THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Case No. 2018-001870
Case No. 18-ALJ-17-002-CC

Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge..... Respondent,

v.

South Carolina Department of Revenue, ...Respondent,

and

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

INITIAL BRIEF OF RESPONDENT ROOFTOP BAR, LLC

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II. Is the Administrative Law Court's determination that Rooftop is primarily and substantially engaged in the preparation and service of meals supported by substantial evidence.

INTRODUCTION[1]

Intervenors and their counsel are on a crusade to change Five Points, and their idea of change is to wipe any establishment that they deem as a "bar" off of the map. Counsel has stated, "We are going to shut down every bar in Five Points without your help, apparently because the city does not have the will to enforce its own laws.[2]" In another interview, "I'm trying to clean up Five Points," said Dick Harpootlian, a Columbia attorney who is leading a crusade by neighbors living around the Five Points district to reverse the spread of late-night college bars. "If this causes ripples across the state, that's not my problem.[3]"

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[1] Appellants Counsel included newspaper quotes and other material from outside of the record in its Introduction as well as in its initial brief, *see e.g.* footnote 9 on page 20 of the Initial Brief. While Respondents frown upon this practice and question whether the same is in accord with Rule 210(c) and (h), South Carolina Appellate Court Rules, and believe that the case law is clear that such material should not be considered by the Court, we have taken the liberty of providing the Court with a counter introduction including matter that provides an appropriate introduction to this controversy and Appellants' stated motives.

[2] *See* Dick's Last Resort: Harpootlian is Hell-Bent on Changing Five Points, *Free Times*, May 23, 2018. Available at https://www.free-times.com/news/cover-story/dick-s-last-resort-harpootlian-is-hell-bent-on-changing/article_edf8e5f4-5e28-11e8-b64f-4732cfc8d7bb.html

[3] *See* Is a microwave a stove? A hot dog a meal? The answers could affect hundreds of SC bars. *The State,* April 27, 2018.
Available at https://www.thestate.com/news/local/article209970389.html.

This appeal is another part of that crusade; one where Intervenors and their counsel, all wealthy local attorneys, want the Court to recast and reinterpret South Carolina law in a manner not intended by the General Assembly. Their brief is a policy argument advocating a position for consideration by the General Assembly. Appellants are unable to demonstrate that the record lacks substantial evidence to support the ALC's findings of fact and conclusions of law.

Rooftop meets all of the statutory and regulatory requirements for the issuance of the license and permit that the ALC granted. Only the Intervenor's protests prevented the immediate issuance of Rooftop's license and permit. After the Administrative Law Judge added restrictive conditions to Rooftop's license to assuage their concerns[4], Intervenors' crusade brings them before this Court. Apparently, their self-proclaimed victory in the Administrative Law Court was not enough to satisfy appellants[5]. Respondents would show the Court that the Department of Revenue, SLED, and the Administrative Law Court applied the law correctly and properly ordered DOR to issue the license and permit.

The Court should not allow itself to be swept into Intervenors Sufistic fervor. Appellants are unable to demonstrate a change in the area or at the location which justifies denying the issuance of the licenses. They failed to do so during the hearing. Their arguments about a percentage of food sales test should also be recognized to be nothing more than an effort to ask the Court to judicially overturn the changes to the Act made to the legislature in 2008 which

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[4] The conditions comported fully with Rooftop's existing practices and merely acted to require Rooftop to continue doing exactly what its representatives testified that the entity was doing to manifest state of the art practices to prevent underage drinking, over-consumption and to maximize food sales.

[5] "'Based on the number and impact of the conditions, it would appear to me that the Rooftop will die a slow death as compared with the quick death of The Roost,' Harpootlian said". Five Points bar doomed to 'slow death' by judge's order, lawyer says, *The State*, September 5, 2018. Available at https://www.thestate.com/news/local/article217860000.html.

statutorily defined the term "primarily" and redefined other relevant words. When it did so, the General Assembly essentially overturned *Brunswick Capitol Lanes v. South Carolina Alcoholic Beverage Control Com*m., 273 S.C.782, 260 S.E. 2d 452 (1979), upon which the Appellants rely. The Court should affirm the decision of the Administrative Law Court. The Department of Revenue, SLED, and the ALC have complied with the law. Appellants are unable to overcome their burden on Appeal.

