

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Rooftop Bar, LLC, d/b/a Rooftop Bar &
Lounge,

Petitioner,

vs.

South Carolina Department of Revenue,

Respondent,

and

Thomas R. Gottshall and April C. Lucas,

Intervenors.

Docket No. 18-ALJ-17-0002-CC

FINAL ORDER

RECEIVED
OCT 19 2018
SC Court of Appeals

APPEARANCES: For the Petitioner: Michael H. Montgomery, Esquire
For the Respondent: Patrick A. McCabe, 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 the following sections of the South Carolina Code of Laws: Sections 1-23-310 et seq. (2005 & Supp. 2017); 61-2-260 (Supp. 2017); 61-4-525 (Supp. 2017); and 61-6-1825 (Supp. 2017). Rooftop Bar, LLC, d/b/a Rooftop Bar & Lounge (Petitioner) seeks an on-premises beer and wine permit, and restaurant liquor by the drink license for its location at 638 Harden Street, Columbia, South Carolina (location).

Polly Felton Morrison, April C. Lucas, John J. Stucker, Karen R. Belser, Judith Holliday, Kathryn S. Smith, the University of South Carolina, James M. Daniel, III, Luther J. Battiste, III, Michael Drennen, Kathryn Fenner, Richard Ackerman, and Thomas R. Gottshall (Protestants) filed a protest to the application.¹ On December 6, 2017, Respondent South Carolina Department of Revenue (Department) denied the application based upon the receipt of the Protestants' valid

¹ On February 16, 2018, counsel for Intervenors filed a Notice of Withdrawal of Protest for Polly Felton Morrison, John J. Stucker, Judith Holliday, Kathryn R. Smith, Luther J. Battiste, III, Michael Drennen, Karen R. Belser, Kathryn Fenner, and Richard Ackerman.



FILED

September 5, 2018

SC ADMIN. LAW COURT

public protests pursuant to Section 61-6-1825.² S.C. Code Ann. § 61-6-1825 (2009); On January 4, 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. A hearing was held on May 14 and 15, 2018, at the ALC in Columbia, South Carolina. The parties and Protestants appeared at the hearing and presented evidence and argument on the issue of whether Petitioner should be granted an on-premise beer and wine permit and/or a liquor by the drink license. After carefully weighing all the evidence, I find that Petitioner meets the requirements for the issuance of an on-premises beer and wine permit, and restaurant liquor by the drink license.

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.

Petitioner seeks an on-premises beer and wine permit, and restaurant liquor by the drink license for its business Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge, located at 638 Harden Street, Columbia, South Carolina. The proposed location is in Richland County, within the municipal limits of the City of Columbia. The general area is often referred to as Five Points.

Permits to sell beer and wine, and licenses to sell liquor by the drink have been issued to various businesses at the location for many years. The most recent previous business at the location was The Attic. No evidence was produced that a license had been revoked or that the location was previously cited for any violations of the alcoholic beverage laws of the State.

On January 2, 2018, the Department issued its determination denying Petitioner's application for the permit and license based on the receipt of the Protestants' valid public protests. The Department otherwise found that Petitioner met all of the statutory requirements to be granted an on-premises beer and wine permit, and liquor by the drink license. The South Carolina Law

² Initially, there was also a question regarding the restaurant having a Grade A Retail Food Establishment Permit prior to the issuance of a license pursuant to S.C. Code Ann. §§ 61-6-20(2) and 61-6-1820(1). This was resolved prior to the hearing and the only basis for denial at the commencement of the hearing was the public protests. The record provided by the Department reflects that the A rating was received by DOR on December 7, 2017.

Enforcement Division (SLED) and the Department investigated the location and, as the Department's Supervisor of Alcohol Beverage Licensing testified, "found everything in order."

Petitioner's principals are over the age of twenty-one. Each is a legal resident of the State of South Carolina, and each has maintained his principal place of abode in this state for at least thirty days before making this application. Notice of the application was lawfully posted at the location and in a newspaper of general circulation.

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:

- Whether all principals of Petitioner were disclosed on the application;
- Whether the proposed business is a bona fide restaurant.
- Whether the business will attract or enable illegal activity in the form of underage drinking;
- Whether the business will burden law enforcement resources;
- Whether the business and its patrons will be a nuisance to nearby businesses and residences; and
- Whether the location is suitable, because they contend the Five Points district is oversaturated with businesses that serve alcohol.

