THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

Case No. 18-ALJ-17-0002-CC
Appellate Case No. 2018-001870

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 – SOUTH CAROLINA DEPARTMENT OF REVENUE

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ISSUE ON APPEAL

IS THE SOUTH CAROLINA DEPARTMENT OF REVENUE AND THE ADMINISTRATIVE LAW COURT REQUIRED TO EXAMINE FOOD SALE PERCENTAGES TO DETERMINE IF A BUSINESS IS BONA FIDE ENGAGED PRIMARILY AND SUBSTANTIALLY IN THE PREPARATION AND SERVING OF MEALS?

INTRODUCTION

Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge ("Respondent") applied for an on-premises beer and wine permit and liquor by the drink license on September 27, 2017. The Department denied the application because it received several valid public protests pursuant to S.C. Code Ann. § 61-4-525 (2009). When the Department denies the issuance of a license or permit based solely upon public protests, the authority to consider the merits of the protest transfers (by operation of statute) to the South Carolina Administrative Law Court ("ALC") for a contested case hearing involving the applicant, protestants, and the Department. In this type of public protest case, the Department defers to the ALC's determination as to whether the applicant's location is suitable for licensure and, therefore, whether the license and/or permit should be issued.

The ALC ultimately granted Respondent's application for a permit and license on several grounds and numerous factual findings. Due to the Department's unique position in this matter, the Department has not appealed the ALC's findings and does not take a position on all of the issues presented in the Appellant's brief. However, the Department believes the second issue in the Appellant's brief–whether a bar that claims 12% of its gross revenue from food sales is primarily and substantially in the business of preparing and serving meals–is one of utmost importance. For the past ten years, the Department has interpreted and applied the 2008 amendments to S.C. Code Ann. §§ 61-6-20(2) and 61-6-1610 (2009) as eliminating any requirement that an applicant for a liquor license must meet a certain percentage of food sales as a prerequisite to licensure. Likewise, since 2008, the ALC has interpreted those statutes in a manner consistent with the Department. However, the ALC's recent ruling in Five Points Roost v. S.C. Dep't. of Revenue, 2018 WL 1724696 (April 3, 2018), incorrectly resurrected the food sales percentage found in Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Comm'n, 273 S.C. 782, 260, S.E.2d 452 (1979) a requirement that neither the Department or the ALC has

imposed since 2008. As a result, the ALC found that the Brunswick rule applies to any restaurant seeking a liquor license and, therefore, denied the licensure of a separate establishment owned by the Respondent.[1] Relying on the ALC's ruling in Five Points Roost v. S.C. Dep't. of Revenue, 2018 WL 1724696 (April 3, 2018),[2] the Appellant raises Brunswick in this appeal. The Department submits this brief as explanation to the Court of the relevant law and the Department's interpretation of such law. Ultimately, the Department contends that its longstanding interpretation of the 2008 amendments to Title 61 are correct: that food sale percentages are not a legal requirement to determine if a restaurant is primarily and substantially engaged in the preparation and serving of meals.

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 397 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2015) provides the following standard:

> 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

[1] See Five Points Roost, LLC, d/b/a Five Point Roost v. S.C. Dept. of Revenue, 2018 WL 1724696 (April 3, 2018) (denying license and permit where food sales generated only 5% of revenue to the business).

[2] This decision, issued by the same judge in this case, was appealed by the Respondent, Appellate Case No. 2018-001064, but was dismissed once the location in question was sold to a third party.

reverse or modify the decision if the substantive rights of the [Appellant] have been prejudiced because the finding, conclusion, or decision is:

(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 ALC's decision to not rely on Brunswick to determine if a business is primarily and substantially in the business of serving meals should be affirmed because the conclusions reached are not in violation of statutory provisions, and/or affected by other legal error of law; nor, was any conclusion of law arbitrary, capricious, or characterized by the abuse of discretion.

ARGUMENT

I. A MINIMUM PERCENTAGE OF FOOD SALES IS NOT A LICENSE CRITERIA FOUND IN THE STATUTORY REQUIREMENTS FOR OBTAINING A LIQUOR BY THE DRINK LICENSE.

