Gottshall and Lucas's Designation of Matter; and,
3. Return in Opposition to Motion to Dismiss Appeal and (Alternatively) Motion for Fees and Costs for Frivolous Appeal.

Served:

Michael Montgomery, Esq.
Post Office Box 11886
Columbia, SC 29211

Elisabeth Shields, Esq.
SCDOR
300A Outlet Pointe Blvd.
Columbia, SC 29210



Holli Miller