Ownership and Control of Rooftop Bar and Lounge

Petitioner's owners are 4TBs, LLC (owned by Stephen Bland), Mongo, LLC (owned by Adam Rounala), and Schatze Capital (owned by Brenda Wells). Brenda Wells owns the majority interest in Petitioner (sixty percent equity based on a \$54,500 investment), while Bland and Rounala hold minority interests (based on \$10,000 and \$7,000 investments, respectively). The business was purchased from Rob Mara for \$85,000 in a seller-financed purchase. Protestants assert that Daniel Wells (Brenda Wells' son who owns or owned another bar purchased by these same individuals) is involved in the business and is an undisclosed principal. I do not find evidence that convinces me that Daniel Wells is an undisclosed principal in this business. There is no evidence Daniel Wells ever had an ownership interest or management role at this location. There is nothing other than speculation to suggest that Brenda Wells' majority ownership interest is held on behalf of Daniel. Therefore, I find that there are no principals of the business that have not been disclosed on the application.

SLED and the Department found that all principals are over twenty-one years of age, are legal residents of South Carolina who have been residents for at least thirty days before the date of application and have maintained their principal places of abode in South Carolina for at least thirty days before the date of application, are of good repute and have not had a license relating to the sale of alcoholic liquors revoked within five years preceding the application filing.

Restaurant

Ruonala and Bland testified that in the weeks since the Court's decision in Five Points Roost, LLC v. S.C. Dept. of Revenue, 2018 WL 1724696 (S.C. Admin. Ct., April 3, 2018), they have made significant efforts to increase the food offerings to establish that Petitioner qualifies as a *bona fide* restaurant. Ruonala testified that they have worked to boost food sales by creating an "image" around the sale of grilled cheese sandwiches and brunch. They have worked with a local food truck chef to create a menu and that chef comes in to prepare brunch at the location. Petitioner's staff also prepares menu items in the kitchen at the location. Petitioner produced a color menu with photographs of the various items served, which consists of hot sandwiches. Petitioner's menu is displayed on a menu board on the street during the day, is posted in its establishment in the evenings, and scrolls on its televisions inside.

Sunday brunch items are served from 11:30 am to 2:00 pm on Sundays. In addition to Sunday brunch, Petitioner serves food in the establishment from 11:30 am until 2:00 am six days a week. Its daily fare includes gourmet grilled cheese sandwiches with multiple combinations of toppings. Petitioner's kitchen equipment includes a refrigerated preparation station, at least forty cubic feet of refrigeration, a stainless-steel preparation table, a griddle, a convection oven, a microwave oven, a freezer, and a food warmer display.

The business has focused on developing a new menu and image. Its certified public accountant testified about Petitioner's growth in food sales. During the combined months of March and April of 2018, food sales averaged approximately twelve percent of gross sales. In April food sales were fifteen percent of gross sales. In May, Petitioner enrolled to sell its food for delivery through Uber Eats and has seen some success with food sales through that platform, grossing approximately \$80 per day in delivery sales. Petitioner incorporates food sales as a material part of its business and invests a substantial amount of its day-to-day operations in providing hot meals, cooked on its premises to its customers.

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. 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. However, that finding must be weighed against the evidence that Five Points has historically been a hospitality district serving the USC and the midlands area. The location at issue is one that has been operated as a restaurant or bar for many years serving beer, wine, and liquor. While the Protestants presented ample evidence of nuisance behavior by patrons of Five Points establishments generally, there is no evidence that this particular location has been the source of illegal or problematic behavior.

Bland and Ruonala testified that they have instituted state-of-the-art practices to detect fraudulent identification and turn away underage patrons. To discourage the overconsumption of alcohol, they have adopted a policy of pricing all drinks over \$3.00. Petitioner has pledged to operate the business in a responsible manner and to utilize best practices to prevent underage drinking in the establishment, including compliance walk-throughs by law enforcement to check that patrons have valid identification demonstrating they are of age to purchase alcohol.

Law Enforcement Resources

There is ample evidence that the Five Points area generally presents law enforcement challenges, and requires significant law enforcement attention and resources. However, no evidence was presented indicating that the issuance of a license at the proposed location will create any negative change or require increased law enforcement presence. The location has been open with a temporary license and permit for more than six months without incident or complaint.