South Carolina law permits only three types of businesses to obtain a liquor by the drink license: nonprofit organizations, businesses which furnish lodging, and businesses which prepare and serve meals. S.C. Const., art. VIII-A § 1; S.C. Code Ann. § 61-6-1820(1) (2009). Chapter 6 of Title 61 specifically defines the statutory requirements for obtaining a Liquor by the Drink (LBD) License as a business who serves and prepares meals. A business qualifies for this type of license only if it is "bona fide engaged primarily and substantially in the preparation and serving of meals. . . ." § 61-6-1610. Moreover, § 61-6-20(2) defines "bona fide engaged primarily and substantially

in the preparation and serving of meals," and § 61-6-1610 provides additional requirements including definitions of "primarily" and "meal".

The Department's longstanding practice is to issue a LBD License to a business who prepares and serves meals when a business meets the technical requirements of the above-referenced statutes. Since 2008, when the General Assembly amended §§ 61-6-20(2) and 61-6-1610 to nullify the holding in Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Comm'n, 273 S.C. 782, 260, S.E.2d 452 (1979), the Department has not required an applicant to meet a minimum percentage of food sales to obtain a LBD License. Likewise, the ALC has not applied the Brunswick "percentage of food sales" test to any business seeking a LBD License until the recent Five Points Roost case.

The Appellant argues that the Court should ignore a decade of administrative practice and find that a business must meet both the technical statutory requirements *and* the percentage of food sales test set forth in Brunswick to obtain a LBD License. Overriding the longstanding practice of the Department would ignore both the plain language of the statutory requirements for a LBD License and the intent of the Legislature to quash a minimum food sales percentage.

A. South Carolina Law Requires Applicants To Meet Specific Statutory Requirements To Obtain A Liquor By The Drink License.

i. The LBD License statutes prior to 2008 did not contain the same criteria for licensure and definitions for "kitchen," "meal," and "primarily" that are found in the LBD License statutes today.

The Alcohol Beverage Control Act ("ABC Act") found in Chapter 6 of Title 61, provides the statutes regarding the regulation of alcoholic liquors within this State. Further, Article 5 of the ABC Act establishes a license to sell alcoholic liquors by the drink and provides statutes regarding the regulation and administration of such licenses. In accordance with the above Constitutional

provision, the General Assembly enacted § 61-6-1610, which provides that "... it is lawful to sell and consume alcoholic liquor sold by the drink in a business establishment ... if the establishment meets the following requirements: (1) the business is bona fide engaged primarily and substantially in the preparation and serving of meals ...." § 61-6-1610.

Prior to 2008, the definition of "bona fide engaged primarily and substantially in the preparation and serving of meals" read:

> (2) "Bona fide engaged primarily and substantially in the preparation and serving of meals" means a business which has been issued a Grade A retail establishment food permit prior to the 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.

S.C. Code Ann § 61-6-20 (2009).[3] In addition to meeting the definition of being "bona fide engaged primarily and substantially in the preparation and serving of meals" as above, an application would also have to meet the license criteria set out in § 61-6-1820, which provided that the Department may issue a liquor by the drink license if "[t]he applicant conducts a business bona fide engaged and primarily and substantially in the preparation and serving of meals. . . ." § 61-6-1820(1). While no further guidance is given in § 61-6-1820 on what constitutes a business "bona fide engaged primarily and substantially in the preparation and serving of meals," the statute provided license criteria that an applicant must meet in order to qualify for a license (e.g. applicant is twenty-one (21) years of age or older (see § 61-6-1820(6)), possesses good moral character (see § 61-6-1820(2)), has not been convicted of a felony within ten years of the application (see § 61-6-1820(8) and others). S.C. Code Ann. § 61-6-1820 (2009).

[3]While the Title year is 2009, the 2008 amended version of § 61-6-20(2) became law in June of 2008, after the General Assembly proposed 2008 Act No. 287 (discussed more fully below).

