THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

REPLY BRIEF OF INTERVENORS, APPELLANTS GOTTSHALL AND LUCAS

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APRIL C. LUCAS

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ARGUMENT IN REPLY

Appellants and 10 other residents from three Five Points-adjacent neighborhoods, the University of South Carolina (USC), the Columbia Police Department (CPD), an expert criminologist, and the Administrative Law Court (ALC) all agree that Five Points has become a place where throngs of inexperienced drinkers overconsume cheap liquor late at night while burdening local law enforcement and neighbors with anti-social behavior. The business model that has fueled this growing public health and safety crisis is illegal. Rooftop impliedly concedes it was at least conceived as an illegal business enterprise, arguing that "[a]s its business and operations evolved, Rooftop continued to modify the business model to focus on the sale of food and meals." Rooftop Br., 4. Put differently, Rooftop has never been a business primarily and substantially engaged in the preparation and service of meals—it is the modern iteration of the public saloon.

Appellants, the other protestants, and their counsel have joined together to stamp out Rooftop and other illegal businesses that have gone under- and unregulated for far too long while adversely affecting the peace and enjoyment of property held by law-abiding citizens and the safety of their community. The South Carolina Department of Revenue (DOR) sheds considerable light on just how conditions have deteriorated to the point that the ALC *twice* found that Five Points is an area where crowds of underage students congregate, loiter, and overconsume and disturb the peace of nearby residents. R. App. 5–11; see also Five Points Roost, LLC, d/b/a Five Points Roost v. S.C. Dep.'t Rev. (Roost), No. 18-ALJ-17-0005-CC, 2018 WL 1724696 (S.C. Admin. Law. Ct. Apr. 3, 2018) (Durden, J.)). DOR explains that over the last decade it has construed the State's statutory licensure regime to have eliminated any minimal food requirement, focusing instead on whether an establishment meets technical requirements. See DOR Br., 2–5. That approach is deeply misguided, and it fails to address one of Appellants' two grounds to reverse the decision

below. Even assuming DOR is correct in its application of South Carolina Code §§ 61-6-20(2) and 61-6-1610 (2009)—something Appellants do not concede—that regime cannot abrogate a constitutional floor on the sale of liquor by the drink for on-premises consumption. That mandate restricts licensure to a business "engage[d] primarily and substantially in the preparation and serving of meals" (S.C. CONST., art. VIII-A § 1), a standard Rooftop does not meet under any fair reading of the record.

Rooftops' *ad hominin* attacks do not diminish Appellants' rights to appear for this purpose (see S.C. Code Ann. § 61-4-525), nor are they persuasive grounds to ignore the rule of law in this case or any other. Appellants respectfully offer the following suggestions in reply.

I. Rooftop's view of suitability analysis is inconsistent with the precedent it cites.

Rooftop's view of suitability analysis is confused and incorrect. The bar advances the ALC's view that alcohol-related harms must flow directly from Rooftop before a court can find the proposed location unsuitable. See Rooftop Br. 10. It points to Palmer v. South Carolina Alcoholic Beverage Control Commission, 282 S.C. 246, 317 S.E.2d 476 (Ct. App. 1984) for the proposition that suitability implicates a "variety of considerations" touching on the enterprise and its impact on the community, and it relies on Kan Enters v. South Carolina Department of Revenue, 420 S.C. 596, 803 S.E.2d 882 (Ct. App. 2017) for the proposition that an applicant can be found unsuitable based on occurrences at the location. See Rooftop Br. 10–11. Appellants have no quarrel with these basic propositions, but they fail to address the suitability question presented. Instead, Rooftop cites this precedent for the proposition that a location cannot be held unsuitable unless there is a causal link between it and community harms. This conclusion does not follow.

Here, the Final Order cited "ample evidence" of public, alcohol-related harms in Five Points but failed to credit *any* of it as evidence of unsuitability unless it was directly tied to

Rooftop's operation (R. App. 5)—thus creating an evidentiary requirement of a causal connection between the applicant and conditions on the ground that support an unsuitability finding. This approach is novel and unsupported by precedent, including the authority cited by Rooftop. In Palmer, the sole issue on appeal was the sufficiency of the evidence supporting the ABC Commission's finding that the location was unsuitable for a beer and wine permit. Palmer, 282 S.C. at 248, 317 S.E.2d at 477. In affirming the Commission's determination, the Court of Appeals cited the following evidence:

> The location known as Kountry (sic) Korner, Route 3, Box 1542, Laurens, South Carolina, is a business operated as a convenience store. *It is approximately one (1) mile from Kagines Shoals on Ravens Creek, the "shoals" (sic) are known as a source of law enforcement difficulty.* The location is at least three (3) miles from the nearest town. It is located in a rural, residential area; this would indicate that necessary law enforcement is not immediately available. The intersection at this location is a dangerous one, with relatively heavy traffic. This complicates the law enforcement problem.