STATEMENT OF THE CASE

Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge ("Rooftop" or "Respondent Rooftop") filed its application for an on-premises beer and wine permit and restaurant liquor by the drink license for its location at 638 Harden Street on September 27, 2017. Rooftop's premise is located within what is identified as Columbia's Five Points entertainment district. The State Law Enforcement Division ("SLED") and the South Carolina Department of Revenue ("DOR" or "Respondent DOR") processed the applications and determined that Rooftop met the criteria for the issuance of a license on October 24, 2017 (Tr. p. 100 l, 3 -7). Attorney April Lucas filed a protest on October 16, 2017. Attorney Tom Gottshall filed a protest on October 19, 2017. Eleven others filed protests, nine of which were dismissed before the hearing. DOR issued its Departmental Determination on January 2, 2018, finding that except the public protests, ". . . the Department has found the Applicant has met all other statutory requirements for licensure." R. App. _____ (SCDOR_000003-04). Rooftop filed its Request for a Contested Case hearing on January 4, 2018. (R.App. _____ (SCDOR __) On January 25, 2018, Attorneys April Lucas and Thomas Gottshall moved to intervene. (R. App.___) On February 1, 2018, the Administrative Law Court ("ALC") granted the Motion to Intervene. (R. App. _____) The ALC

conducted a hearing on May 14 and 15, 2018 and subsequently issued its Order granting the Permit and License with conditions on September 5, 2018. (R. App. _____) On September 17, 2018, Intervenors, Appellants filed a motion with the ALC to alter or amend the Order. (R. App _____) The ALC entered an Order denying the Intervenors' motion on October 3, 2018. (R. App _____) Intervenors filed a notice of appeal on October 19, 2018. (R. App. _____)

FACTS

Rooftop, LLC purchased the operating assets of the Attic, an establishment which held a beer and wine permit and liquor by the drink licenses. The Attic and its predecessors were licensed for a number of years. (R. App. _____) (Tr. p. 311 l. 18 – 312 l.9; p. 442 ll. 5-16, p. 555 ll. 15-24)) Rooftop began operating the business under a temporary license[6]. As its business and operations evolved, Rooftop continued to modify the business model to focus on the sale of food and meals. (R. App. _____) (Tr. p. 219.11-25) The establishment opened at 11:30 AM for lunch every day and served hot meals prepared on premises throughout the day, and during the entire time it remained open. (R. App. _____) (Tr. p. 249.15-250.13) Rooftop opens for Sunday brunch with a special dining menu. (R. App. _____) (Tr. p. 248.l. 20- p.249. l.2) The restaurant enrolled in Uber Eats effective May 1, 2018, and was selling substantial meals through that service (R. App. _____) (Tr. p. 190.1-194.15). During the month before the hearing, 15% of its total sales were sales of food. (R. App. _____) (Petitioner's Exhibit 3, Tr. p. 128 ll. 22-25). Its food sales were, therefore, a substantial and material part of its business. (R. App. _____) (Tr. p.

[6] *S. C. Code Ann.*, 1976 (2018) §§61-6-1825 and 61-4-525 allow the purchaser of a going concern to obtain a temporary license and operate the business pending the issuance of a permanent license. Applicants seeking to open a new establishment do not have the ability to open until the license is approved.

133 ll. 15-19; p.322 l.25- p. 323.l.1). The location has had no law enforcement or other complaints or problems since it opened. (R. App. _____) (Tr. p. 106. ll.2-4)

During the hearing, no witness was able to attribute any of their complaints to activities emanating from Rooftop. Mr. Olulenu, a resident of Martin Luther King Park area, testified that he did not know that anyone about whom he complained had been to Rooftop. (R. App. _____) (Tr. p. 338 l. 24 – p. 339 –l. 3) Chief Holbrook of the Columbia Police department testified that there had been no problems with the Rooftop since it opened in September 2017.[7] (R. App. _____) (Tr. p. 363 ll. 4-9) Moreover, Chief Holbrook was unable to present any evidence that the business presence of Rooftop caused any change in needed resources or required additional law enforcement presence in the area. (R. App. _____) (Tr. p. 365 1. 21 – p 366-l.12) Chief Holbrook further testified that the law enforcement resources have been static during his tenure and that other than for special events there has been no need to increase the quantity or amount of law enforcement presence or resources in Five Points. (R. App. _____) (Tr. p. 366 ll. 8 -20) Chief Holbrook also testified that the activities that cause changes in requirements for law enforcement include sporting events, festivals and other special events. (R. App. _____) (Tr. p. 367 ll. 5-24). He specifically did not list Rooftop or, in fact, any other Five Points establishment as requiring the commitment of additional law enforcement resources. Mr. Bill Lamb, one of the protestants, testified "I know nothing about the Rooftop" (R. App. _____) (Tr. p. 381. 1. 19). He also testified that he had no evidence to support an assertion that the number of establishments had increased in Five Points in the last five years. (R. App. _____) (Tr. p. 382 ll. 22-24). He testified that he had no evidence of any impact caused by Rooftop. (R. App. _____) (Tr. p. 385: ll 1 – 15) Ms. Anna Edwards, representing the University of South Carolina, which along with