The General Assembly did not provide criteria for determining whether a business is "primarily" engaged in the preparation and serving of meals as the term is used in the pre-2008 forms of §§ 61-6-20(2), 1610, and 1820(1). As discussed in more detail below, the South Carolina Supreme Court analyzed what "primarily" means as used in the relevant statutes in the case of Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Comm'n, 273 S.C. 782, 260, S.E.2d 452 (1979).

a. *The South Carolina Supreme Court's holding in the 1979 Brunswick case imposed an additional common law requirement for licensure, which was then adopted by the ALC.*

Brunswick is the case that examined the licensing requirements for a bona fide business engaged primarily and substantially in the preparation and serving of meals. In Brunswick, the Supreme Court held that a bowling alley containing a snack bar and lounge did not meet the statutory requirements to be considered "bona fide engaged primarily and substantially in the preparation and serving of meals," and, therefore, was not entitled to a "minibottle license."[4] Id. Crucial to the Supreme Court's analysis was the fact that the statutory requirements at that time did not define "primarily and substantially." Consequently, the Court looked to the dictionary definition and determined that "primarily," as it was used in the statute,[5] meant "of first importance" of "principally." Id. at 783, 260 S.E.2d at 453. In applying this definition to the facts of the case, the Supreme Court concluded that "a business which attributes only 10% of its gross revenues to food preparation and sale does not fulfill the 'primarily' and 'substantially' requirement of the statute." Id. at 784, 260 S.E.2d 453.

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[4]A "minibottle" license was the previous form of the current LBD License.

[5]At the time of Brunswick, the "primarily and substantially" language currently found in §§ 61-6-20 and 1820 was found in S.C. Code Ann. §§ 61-5-20(4) and 61-5-10(1) (2009).

While no other South Carolina appellate courts have addressed the food sales requirement discussed in Brunswick, the minimum food sales percentage test (the "Brunswick rule") has been considered in several ALC cases in determining whether a business establishment qualifies for a LBD License.[6] In 2008, the General Assembly amended §§ 61-6-20(2) and 61-6-1610 and in so doing eliminated the need to analyze food sale percentages.

ii. The General Assembly amended the statutory LBD License requirements in 2008, abrogating the minimum food sales requirement established in *Brunswick*.

The General Assembly amended §§ 61-6-20(2) and 61-6-1610 in 2008. See 2008 Act No. 287. The purpose of the Act was "to Amend Section 61-6-20 ... relating to definitions for purposes of the Alcohol Beverage Control Act, so as to revise the definition for an establishment serving meals; and to Amend Section 61-6-1610 ... 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." 2008 Act No. 287 (emphasis added).

After these amendments, § 61-6-20(2) provides 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 table for the service of meals that:

[6]See S.C. Dep't of Revenue v. Flipside 2, Inc. d/b/a/ Revolutions, 2006 WL 1126421, at *3 (Apr. 4, 2006) (denying license where less than 5% of revenues were attributable to food sales); Samuel Gamble, d/b/a Casablanca II 1807 Front St., Georgetown, SC, Petitioner, 2003 WL24004754, at*2 (Aug. 14, 2003) (denying license because proposed location "derives no more than 20% of its profits from the sale of food" and because it only offered a meal on half of the days it was open); With Owl's Eyes of Spartanburg, LLC, d/b/a Hooters, Petitioner, 2007 WL 1876430, at *2 (May 17, 2007) (granting liquor license where the evidence showed, among other things, that approximately 79% of the earning will be derived from food sales); and Nicholas Bishop, d/b/a the Barn Grille, Petitioner, 2007 WL 7577270, at *1 (Jan 22, 2007) (granting liquor license where evidence showed, among other things, that approximately 60% of its earnings will be derived from food sales).

> (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 discernable by the guest or patrons; and
>
> (c) prepares for service to customers, upon the demand of the customer, hot meals at least once a day the business establishment chooses to be open.

Section 61-6-20(2)(a)-(c). Further, the General Assembly amended § 61-6-1610 to add section (I), which incorporates the definitions of "kitchen" "meal" and "primarily" as defined by the Department in S.C. Code Ann. Regs. 7-401.3 (Supp. 2016). Specifically, § 61-6-1610(I) provides:

> (1) "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. The area must be adequately equipped for cooking, serving, and storage of solid foods and must include at least twenty-one cubic feet of refrigerated space for food and a stove.
>
> (2) "Meal" means an assortment of various prepared foods available to guests on the licensed premises 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.
>
> (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 the guests and patrons during the normal meal times 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.

Section 61-6-1610(I).