Id. (emphasis added). Thus, the adverse consideration weighing against the applicant's permit was *not* a public harm flowing from the location itself—it was the applicant's proximity to a high-crime area a mile away from the proposed location. So, while Rooftop cites Palmer (correctly) for the proposition that suitability turns on the nature and operation of the proposed business and its impact on the community (see Rooftop Br. 10), courts have never applied that standard myopically as the ALC did below and Rooftop encourages here. Indeed, if the Commission in Palmer was correct to consider the applicant's possible adverse effect on a location a mile away, then the Final Order erred when it reasoned that public harms in the immediate vicinity of Rooftop were irrelevant to its suitability analysis.

Rooftop urges the Court to look to Kan as the proper standard for discerning suitability because, in that case, "the Court found that [the applicant] was no longer a suitable location based upon occurrences in the record **specifically occurring on its premises**." Rooftop Br. 11 (emphasis

original). Rooftop's reading of the rule in Kan is overstated. In Kan, DOR found the applicant met statutory requirements, but denied the application based on public protests arguing that renewing the permit would promote "littering, panhandling, loitering, public drunkenness, and other criminal activity *in its vicinity and nearby community*." Kan, 420 S.C. at 599, 803 S.E.2d at 884 (emphasis added). In addition to these concerns, the applicant had been cited for selling alcohol to a minor and required significantly more police services than nearby convenience stores. Id. at 599–600, 803 S.E. at 884–85. Thus, the decision to deny the applicant's reapplication turned on community harms *and* specific bad acts. As Appellants have previously explained, while bad acts by an applicant are sufficient grounds to deny a permit or license, they are not the exclusive grounds to do so because suitability analysis requires a court to consider the community's interests without regard for whether the applicant acted lawlessly or immorally. See App. Br. 22–24 (citing, e.g., Schudel v. S.C. ABC Comm'n., 276 S.C. 138, 140–41, 276 S.E.2d 308, 309 (1981); Terry v. Pratt, 258 S.C. 177, 185, 187 S.E.2d 884, 888 (1972)). Bad acts by the applicant fall within the purview of other licensure criteria. See App. Br. 24–26. Kan reinforces this conclusion and Rooftop fails to explain why adopting its view here will not frustrate the statutory permitting and licensure regime by blurring these otherwise distinct analytical concepts. While location specific harms are certainly sufficient to justify a denial, they are not necessary.

Kan is also instructive as to Rooftop's claim that the ALC should have found this case akin to Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973). Rooftop contends the circumstances of this case "are not distinguishable" because there "is no evidence that the location at 638 Harden Street is less suitable for licensing now than it has been in the past." Rooftop Br. 12. However, Taylor turned on the Supreme Court's finding that testimony adverse to the applicant consisted

"entirely of opinions and conclusions which are not supported by any facts." Taylor, 261 S.C. at 171–72, 198 S.E.2d at 802. That is *not* the case here as the ALC distinguished Taylor and found:

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

R. p. 12. This factual finding is backed by first-hand accounts from residents and law enforcement and corroborated by data collected by USC officials and an expert criminologist. While Rooftop maintains the record is "bereft of any support that the neighborhood is worse than it was" (Rooftop Br. 12), the ALC soundly rejected that assertion.

In Kan, the Court of Appeals rejected an argument based on Taylor similar to the one raised by Rooftop. Like Rooftop here (see Rooftop Br. 12–13), the Kan applicant argued the ALC misapplied Taylor by not requiring proof that the applicant was less suitable than it was during a prior application. The Court of Appeals disagreed based on reasoning that further undermines the Final Order's legal reasoning in this case:

> In the instant case, Kan argues the ALC misapplied Taylor to this case, stating no evidence was presented at the hearing showing that A1's location was any less suitable for the sale of beer and wine now than in the last twenty years it has operated under a permit or its last renewal in 2012. In other words, Kan seems to contend that, under Taylor, the DOR may not deny an off-premises permit renewal unless it is proven that conditions surrounding a proposed location are worse than at the time of the permit's initial issuance or last renewal.
>
> *Contrary to Kan's position, we find Taylor does not articulate a more lenient suitability standard for the renewal of an off-premises permit as opposed to its initial issuance*. Although the supreme court in Taylor considered the fact that the grocery store had operated under prior beer permits, the ultimate inquiry remained whether its location was a proper one for the sale of beer. See id. at 172, 198 S.E.2d at 802 ("The order of [the ABC] denying the permit assigns no factual basis or reason for its finding of unsuitability and the record before us reveals none."). Upon

> our review of the record in the instant case, substantial evidence supports the ALC's findings that conditions at A1 made it unsuitable for the sale of alcohol.