Mr. Lamb were the non-intervenor protestants not dismissed from the action, testified that she had no specific knowledge about the Attic or Rooftop (R. App. _____) (Tr. p. 411 ll. 2-4). Ms. Edwards testified that the number one problem experienced by the University and its students was pre-gaming[8], which does not take places in Five Points. (R. App. _____) (Tr. p. 426 l 20, p. 427 l18). Upon cross-examination, Ms. Edwards admitted that she has no evidence about Rooftop causing any problems. (R. App. _____) (TR. p. 437. ll. 2-7). Likewise, she confirms that she has no evidence that underage students were going to Rooftop or that it was selling discounted beverages (R. App. _____) (Tr. p. 440: ll.18-24).

Mr. Weiser, who the Court qualified as an expert in criminology over the objection of the Respondents, testified that his study revealed no alcohol-related crime on the east side of the 600 block of Harden Street where Rooftop is located. (R. App. _____) (Tr. p. 470 ll. 5 – 24). He testified that there was no statistical basis for selection of the individuals interviewed for his study nor was any precaution taken to eliminate duplicate responses (R. App. _____) (Tr. p. 471 l. 23 – p. 473 l.5). Upon cross-examination, he essentially admitted that the real measure of his survey is "the effect of the bus that the University's running." (R. App. _____) (Tr. p. 475 l. 21 – p. 476 l. 16). His testimony concluded with him admitting that he has no data to offer the Court "that's going to suggest or prove scientifically that an outlet remaining at 638 Harden Street under a different name is going to have any impact on any issue" (R. App. _____) (Tr. p. 480 ll. 9-14). Intervenor Attorney April Lucus admitted upon cross-examination that she had no hard evidence that the problems she testified to came from a location in Five Points other than by her

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[7] Rooftop operated under a temporary license starting in September 2017 and had been open approximately 8 months at the time of the hearing. (ROA at _____.)

[8] "Pre-gaming is when students gather together prior to going out for the evening to give a start on their fun for the night. Most commonly this occurs for students who are under age and feel

general surmise (R. App. _____) (Tr. p. 526 l. 19 – p. 527 l. 5). She testified that she had no issues with Rooftop or evidence of problems there (R. App. _____) (Tr. p. 530 ll. 8-10). Intervenor Gottshall was unable to offer any testimony that the Location at 638 Harden Street was the cause or source of any problems in the neighborhood. R. App. _____ (Tr. p. 555 ll. 3-25)

STANDARD OF REVIEW

The Administrative Procedures Act, *S. C. Code Ann.*, 1-23-10, *et. seq.* (2018) articulates the standard of review to be used by the Court in this matter. *S. C. Code Ann.,* 1976 §1-23-610(b) (2018) provides that:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
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> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The "substantial evidence" rule is the established standard for review of ALC decisions. South Carolina decisions previously dealing with that standard articulate the scope of review. *See e.g. Roper Hospital v. Board of South Carolina Dept. of Health and Environmental Control*, 306 S.C. 138, 410 S.E.2d 558 (1991); *Lark v. Bi-Lo Inc.,* 276 S.C. 130, 276 S.E.2d 304 (1981).

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that maybe they -- their fake ID will not work or they won't be able to drink once they go out for the evening. (R. App. _____) (Tr. p. 399 ll. 8-14)

Under the substantial evidence standard of review, the Court may not substitute its judgment for that of the agency (or the Administrative Law Court) unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record. *Wilson v. State Budget and Control Board Employee Insurance Program,* 374 S.C. 300, 648 S.E.2d 310 (Ct. App. 2007).

Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow a reasonable mind to reach the conclusion that the administrative agency reached to justify its action. *Rogers v. Kunja Knitting Mills, Inc.,* 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). *See also, Ruocco v. South Carolina State Board of Registration for Professional Engineers and Land Surveyors*, 314 S.C. 111, 441 S.E.2d 829 (Ct. App. 1994) (when reviewing an agency's decision under the APA to determine if substantial evidence exists, the record must be viewed as a whole to determine whether there is evidence that will allow reasonable minds to reach the conclusion of the agency). An abuse of discretion occurs only when a factual ruling is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Sharp v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999).

Our Supreme Court has also explained:

> *Substantial evidence exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury.*

Porter v. South Carolina Public Service Commission, 33 S.C. 12, 20, 507 S.E.2d 328, 332 (S.C. 1998)

It is important to note that this is a deferential standard of review, which gives great weight to the Board's informed decision and a reviewing court "may not substitute its judgment

for the judgment of the agency as to the weight of the evidence on questions of fact." *S.C. Code Ann.* §1-23-380(5) (Supp. 2008).

The burden of proof falls upon the Appellant. Here, the ALC's findings are presumptively correct, and therefore the Appellant as the challenging party bears the burden of proving that the Court's decision was erroneous in view of the substantial evidence in the record. *See, e.g. Leventis v. S.C. Dep't of Health & Environmental Control*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (S.C. App. 2000); *Too Tacky Partnership v. South Carolina Department of Health and Environmental Control and May Read Jr.,* 386 S.C. 32, 686 S.E.2d 194 (S.C. App. 2009). This is a strong burden of proof as "the burden is on Appellants to prove *convincingly* that the agency's decision is unsupported by the evidence. [citations omitted, emphasis added]." *Bursey v. South Carolina Dept. of Health and Environmental Control,* 360 S.C. 135, 142, 600 S.E.2d 80, 84 (Ct. App. 2004).

ARGUMENT

I. The Court correctly found that 638 Harden Street is a suitable location.

The Court acknowledged that numerous licenses and renewals were previously 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. Rooftop's principals testified about their best practices to address the neighbors' concerns, and the Court mandated that Rooftop continue to adhere to those best practices as conditions of its license and permit. Not only did the Court conclude that the location is suitable; the Court added additional protections against Appellant's concerns by imposing conditions on the license.

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). Here, the Court correctly concluded that the Intervenors complaints and perceptions were not tied to the suitability of the Rooftop location. The Court decided the suitability issue based upon the Rooftop's business location and its impact on the community. It is proper to decide the license on the licensed business and its impact. If it does not negatively affect the area, how could the location be unsatisfactory? This analysis is consistent with *Kan*

Enters v. S.C. Dept. of Revenue, 420 S.C.596, 803 S.E.2d 882 (Ct. App. 2017). In *Kan*, the Court found that A1 was no longer a suitable location based upon occurrences in the record **specifically occurring on its premises**. [emphasis added] The Court noted "A1 had significantly more calls for police services and arrests than any of the three nearby convenience stores from 2011 to 2014 and nighttime calls for police services increased during that period. The Court did not analyze the area convenience stores and their impacts, because it does not undertake to zone and those locations were not at that time seeking licenses. That approach is consistent with the review below.

Furthermore, local community members testified A1 had not improved." *Kan, supra* at 420 S.C. 606. While the Court in *Kan* noted the while considering law enforcement presence in the area, the primary (and proper) consideration was the activities on the premise of the Petitioner.[9] Here, the Appellants were unable to establish any problems emanating from Rooftop premises or operations. They cannot demonstrate that continuing to allow a licensed establishment to operate at 638 Harden Street has any negative impact or that there have been any problems, issues or concerns emanating from that location. Given that legal framework, the only proper decision here was the one the Court reached, that the location was suitable – even without the conditions that the Court attached to the license and permit[10]. Respondents would suggest that the location is suitable without the conditions applied by the Court and that those conditions were an effort to mollify the Intervenors, Appellants.

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[9] "The Court should weigh evidence of the location's burden on law enforcement in deciding its suitability." *Kan* 420 S.C. at 606 citing *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).

[10] Again, the conditions imposed comport with business practices Rooftop utilizes and only serve to codify its means of operations.