The clear import of the 2008 amendments was to alter the analysis for determining whether an applicant is primarily and substantially in the business of serving meals. Instead of examining

a concrete number or ratio–that is, the percentage of sale attributable to food versus total gross sales–the analysis focuses on whether the sale of food is a regular source of business to the licensed establishment, that meals are served upon the demand of the guests and patrons during the normal meal time 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. In other words, the statutes now frames the appropriate analysis as whether an applicant is ready, willing, and able to sell food–not whether it actually sells it. See, e.g., S.C. Dep't of Revenue v. Flipside 2, Inc. d//b/a Revolutions, 2006 WL 1126421, at*1 (Apr. 4, 2006) (noting that a licensed business cannot "force people to eat"). This is the current statutory framework of the LBD License requirements that the Department follows when determining whether to issue or renew a LBD License. Based upon the 2008 changes, the Department looks to whether an applicant has the required facilities and supplies to be a restaurant and not whether the applicant has a certain percentage of food sales. One ALC case demonstrates the effects the 2008 amendments had on the Brunswick rule and how the amendments removed the need to inquire into an applicant's food sales.

a. Tavern on Greene *and the ALC's acknowledgment of the General Assembly's abrogation of the minimum food sales requirement.*

In 2009, the ALC recognized the impact of the 2008 amendments discussed above almost immediately in the case of Jok, Inc., d/b/a the Tavern on Greene v. S.C. Dep't of Revenue, 2009 WL 8239740 (May 29, 2009).[7] In this case, the ALC held a contested case hearing regarding a public protest of Tavern on Greene's renewal of its on-premises beer and wine permit and LBD License. Id. Evidence showed that food sales accounted for 10-20% of Tavern on Greene's gross sales. Id. at*2. The ALC initially denied the renewal of the LBD License citing Brunswick and

[7] Ironically, Tavern on Greene was located in the same Five Points entertainment district in Columbia as the Respondent in this appeal.

finding that the food service was a "'very minor' portion of [the] business comprising less than 10-20% of [its] revenue" and "[t]herefore, [Tavern on Greene] is not primarily or substantially engaged in the preparation and serving of meals in violation of Section 61-6-1820." Id. at *7.

However, Tavern on Greene filed a Motion to Reconsider based upon the 2008 amendments to LBD License statutory requirements, and the ALC subsequently reversed its prior holding and granted the renewal of the LBD License. Jok, Inc., d/b/a the Tavern on Greene v. S.C. Dep't of Revenue, 2009 WL 8239741 (June 23, 2009). In doing so, the ALC noted that the 2008 Act No. 287 amended § 61-6-1610 (captioned "Food-service establishments or places of lodging") to add subsection (I), which provides definitions for the words "kitchen," "meal," and "primarily." Id. *5. Based upon the newly amended definition of "primarily" and no longer relying on the definition provided in Brunswick, the ALC found that "it is clear from the evidence that the serving of meals by [Tavern on Greene] at its location is a regular source of its business" and, therefore, it met the requirements of § 61-6-20(2) as amended. Id. *5. Thus, despite the fact that less than 20% of the total revenues were attributable to the sale of food, a fact the ALC had originally found was dispositive in determining whether the business met the statutory requirements, the ALC subsequently concluded that Tavern on Greene met the statutory requirements for a LBD License as amended because "the serving of meals . . . at its location is a regular source of business." Id. (Emphasis added). Notably, the ALC removed any reference to Brunswick from its final order following the Motion to Reconsider.

Tavern on Greene is an important case because it establishes the ALC's recognition that the 2008 amendments eliminated analysis of food sale percentages as an element for satisfying the LBD License statutory requirements. In fact, since 2008 only one ALC decision has relied on

Brunswick or imposed the Brunswick rule as a requirement for licensure.[8] Just as the ALC in Tavern on Greene did not consider food sale percentages following the motion to reconsider, the Department has not interpreted the amended statutes to require a minimum food sales percentage for the applicant to be primarily and substantially engaged in preparing and serving meals. The Department relies on the plain language of the statutes and the intent of the Legislature in excluding any minimum food sales percentage requirement in the 2008 amendment.

B. Based On The Plain Language Of The Relevant Statutes And The Intent Of The Legislature In Its 2008 Amendments, The Department Has Not Required A Minimum Food Sales Percentage To Obtain A LBD License.

The relevant statues setting forth the requirements to be considered "bona fide engaged primarily and substantially in the preparation and serving of meals" are unambiguous. So long as the business can meet the technical requirements set forth in §§ 61-6-20, 1610, and 1820, the Department may issue a LBD License. Accordingly, the Department does not required an applicant to demonstrate a minimum food sale percentage before gaining a LBD License because imposing such a requirement goes beyond the plain language of the statutes and the intent of the Legislature in its 2008 amendments.

i. A minimum food sale percentage is not a requirement for licensure under the plain language of the statutory requirements.