The City of Columbia's police chief testified that he was unaware of any reports or complaints relating to this location since it reopened last September, and that he did not recall any arrests at this location under the previous owner. He noted that the police department works with businesses to develop good practices and that he had no information that Petitioner was not complying with those best practices. Law enforcement resources in the Five Points area have been static for at least four years. The police chief described Five Points as a busy area with a high

concentration of young adults and students. He noted that any area that attracts crowds of people requires extra attention and personnel; the Five Points entertainment district is such an area.

Protestants' Testimony

Anna Edwards testified as a representative of USC. She is the Associate Vice President for Student Life. USC is protesting the permit and license because it would like to decrease the number of bars in Five Points to reduce the accessibility and availability of alcohol. Ms. Edwards testified that twenty-five percent of USC students reported drinking in a high-risk manner. The evidence establishes that many students under the age of twenty-one are drinking at establishments in Five Points. She also testified about the efforts that USC makes to educate its students about alcohol and alcohol use. Ms. Edwards did not present any evidence relating to this particular location either under former management or since Petitioner opened at the location. She testified that the high density of bars and the availability of alcohol in Five Points promotes a culture of overconsumption.

April Lucas, Olufemi Olulenu, and William Lamb testified about the concerns of the Protestants and Intervenors who are residents of nearby neighborhoods. Resident witnesses all reported incidents of public intoxication, public urination, harm to property, and late-night disturbances stemming from nightlife in Five Points. The residents are concerned with the number of bars concentrated in the Five Points area (approximately forty-two licensed establishments). Ms. Lucas testified that the Five Points area is "an attractive nuisance," drawing many underage students who drink to excess and then perpetrate minor crimes. She also testified that these students also become vulnerable targets as victims of more serious crimes.

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 Court pursuant to the following sections of the South Carolina Code: Sections 61-2-260 (2009); 1-23-310 et seq. (Supp. 2017); 61-4-525 (2009); and 61-6-1825 (2009). Unless otherwise specified, the standard of proof in an administrative proceeding such as this is a preponderance of the evidence. 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' 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

Section 61-2-260 of the Code grants the Court the responsibility to determine contested case matters governing alcoholic beverages, including beer, wine and liquor. S.C. Code Ann. § 61-2-260 (2009). 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 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 Section 61-4-520 of the Code. South Carolina Code Ann. § 61-4-520 (2009). The requirements for a liquor by the drink license are contained in Section 61-6-1820. South Carolina Code Ann. § 61-6-1820 (2009 and Supp. 2017).

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) and (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 suitable for the type of business Petitioner intends to operate with the conditions 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 a factor tending to indicate that the proposed location may not be suitable for the type of business Petitioner intends to operate. Proximity to a place “where young people congregate and loiter” has been recognized by the South Carolina 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.

On the other hand, the Five Points area has historically served as a primary hospitality district for the Columbia area as well as USC. Recognizing this role, the Court concludes that a proper balance must be struck. To that end, in order to protect the underage young adults that gather in the area, only those establishments that can be expected to operate utilizing best practices related to security and detection of false identification should be licensed or permitted to sell alcohol in the area. Petitioner has testified to measures it has taken to prevent underage students from purchasing alcohol at its establishment. Petitioner’s principals testified that it is their practice

to price all alcoholic beverages at \$3.00 or above, and to not offer drink specials. This has the added effect of discouraging overconsumption among students who are of a legal age to drink. I find that if Petitioner abides by the business and security practices to which its principals attested at the hearing, the likelihood of underage students obtaining alcohol at this location is greatly reduced. In particular, Petitioner's owners testified that they:

1) Scan all identification cards (IDs) with the same type of blacklight used by the federal Transportation Security Administration to check for forged identification;

2) Scan each ID utilizing a state-of-the-art scanner that verifies the ID is bona fide and also flags any ID that has already been used in the same evening to prevent patrons who enter the business from sharing their IDs with underage individuals waiting in line.

3) Work with law enforcement to encourage compliance walk-throughs of the business during which law enforcement checks for proper identification. The regular practice of these compliance walk-throughs has the effect of deterring underage students from attempting to gain entry with falsified IDs.

4) Price all drinks at \$3.00 or more and offer no drink specials.

I conclude that the risk of serving underage individuals and overserving patrons is greatly reduced with the utilization of these measures.

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 also 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, there is no doubt that the Five Points entertainment district is an area that regularly requires significant law enforcement resources. The City of Columbia's police chief testified that he staffs the Five Points area according to what is going on, and that any area with a high concentration of people requires extra attention and personnel. He testified that the law enforcement resources allotted to Five Points has been static for the past four years. He generally increases police resources in response to drink specials, private parties, and events at USC, especially sporting events. The police chief indicated that he allots law enforcement resources to Five Points similarly to the way he treats The Vista, Columbia's other predominant hospitality district. He testified that he was not aware of any arrests at Petitioner's location.