II. *Taylor v. Lewis* is not distinguishable here and should apply.

Here, the Court should have found the circumstances consistent with the Supreme Court's findings in *Taylor v. Lewis, infra.* The fact the location has been licensed in the recent past, and the record is bereft of evidence that the location is not 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). The circumstances here are not distinguishable, and the record, in this case, demonstrates that there is no evidence that the location at 638 Harden Street is less suitable for licensing now than it has been in the past. The Court also held that, 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.* Respondents here must point out to the Court that the record is bereft of any support that the neighborhood is worse than it was that can be supported by scientific fact or other evidence. The only evidence offered by the Appellants below was based upon the surmise, conjecture and speculation of the witnesses. The Court ought to consider that the *Taylor v. Lewis* factors could be an additional sustaining ground.

The ALC gave too much consideration to general complaints not specific to this or any location. There was no need to attempt to mollify the Intervenors by imposing conditions.

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)

No witness offered by the Intervenors was able to provide any scientifically valid or accurate testimony causally relating any of their complaints to the location. The evidence in the record affirms the suitability of the location.

The evidence submitted by the Intervenors consists entirely of factually unsupported opinions and conclusions. Essentially, the Intervenors absurdly contended that all of their complaints result from the presence of licensed establishments in Five Points that overserve underage and naïve University Students. They did not offer any evidence in the form of valid scientific study or direct testimony which demonstrates some proximate causation that the issues were related. It appears that the primary cause of the problem, from cross-examination of Dr. Weiser, is that the University of South Carolina has grown resulting in an increased student population in the area – and it operates a late-night bus service which brings students into the neighborhood. Rooftop has no control or responsibility for that. Moreover, it is apparent that Appellants are mostly trying to use ABL as a means to change the zoning in an area to usurp local government's control of what businesses are licensed to operate in the area.

III. The Court Correctly found that Rooftop is Engaged in the Service of Meals.

The Court found that Petitioner is *bona fide* engaged primarily and substantially in the preparation and serving of meals. (ROA p. _____ (Final Order p. 16)) In doing so, the ALC correctly interpreted the facts and the law. "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 and the Court adopted 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.

Intervenors would have the Court apply a percentage of sales test like that employed in the *Brunswick, supra,* case. There, 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 state[11]. The only limitation in the

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[11] S. C. Const. art. VIII(A) 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*

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.* §61-3-20[12]. That definition was the one the Court used in *Brunswick*. The definition provided that 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 the word "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

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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]

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

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."[13]

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;*
> *(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

> *(I) 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.*

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[13] 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.**

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*[14]. Moreover, it added additional requirements for clarity. DOR has followed this licensing scheme and granted licenses according to these requirements ever since.

Appellants demand that this Court overturn Act 287 and direct that the standard for determing restaurant status return to a squishy and easily manipulated percentage of sales. Numerous problems emanate from such a determination. Selling alcoholic beverages for lower prices – which Appellants contend is a problem -- becomes attractive as doing so reduces that percentage of sales and increases the percentage of food sales[15]. Most importantly, an establishment can offer food and beverage to its patrons. It cannot dictate what they purchase – so the percentage becomes manipulative as well as variable and subject to preference, time and location[16]. The fact that their method rewards businesses that serve pricey foods also adds a discriminatory element to the equation – expensive restaurants have a much easier time meeting a percentage test than would inexpensive ones.

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[14] 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".

[15] This is a function of simple mathematics. Reducing alcohol sales reduces total sales (the fractional denominator) which thereby increases food sales percentage.

[16] This also makes it much easier for higher priced establishments to function than lower priced ones. A $30 entrée offsets more alcohol sales than an $8 plate of food.

Additionally a percentage of sales test creates substantial regulatory problems. When the licensing agency is initially issuing the license, before sales are initiated.[17] it is impossible to determine what the percentage of food sales might be. In essence, Appellants argue for the return to an unmanageable, untenable test properly jettisoned by the General Assembly because they believe that it may afford them more flexibility in using the licensing process to change their neighborhood where they have been unable to do so with zoning or other legal means. Their proposed test lets them play 'gotcha' with the establishments in Five Points which are the subject of their self-described crusade.

Act 287 unquestionably addresses Brunswick and alters the licensing landscape. 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 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 of *Brunswick*, 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. 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

[17] Except in cases of the transfer of a going concern, new businesses cannot operate until a license is issued – therefore no sales have taken place and there is no basis from which a percentage could be ascertained.

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* nor what the Appellants argue here.

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."

The ALC correctly did not apply a percentage test in making its findings. One is neither applicable nor appropriate. The General Assembly defined 'primarily' with precision in Act 287. That definition, applied to the analysis in *Brunswick*, changes the outcome of that case. Appellant's argument to the contrary is meritless.