"Where a statute's language is plain and unambiguous and conveys a clear and definite meaning, the court has no right to impose another meaning." Epstein v. Coastal Timber Co., Inc., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). To impose another meaning to a statute which is clear and unambiguous would either limit or expand the statute's application. Id. A reading of the

[8]See Five Points Roost, LLC, d/b/a Five Point Roost v. S.C. Dept. of Revenue, 2018 WL 1724696 (April 3, 2018).

plain language of the amended §§ 61-6-20 and 1610 shows that there is no statutory minimum food sales percentage requirement in order to obtain a LBD License in South Carolina.[9]

In this case, the Appellants argue that the ALC should find "[t]he upper bound of Rooftop's food sales is just 15 percent, while the predominant emphasis of the business is the sale of alcohol, and first and foremost liquor." (R. p------------; Intervenor's Proposed Order p 10: 5-7). And that the Respondent "cannot be found to be a restaurant because the sale of food contributes, at most 15 percent of revenue to the business." (R. p------------; Intervenor's Proposed Order p 19:8-9). "[W]here food consists of just 12 percent of gross sale receipts, the applicant is indistinguishable from the bowling alley in Brunswick and falls short of Article VIII-A§1's mandate." (R. p---------; Initial Brief of Intervenors p 33:14-15). For all intents and purposes, the Appellant asks the Court to ignore the 2008 amendments and find an additional requirement in the statutes that does not exist. Requiring the Respondent to meet some unspecified ratio[10] would erroneously expand the

[9]There are several states that use sales percentages to determine alcohol license eligibility. Those states have done so by explicit legislative action. See e.g. NC Gen. Stat. Ann. § 18B-1000(6) (2018) (gross receipts from food and nonalcoholic beverages shall not be less than thirty percent of total gross receipts); Va. Code Ann. § 4.1-210 (2018), (mixed beverage licenses only granted to persons who operate a restaurant and whose gross receipts of food and nonalcoholic beverages amount to at least forty-five percent of the gross receipts from the sale of mixed beverages and food); Tenn. Code Ann. § 57-4-102 (22) (2018) (limited service restaurant is a facility where the gross revenue from sale of prepared food is less than fifty percent of the revenue generated from the sale of alcoholic beverages); Miss. Code Ann. § 67-1-5 (M)(i) (2018) (no place can qualify as restaurant unless 25% of revenue is generated from preparation and serving of meals); Ga. Code Ann. § 3-1-2-3 (2018) (the statute defines eating establishment as that which derives at least 50% of annual sales from the sale of prepared meals or food); and Utah Code Ann. § 32B-6-305.2 (2018) (70% of full-service restaurant's total business must be from the sale of food).

[10]The South Carolina Supreme Court never determined what percentage of gross sales attributed to food preparation would fulfill the primarily and substantial requirement of the § 61-5-20(4)(a), only that 10% of gross sales attributed to food preparation did not meet the requirements.

language of the LBD License Statutes and ultimately create a question of the percentage of food sales needed to be considered a restaurant.

ii. The Legislature abrogated the definition of primarily utilized by the *Brunswick* Court when it enacted its own definition of primarily.

In Brunswick, the Supreme Court held that a business must not only meet the technical requirements outlined in the statute, but must also actually be "primarily engaged in the preparation and serving of meals," Brunswick at 784, 260 S.E.2d at 453. As the licensing statute at the time of Brunswick did not include a definition of "primarily," the Brunswick Court used the dictionary definition of "primarily" ("of first importance" or "principally"). Brunswick at 783, 260 S.E.2d at 453. However, when the General Assembly amended § 61-6-1610 in 2008 it adopted the definition of "primarily" that was used in Department's regulations, Regulation 7-401.3. The Legislature is presumed to be familiar with prior judicial decisions when it enacts or amends statutes. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013). Therefore, the Legislature knew of the definition of "primarily" used by the Brunswick Court when it enacted § 61-6-1610(I) in 2008 and by enacting a specific definition of "primarily" in the 2008 amendments, the Legislature did not set out to overrule the constitution, as the Appellant argues, but to purposefully abrogated the definition of "primarily" used by the Brunswick Court.

iii. The Department's construction of the plain language of the LBD License statutory requirements is entitled to deference.