In light of the historic role of Five Points as a hospitality district, this Court concludes that the proper balance for preventing the location from becoming a strain on law enforcement is to assure that only those establishments that can be expected to operate with best practices related to security and crowd control should be licensed or permitted to sell alcohol in the area. In particular, the police chief mentioned that offering drink specials is something that a restaurant/bar owner might do that requires additional law enforcement personnel to be deployed. As discussed above, Petitioner's principals have represented to this Court that:

- 1) it will not sell any alcoholic drinks for less than \$3.00;
- 2) it will never offer alcoholic drink specials;
- 3) all of its advertising promotes the food offered at the location, and not alcoholic beverages;
- 4) it maintains a roped-off area outside its entrance for patrons waiting in line for admittance so that law enforcement can easily distinguish between individuals waiting in line versus other individuals who may be loitering; and
- 5) it conscientiously implements the best practices related to security, including all those requested by law enforcement.

I find that under these conditions, along with the ones enumerated above, the risk of Petitioner becoming a strain on law enforcement resources is greatly reduced.

Nuisance

Section 61-4-580(5) of the Code 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. S.C. Code Ann. § 61-4-580 (Supp. 2017).

Licensed or permitted premises have been said to include 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. Compare S.C. Code Ann. § 61-4-1700 (2009) (as relates to brew pubs, Section 61-4-1700(2) provides in part that “Permitted premises’ means those areas normally used by the permittee or licensee to conduct his business and includes, but is not limited to, the selling areas, brewing 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, 2007 WL 1219343 *4 (S.C. Admin. Law Ct., March 19, 2007) (citing S.C. Code Ann. § 61-4-580(5) (Supp. 2006) 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. O’Cain v. O’Cain, 322 S.C. 551, 561, 473 S.E.2d 460, 466 (Ct. App. 1996). 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. Id.

In this case, while there is abundant evidence of nuisance behavior by patrons of Five Points establishments generally, there is no evidence that this particular business is, or has been, operated in an unlawful or unreasonable manner, or in a manner that promotes such nuisance behavior. If the Petitioner is operated consistent with the testimony of its principals at the hearing, it would be expected to be an example of the type of establishment that implements best practices to avoid the types of behaviors that vex and annoy the nearby residents, and about which the Protestants complain.

Suitability of Location Previously Licensed

In support of its position that the location is a suitable one for the sale of alcohol, Petitioner points to the fact that the proposed location has been the locale of businesses with alcohol licenses for many years. In Taylor v. Lewis, 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).

Here, the location has been the site of a restaurant/bar selling alcohol for many years. Unlike the facts in Taylor, this case presents facts that demonstrate that circumstances in the general Five Points area are less suitable for the sale of beer, wine and liquor than they have been in years past. In particular, the evidence demonstrates that the Five Points area has increasingly become the scene of problems related to unruly and unlawful behavior and underage drinking, especially underage students with fraudulent identification. These issues have progressively become a greater nuisance to residents in the nearby neighborhoods.

After carefully weighing the evidence and applying the law as discussed above, the Court finds it inappropriate for the decision in this case to turn on the history of licensed alcohol sales at the location. The history of alcohol sales and the fact that Five Points is a recognized-hospitality district militates in favor of granting the license and permit sought under the Taylor rationale. However, the overwhelming evidence demonstrates that circumstances in Five Points have deteriorated to the point that underage drinking, unlawful behavior, and nuisance behavior have become a matter of serious concern for area residents. Because of that change in circumstances, I find the Taylor decision distinguishable from the circumstances in this case. In Taylor, there was no factual evidence in the record showing that the location was unsuitable. The denial of the license

was based solely upon the protestants' testimony concerning their fears. In Taylor, 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. Here, there is overwhelming factual evidence that Five Points is the scene of problematic behavior, and that crowds that would likely be attracted to the business could contribute to the existing strain on local law enforcement resources, underage drinking, and public drunkenness. The lack of evidence that led the Supreme Court to conclude that, "a determination of unsuitability ... is wholly unsupported by any competent evidence" in Taylor is not the case here. Id. The focus of this Court's inquiry must be whether this location is suitable at this time, not upon the fact that the location has a history of alcohol sales. Kan Enterprises, Inc. v. S.C. Dept. of Revenue, 240 S.C. 596, 605, 803 S.E.2d 882, 887 (Ct. App. 2017). Therefore, I conclude that the fact that a business selling alcohol has been licensed at the location for many years is not a significant factor influencing the decision to grant the permit and license in this case.