Kan, 420 S.C. at 605–06, 803 S.E.2d at 887 (emphasis added, footnote omitted). Properly read, Taylor merely stands for the proposition that speculative testimony is insufficient to establish harms that mitigate against suitability. The sufficiency of the evidence is not at issue here, while the ALC's application of the evidence (or failure thereof) is disputed.

The ALC's Final Order found specific, concrete harms that speak to the myriad of factors properly weighed during a suitability analysis, but then failed to credit any of this evidence and instead looked for a causal link between Rooftop's relatively new enterprise and those public harms. That approach is nearly identical to the argument that was *rejected* in Kan and is inapposite with precedent like Palmer, Schudel, and Terry.

II. Appellants offer the only credible reading of the Constitution's primary-and-substantial requirement.

The conditions on the ground in Five Points have deteriorated because the state agency principally responsible for enforcing this State's liquor laws has failed to abide by the first among those laws. As Appellants have explained (and no litigant has disputed), article VIII-A § 1 of the South Carolina Constitution establishes a constitutional floor for the on-premises sale of liquor by the drink by limiting such activity to a business primarily and substantially engaged in the preparation and service of meals. See App. Br. 18–19 & 27–33. Whatever *additional* regulation the General Assembly may choose to impose on the sale of liquor for on-premises consumption, those requirements are second to this constitutional regulation.

Over the last decade, the primary-and-substantial requirement has been overlooked and ignored by DOR and other regulatory investigators like the South Carolina Law Enforcement Division (SLED) in favor of a statutory scheme DOR construed to remove any such requirement.

It explains, "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." DOR Br., 2. Of course, it was during that decade that bar crowds in Five Points grew ever larger and more raucous. See R. App. 513:8–23, 518:19–23, 555:14–19 & 577:3–7. Still, according to DOR, there is no basis in law for *any* minimal food-service requirement based on the Department's "longstanding interpretation" of the 2008 amendments to Title 61. DOR Br., 2–3. Instead, DOR's 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 statute." DOR Br., 5 (emphasis added); cf. App. Br. 32–33 (blaming the check-list approach for the proliferation of illegal drinking establishments in Five Points). While DOR's candor on this point is laudable, its position is not on point and should be afforded no deference here.

First, whatever effect the 2008 amendment may have had to the South Carolina Code, it certainly did not abrogate the constitutional mandate that on-premises liquor consumption be limited to businesses engaged primarily and substantially in the preparation and service of meals. The procedure capable of abolishing this regulatory mandate requires action by the General Assembly *and* the people. See S.C. CONST., art. XVI. For its part, Rooftop acknowledges the constitutional mandate but appears to read it as a *grant* of constitutional authority rather than a limit placed on the General Assembly's police power. See Rooftop Br. 14–15 (stating, without explanation or citation, the Constitution's "only" limitation on the sale of liquor for on-premises consumption is that the business is engaged "primarily and substantially in the preparation and serving of meals, during such hours as the General Assembly may require."). As to precisely what the primary-and-substantial requirement means, Rooftop contends the Constitution "leaves this

determination to the Legislature" (Rooftop Br. 15) but fails to address the fact that the Constitution serves as a *limit to* legislative power. See App. Br. 31. Put differently, in the absence of article VIII-A § 1, the Court would rightly presume the General Assembly exercises plenary police powers, but that is not the constitutional landscape here. Thus, the question Rooftop and DOR should have addressed is what legislative restraint or constitutional floor is imposed by the primary-and-substantial requirement. Neither provides a plausible explanation.