In analyzing the weight given to administrative agencies interpretations of the statute, South Carolina uses what is commonly called the deference doctrine. This doctrine provides that "[t]he construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not be overruled without cogent reasons." Kiawah Development Partners, II v. South Carolina Dep't of Health & Envtl. Control, 411 S.C.

16, 33, 766 S.E.2d 707, 718 (2014). "We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight and should not be overruled without cogent reasons." Etiwan Fertilizer Co. v South Carolina Tax Comm'n., 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950).

The Department is charged with the duty of exercising and administering the alcohol laws within Title 61. See S.C. Code Ann. § 61-2-20 (2009). This includes the laws regarding applications for and the issuance of liquor by the drink licenses under Article 5 of the ABC Act, including the laws for LBD Licenses. The South Carolina Supreme Court has held the court generally gives deference to an administrative agency's interpretation of an applicable statute. Brown v. Bi-Lo, Inc., 354 S.C 436, 440, 581 S.E.2d 836, 838 (2003).

The Department does not currently require an applicant to meet a minimum food sales percentage to obtain a LBD License as the plain language of §§ 61-6-20 and 61-6-1610 does not impose such a requirement. In the past, the Department sought to revoke the LBD License of businesses that did not satisfy the Brunswick rule.[11] However, the Department has not relied on Brunswick in any manner since the General Assembly amended the statutes in 2008. The Appellant argues that the Brunswick rule still applies. If this Court were to disregard the work of the General Assembly and make the Brunswick rule a permanent requirement for all applicants of LBD Licenses, the imposition of a minimum food sales percentage requirement will pose impractical results to all current and future LBD License holders.

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[11] See S.C. Dep't of Revenue v. Flipside 2, Inc. d/b/a Revolutions, 2006 WL 1126421 (Apr. 4, 2006).

C. The Addition Of A Minimum Food Sales Percentage As An Additional Requirement To The Existing Statutory Requirements Will Prove To Be Impractical.

Not only is the Department's longstanding practice and construction of the LBD License laws entitled to deference, but the resurrection of the Brunswick rule and imposition of a required food sales percentage will likely lead to unintended consequences and enforceability problems that would result from imposing a required minimum food sales percentage.

i. A minimum food sales requirement cannot be applied consistently between applications as each application may have a different length of time from which sales records can be obtained.

The Department receives and reviews both new applications for applicants seeking to obtain a new alcohol license(s) and renewal applications for applicants seeking to renew their current alcohol license(s). As stated above, the Department does not conduct an analysis of the applicant's food sales when reviewing a new or renewal application. To require such an inquiry would lead to inconsistent treatment of applicants for several reasons.

First, the Department would be unable to apply the Brunswick rule to new applicants who have never been opened for business and consequently have no figures regarding sale revenues. It is customary for the Department to receive applications from applicants who have not opened their business. This is due to the fact the applicant does not seek to incur the costs of opening and operating a business until it is certain that they have obtained a LBD License. If the Department were to require a minimum food sales percentage to these applications, the Department would be forced to evaluate the applicants based upon a nonexistent food sales figures, which does not reflect the applicant's future business. Second, the Department also receives new applications for LBD Licenses from applicants who are purchasing an existing business and, therefore, may be operating under a temporary license and/or permit granted by the Department under S.C. Code Ann. §§ 61-

4-210 and/or 61-6-2005 (2009).[12] Under these circumstances, the Department would be required to determine whether an applicant satisfies the Brunswick rule based solely on sales made during the time the applicant possessed the temporary license and/or permit, which is no longer than one hundred and twenty days from the date of the Department's issuance of the temporary license and/or permit unless an extension is granted by the ALC, as was the case in this matter. See §§ 61-4-210 and 61-6-2005. Again, this is an impractical period by which to measure the reality of an applicant's future sales revenue, as in most cases the figures are reflective only of a business' start-up revenue.