IV. *The Court should affirm the Determination of DOR as DOR's Interpretation of the Statute it is Administering is entitled to Deference.*

The Court's first task is to 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.

Here, 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 11:30 AM until 2:00 AM or an earlier closing time and serves food during all business hours. (ROA p. ____ (Tr. p. 48 l.8 – p. 50 l.4, p.202 ll. 9-10)) There is no contrary evidence in the record. Petitioner's witnesses testified that they were looking for ways to increase Rooftop's food sales by developing new menu items and offering new and different foods. 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. It provides food for delivery. 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. (ROA p. ____ (Tr. P. 49 ll. 17-24)) 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."

Rooftop is a *bona fide* restaurant that meets the statutory criteria articulated by the General Assembly and interpreted by the regulating agency, whose finding this Court should afford substantial deference. The record is bereft of evidence that demonstrates otherwise. 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 Rooftop meets these requirements. 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 should clearly affirm the General Assembly's ability to legislate and the DOR's ability to regulate based upon the statutory framework that has been in place for more than ten years. Appellant's arguments are without merit. The Court should affirm the ALC.

CONCLUSION

Appellants cannot demonstrate a basis in law or fact that justifies reversing the ALC's decision. The DOR correctly determined that issuing the license and permit was proper. Intervenors, Appellants, and their fellow protesters were unable to demonstrate any problem with the location warranting a determination that it was unsuitable. They are unable to establish any

causal relationship between Rooftop and any problem, issue or complaint that they raised. They are unable to demonstrate that the location creates any negative factors at all.

Their quest is one to change the neighborhood by attacking an establishment that they cannot show caused, created or encouraged any of the problems about which they complain. Respondent would respectfully assert that their issues are with the University of South Carolina, its students, and the zoning allowed by the City of Columbia and not with Respondent Rooftop which has demonstrated that it operates a safe, compliant establishment that utilizes state of the art procedures to guard against the problems about which Appellants complain. Additionally, the Court should not change the law to allow alcoholic beverage licensing to be utilized in lieu of a local zoning ordinance as the Appellants urge.

Simply put, the record is full of substantial evidence which supports the ALC's finding, and the Appellants have provided the Court with no basis in fact or law upon which it should reverse the Administrative Law Court.

For the preceding reasons, this Court should affirm the lower court's Final Order

Respectfully submitted,

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Attorneys for Respondent

January 18, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Case No. 2018-001870
Case No. 18-ALJ-17-002-CC

Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge..... Respondent,

v.

South Carolina Department of Revenue, ...Respondent,

and

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

CERTIFICATE OF COUNSEL

I hereby certify that this Initial Brief of Respondent, Rooftop Bar, LLC complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge..... Respondent,

v.

South Carolina Department of Revenue, ...Respondent,

and

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

PROOF OF SERVICE

I, Cristy M. Bradley, paralegal to attorney, Michael H. Montgomery representing Respondents Rooftop Bar, LLC, hereby certify that I have served the Initial Brief of Respondent Rooftop Bar, LLC, Designation of Matter to be Included in the Record of Appeals on the Intervenors, Appellants and the Respondent South Carolina Department of Revenue, by email and by depositing a copy of each in USPS, postage paid, on the 18th day of January 2019, to the following:

(served by email and USPS)
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Patrick McCabe, Esquire
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(served by email and USPS)
Richard A. Harpootlian
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The Honorable Jana E. Shealy
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VIA HAND-DELIVERY

January 18, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Rooftop Bar, LLC d/b/a Rooftop Bar and Lounge v. South Carolina Department of Revenue***
Appellate Case No. 2018-001870
Our File number: 2176156

Dear Ms. Kitchings,

Enclosed please find the original and six copies of the Respondents-Rooftop Bar, LLC's Intitial Brief and Designation of Matter in the above referenced matter.

Please clock the original and copies and return the clocked copies to the individual that has hand-delivered this package.

By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions or concerns, please do not hesitate to contact our office.

With kind regards, I am

Many Thanks,

Montgomery Willard, LLC

Cristy M. Bradley
Paralegal for Michael H. Montgomery

Enclosures
cc:
Patrick A. McCabe, Esquire
Elisabeth W. Shields, Esquire
Richard A. Harpootlian, Esquire
Jana Shealy, Clerk of Court