Restaurant

Section 61-6-1820(1) of the Code 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." S.C. Code Ann. § 61-6-1820(1) (Supp. 2017). This requirement mirrors the language of the mandate of our state's constitution. S.C. Const., art. VIII-A § 1. Section 61-6-1610(I)(3) 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." S.C. Code Ann. § 61-6-1610 (Supp. 2017). 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. 2017). Section 61-6-20(2) defines "[b]ona 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.

S.C. Code Ann. §61-6-20(2) (Supp. 2017). Regulation 7-401.3 elaborates further:

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. Reg. 7-401.3 (Supp. 2017).

The statute and regulation 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, and I have found that it meets the requirements defined by the statutes and the regulation. Petitioner has seating for at least forty. The kitchen includes a griddle and at least twenty-one cubic feet of refrigerator space for food. Petitioner has created a menu featuring many variations on grilled cheese sandwiches, and a Sunday brunch menu. It opens for lunch at 11:00 am each day. It enrolled the restaurant in Uber Eats and is earning revenue from sandwiches sold and delivered through the Uber Eats program. Hearing testimony indicates that up to fifteen percent of the business’ revenue in the most recent two months was from food. This represents a significant change from the time Bland’s deposition was taken on February 12, 2018, when he testified that approximately five percent of revenue came from food.

Intervenors argue that Petitioner cannot be found to be a restaurant because the sale of food contributes only five to twelve 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. In response, Petitioner notes 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 Supreme 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 also must actually be “primarily” engaged in the preparation and serving of meals. Id.

In this case, Petitioner has taken affirmative steps to increase the food service component of its business since Bland’s deposition, and this Court’s April 3, 2018 decision in Five Points Roost, LLC, supra, finding that another bar owned by these same parties was not bona fide engaged primarily and substantially in the preparation and serving of meals. I conclude that, so long as

Petitioner continues to operate consistent with the representations made in Bland and Runoala's testimony at the hearing of this case, it is bona fide engaged primarily and substantially in the preparation and serving of meals. By opening at 11:30 am daily, serving food from 11:30 am to 2 am, and maintaining enrollment in Uber Eats, Petitioner has demonstrated that it is devoting significant energy and resources to the preparation and service of meals at the location.

Given all the circumstances and facts in this case, I conclude that, as long as the Petitioner continues to serve food daily at all times it is open, beginning at 11:30 am, and to sell menu items through Uber Eats or a similar service, it is a business that is bona fide engaged primarily and substantially in the preparation and serving of meals. Because it is apparent that these changes to Petitioner's business model have been motivated by its desire to obtain the liquor license, I conclude that the license should be granted with the condition that those newly-adopted practices continue.

CONCLUSION

After carefully weighing the evidence and applying the law as discussed above, the Court finds the location to be suitable for the permit and license sought by Petitioner so long as the conditions enumerated below are met. If Petitioner operates in the manner its owners have testified that they intend to, the risk of adding to the strain on law enforcement resources or enabling underage drinking and overconsumption of alcohol will be minimized. Under those circumstances the business is not likely to be a nuisance to the community.

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 Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge at 638 Harden Street, Columbia, South Carolina is **GRANTED** contingent upon the following conditions. Petitioner will:

- 1) Scan all ID's with the same type of blacklight used by the federal Transportation Security Administration to check for forged identification;
- 2) Scan each ID in a scanner that verifies the ID is bona fide and flags any identification that has already been used in the same evening to prevent patrons who enter the business from sharing an ID with an underage individual waiting in line;

3) Work with law enforcement to encourage compliance walk-throughs of the business in which law enforcement checks for identification;

4) Price all alcoholic drinks at \$3.00 or more and offer no alcohol promotion;

5) Exclude the promotion of alcohol from its advertising;

6) Implement all best practices requested by law enforcement;

7) Serve lunch and brunch each day the business is open beginning no later than 11:30 am; and

8) Offer menu items for sale and delivery through Uber Eats or a similar service.

Violation of any of the above-listed conditions shall be deemed a violation of the permit and license.

AND IT IS SO ORDERED.



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

September 5, 2018
Columbia, South Carolina