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[12]Section 61-4-210 provides, in pertinent part:

> (A) A person who purchases or acquires by lease, inheritance, Divorce, decree, eviction, or otherwise a retail business which sells beer or wine from a holder of a retail permit to sell beer or wine at the business, upon initiating the application process for a biennial retail beer or beer and wine permit, may be issued a temporary retail beer or beer and wine permit by the department at the time of the purchase or acquisition if the location for which the temporary permit is sought is not considered by the department to be a public nuisance and:
>
> (1) the applicant currently holds a valid beer or beer and wine permit; or
>
> (2) the applicant has had a criminal history background check conducted by the division within the past thirty days.
>
> (B) A temporary beer or beer and wine permit issued pursuant to subsection (A) is valid until a biennial retail beer or beer and wine permit is approved or disapproved by the department, but in no case is it valid for more than one hundred twenty days from the date of issuance.

Section 61-6-2005 provides essentially the same language, except it applies to selling alcoholic liquors by the drink.

This raises the question of what would be the appropriate length of time a business should be allowed to operate before examining its sales to determine the food sales percentage. As the length of time could vary from application to application–i.e., new applications operating under a temporary license versus renewal applications, where there could be up to two years of sales information–the application of food sale percentage analysis rule is impractical.

ii. The imposition of a minimum food sales requirement does not take into account the type of business applying for a LBD License or other circumstances which may attribute to low food sales.

The minimum food sale established by Brunswick does not take into account the type of business operating under the license, which is surprising when you consider that the business under review in Brunswick was a bowling alley. In the Brunswick case, the South Carolina Supreme Court noted that 10% of Brunswick's gross sales were derived from the preparation and sale of food, while 80% of its gross sales derived from Brunswick's bowling operation. Brunswick at 783, 260 S.E.2d at 452.[13] Consequently, the Court determined that Brunswick was not engaged primarily and substantially in the business of preparing and serving meals. Id at 784, 260 S.E.2d at 453.

Using this reasoning, it would suggest that no business whose largest source of revenue is the sales or operation of something other than food or alcohol–even though the business is ready, willing, and able to sell food–would qualify for a LBD License. Arcades, golf courses, or comedy clubs may never qualify for a LBD License depending on its ratio between food sales and the total gross from its entire business operation. As discussed above, the definition of "primarily" in § 61-

[13]It is worth mentioning that the South Carolina Supreme Court did not compare Brunswick's gross food sales against its revenue generated by alcohol sales.

6-1610 only requires that the sale of food be a regular source of business–not a "principal" source of business as the Brunswick Court held. Consequently, the plain language of "primarily" definition in § 61-6-1610 now allows businesses that have other sources of revenue, whether they be primary or secondary, to obtain a LBD License. Requiring a minimum food sale percentage will render ineligible many businesses that are currently eligible for and hold a LBD License.

Determining qualifications for a LBD License based upon food sales percentages also fails to take into account other circumstances which may ascribe to low food sales, such cases where the applicant has a full kitchen and menu and is prepared to serve meals to its customers, but customers do not choose to order food. The ALC grappled with this specific issue in a case decided just two years before the 2008 amendments, where the ALC found that food sales made up just 1–3% of monthly revenues, but acknowledged the problem that licensed business could not "force people to eat," S.C. Dep't of Revenue v. Flipside 2, Inc. d/b/s Revolutions, 2006 WL 1126421, at *1 (Apr. 4, 2006) ("nevertheless, [the applicant] asserted that he cannot force people to eat. I find that assertion not only true but also reflective of efforts by Respondent and relevant to the appropriate penalty. Respondent has made efforts to employ an individual to cook if requested and has also spent significant funds to equip the kitchen with an Air Master Oven as suggested by the SLED agent. Accordingly, I do not find that a penalty against the Respondent's beer and wine permit is warranted.") The Appellant's interpretation requires that a licensee not only have the required facilities and personnel to operate a restaurant, but, moreover, that the licensee be a successful restaurant. The statutes as written do not require that a restaurant be successful in its efforts to sell meals, only that it have the facilities and supplies to provide such meals if requested.