Correctly, DOR does not suggest the General Assembly could abrogate article VIII-A § 1 by statue but argues instead that Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Commission, 273 S.C. 782, 260 S.E.2d 452 (1979) was abrogated by the 2008 amendments to the code. See DOR Br. 5; see also Rooftop Br. 15. While DOR is correct that Brunswick considered then-section 61-5-20(4), which has since been replaced (see App. Br. 28 (acknowledging the same)), Brunswick is controlling here because it is the only authority to construe what it means to be a business "[b]ona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging[.]" See Brunswick Capitol Lanes, 273 S.C. at 783, 260 S.E.2d at 452. That language is almost identical to the constitutional floor for licensure set by article VIII-A § 1 and no appellate court has spoken since Brunswick to suggest this language should be construed any different. Cf. DOR Br. 8 (agreeing no appellate court has reexamined the issue). As Appellants explained, the primary-and-substantial requirement serves a specific purpose—prohibition of the public saloon—based on a long history in this state (and others). See App. Br. 18–20. Again, DOR takes no issue with this proposition. Thus, assuming the Department correctly reads the current statutory regime to "frame[ ] the appropriate analysis as to whether the applicant is ready, willing, and able to sell food—not whether it actually sells it" (DOR Br. 10), the Constitution still requires something more.

Notwithstanding the General Assembly's power to *add* licensure requirements, article VIII-A § 1 requires that a licensee is, in fact, a restaurant. A check-box approach is incompatible with a substantive mandate and Appellants read the constitutional terms "primarily" and "substantially" to have real meaning. See App. Br. 29–30. Specifically, the constitutional regulation is best read to require an investigation into whether an enterprise's primary business is the preparation and sale of meals and whether it is substantially engaged in doing so. Food sales as a percentage of gross receipts are one important component of this analysis, but not the only one. No other litigant here offers a view on this dispositive issue, while Rooftop's enterprise falls short of that standard on both prongs. As to primacy, the record indicates Rooftop's priority is alcohol sales and, as to substantiality, 12 percent in food sales is indistinguishable from Brunswick.

Second, while Appellants have not argued for reversal based on a misapplication of the licensure statute, they are *not* prepared to concede that the 2008 amendments to the Code abrogated Brunswick's import here. To be sure, the current statutory scheme defines primarily, meal, and bona fide engaged primarily and substantially in the preparation and serving of meals; it does so in order to impose further limits on the sale of alcohol. See S.C. Code Ann. §§ 61-6-20(2) (defining a bona fide engagement to include seating for the simultaneous service of meals to 40+ people, a kitchen used to prepare meals, and menus used to offer meals); id. § 61-6-1610(A)(1)–(2) (limiting the hours during which alcohol can be sold by a bona fide engagement); id. § 61-6-1610(I)(1)–(3) (defining "kitchen," "meal," and "primarily"). As DOR explains, this was also true of the statutory scheme at issue in Brunswick, which defined the primarily-and-substantially requirement to mean a business with a Grade A food permit and seating for 40 persons. See DOR Br. 6 (citing S.C. Code Ann. § 61-6-20 (2009)). In Brunswick, meeting the food permit and seating requirements

was necessary but not sufficient, as the Court gave the terms primary and substantial real meaning. See Brunswick Capitol Lanes, 273 S.C. at 783–84, 260 S.E.2d at 452–53.

The current statutory scheme cannot resolve this appeal as Appellants have always relied on the constitutional requirement in challenging Rooftop's licensure. No litigant here credibly challenges Appellants' view that article VIII-A § 1 imposes a legal limit on licensure or offers a competing construction of that standard. The ALC should have conducted a qualitative and quantitative analysis and then held that Rooftop falls short on this record.

III. Rooftop's appeal to agency deference is misplaced.

Finally, this appeal fails to raise any issue capable of resolution under the agency deference doctrine. The doctrine provides that courts will defer to the construction given to a statute or regulation by those charged with its administration and will not disturb that construction without a compelling reason to differ. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 33–34, 766 S.E.2d 707, 717–18 (2014) (collecting cases). Rooftop purports to make an agency-deference argument here, but what it actually seeks is deference to the agency's *factual* findings. See, e.g., Rooftop Br., 20 ("Here, [DOR] determined that Petitioner's establishment met the applicable criteria."). Whatever deference DOR might otherwise be afforded, it never extends to the Department's view of the facts. The facts relevant to this appeal were ably detailed by the ALC in its Final Order, while the questions presented are matters of law.

CONCLUSION

For these additional reasons, the Final Order should be reversed.

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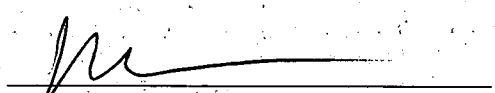
Respectfully submitted by,



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