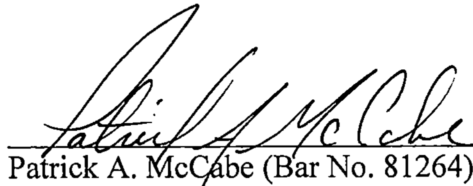
CONCLUSION

In this case, the Appellants contend that the Department does not correctly implement the statutory requirements for a LBD License. (See R. pp--------; Tr. pp. 51:7-52:2, 67:13, 73:16-75:21, 80:5-14). Specifically, the Appellants proposed to the ALC that a business which can only attribute 15% of its gross sale to the business of food is not entitled to a LDB license (See R. p. -----; Intervenor's Proposed Order p. 20:3-5) and that the Department should audit businesses seeking to obtain a LDB license in order to determine if a business's sale meet this threshold. (See R. p. -----; Tr. pp. 51:8-11, 67:13). However, in their brief, the Appellants argue that that "12 percent of gross sale receipts is indistinguishable from the bowling alley in Brunswick…." (R. p.----; Initial Brief of Intervenors p. 33:14-15). The inconsistency of percentages in the Appellant's argument is a perfect example of why the General Assembly abrogated the definitions found in Brunswick. An undefined percentage can be changed on a case-by-case basis; thereby, creating situations where businesses that are similar in nature may not receive similar treatment. The issuance of a LBD License should be based upon a set of quantifiable factors that business owners can rely upon, not an unfixed percentage that is subject to change.

As discussed above, the plain language of the statutory requirements for a LBD License, as they are written today, demonstrates that the statutes do not impose a minimum food sales percentage on applicants nor do the statutes require the Department to audit an applicant's sales to determine an applicant's food sales. To impose a minimum food sales requirement would expand the application of the statute and counteract with the General Assembly's intention of abrogating the food sales requirements when it amended the LBD statutes in 2008.

For the foregoing reasons, the LBD License requirements, specifically §§ 61-6-20 and 1610 do not require that a business meet a minimum food sales percentage to be considered "bona fide primarily and substantially engaged in the preparation and serving of food" and the General

Assembly abrogated such a requirement when it amended the relevant statutes in 2008. Therefore, the Department respectfully requests this Court affirm the Department's (and ALC's) longstanding interpretation of the LBD License requirements and find that the Brunswick rule is no longer a prerequisite to obtaining a LBD License and therefore, the law does not require the Department to examine food sale percentages to determine if a business is bona fide engaged primarily and substantially in the preparation and serving of meals.



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January 18, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden, Administrative Law Judge

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Case No. 18-ALJ-17-0002-CC
Appellate Case No. 2018-001870

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

v.

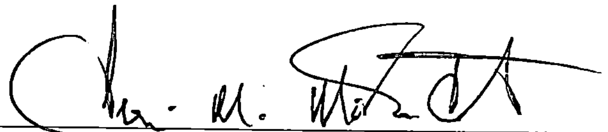
South Carolina Department of Revenue,..Respondent,

and

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

PROOF OF SERVICE

I, Tonie M. Miranda, hereby certify that I have caused to be mailed a copy of South Carolina Department of Revenue's Initial Brief of Respondent and Designation of Matter to be included in the Record on Appeal regarding the above-referenced case, by causing a copy of same to be deposited in the United States Mail, postage prepaid, on January 18, 2019, addressed to the attorney(s) of record, Michael H. Montgomery, Esquire, Montgomery Willard, LLC, PO Box 11886, Columbia, SC 29211-1186 and to Richard A. Harpootlian, Esquire, Richard A. Harpootlian, P.A., P.O. Box 1090, Columbia, SC 29202, and by hand delivery to the Court of Appeals, 1220 Senate Street, Columbia, SC 29201.



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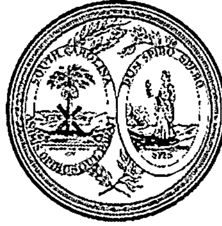

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January 18, 2019

RECEIVED
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SC Court of Appeals

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

Re: Thomas R. Gottshall and April C. Lucas v. Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge and South Carolina Department of Revenue
Appellate Case No. 2018-001870
ALC Docket No. 18-ALJ-17-0002-CC

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the following documents in the above-referenced matter:

1. Initial Brief of Respondent – South Carolina Department of Revenue;
2. Respondent – South Carolina Department of Revenue's Designation of Matter to be included in the Record on Appeal; and
3. Proof of Service.

Should you have any questions, please do not hesitate to contact me at 803-898-5056 or Patrick.McCabe@dor.sc.gov.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

Patrick A. McCabe
Counsel for Litigation

c: Richard A. Harpootlian, Esquire for Thomas R. Gottshall, Intervenor, Appellant, and April C. Lucas – Intervenor, Appellant
Michael H. Montgomery, Esquire, for Respondent

Enclosures
PAM: tm