THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

INTERVENORS, APPELLANTS GOTTSHALL AND LUCAS'S MOTION TO CERTIFY AND TRANSFER UNDER RULE 204

Intervenors, Appellants Thomas R. Gottshall and April C. Lucas (Appellants) respectfully move the Court under Rule 204(b) of the South Carolina Appellate Court Rules for an order transferring this case from the South Carolina Court of Appeals to this Court's docket. This appeal presents a dispute concerning (1) proper application of article VIII-A § 1 of the South Carolina Constitution to this State's alcoholic beverage licensing law and (2) whether the suitability-of-location licensing doctrine requires a direct causal link between a beer-and-wine permit and liquor-by-the-drink applicant's conduct and alcohol-related harms surrounding the proposed location. Because of the constitutional nature of the dispute, its importance to the alcohol beverage licensing

regime, and significant public interest, Appellants believe any decision by the Court of Appeals will likely result in one or more of the parties here petitioning this Court for a writ of certiorari.

Prior to moving, the undersigned conferred with counsel for Respondents South Carolina Department of Revenue (DOR) and Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge (Rooftop). Neither respondent opposes the motion. For the following reasons, the case should be transferred.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On September 27, 2017, Rooftop applied for an on-premises beer-and-wine permit and restaurant liquor-by-the-drink[1] license for its location at 638 Harden Street in Columbia's Five Points business and recreation district. R. App. 662. Twelve residents from neighborhoods adjacent to Five Points and the University of South Carolina (USC) filed protests with DOR. R. App. 727–72. On January 2, 2018, DOR denied the application citing the unsuitability of the proposed location as alleged by public protests filed under South Carolina Code § 61-4-525. R. App. 778–82. On January 4, 2018, Roost requested a contested case hearing. On February 1, 2018, the Administrative Law Court (ALC) granted Intervenors leave to intervene.

An evidentiary hearing was held on February May 14 and 15, 2018, during which the ALC considered testimony from 12 witnesses, including two Rooftop owners, the Columbia Police Department's (CPD's) chief of police, a USC administrator, an expert criminologist, and four residents (see R. App. 150–653), and admitted numerous exhibits into evidence. See, e.g., R. App. 102, 125, 189, 214, 222, 228, 273, 306, 406, 490, 576, 585 & 595.

[1] Liquor by the drink is "a drink poured from a container of alcoholic liquor, without regard to the size of the container for consumption on the premises of a [licensed] business[.]" S.C. Code Ann. § 61-6-20(1)(b).

On September 5, 2018, the ALC entered a Final Order (R. App. 1–17) granting Rooftop a permit and license subject to certain, enumerated conditions. Specifically, the ALC found that:

- Crowds of underaged USC students, "many armed with sham identification and intent upon drinking in Five Points bars," gather in Five Points while intoxicated, which puts their safety at risk and causes problems for law enforcement while disturbing the peace of nearby residents (see R. App. 8);

- These crowds of underage college students congregate, loiter, and use falsified identification to "enter[ ] the bars and drink[ ] to excess." (see R. App. 5);

- There is "ample evidence" and "no doubt" that the Five Points district "presents law enforcement challenges, and requires significant law enforcement attention and resources." (see R. App. 5 & 10);

- "The police chief describes Five Points as a busy area with a high concentration of young adults and students[that] attracts crowds of people requir[ing] extra attention and personnel[.]" (see R. App. 5–6);

- The University of South Carolina (USC) protested the permit and license because "it would like to decrease the number of bars in Five Points" based on its believe that "the high density of bars and the availability of alcohol in Five Points promotes a culture of overconsumption[,]" a view informed by significant data describing the frequency of high-risk drinking behaviors by students (see R. App. 6);

- Residents are likewise concerned that the number of bars in Five Points is an "attractive nuisance" that gives rise to public intoxication, public urination, property damage and late-night disturbances (see R. App. 6); and

- There is "abundant" and "ample evidence of nuisance behavior by patrons of Five Points establishments generally," (see R. App. 5 & 11).

Notwithstanding its factual findings,[2] the ALC concluded the proposed location was suitable because "there is no evidence that *this particular* location has been the source of illegal or problematic behavior" and because "no evidence was presented indicating that the issuance of a

[2] These factual findings comport with the ALC's findings in a related matter captioned 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.)), in which the ALC declined to grant a permit and license to another establishment also owned by Rooftop's owners.

license at the proposed location will create any negative change or require increased law enforcement presence." See R. App. 5 (emphasis added).

The ALC also rejected Appellants' argument that Rooftop's food sales of just 12 percent were insufficient to meet the constitutional mandate that only a business "engage[d] primarily and substantially in the preparation and serving of meals" can be licensed for on-premise sale and consumption of liquor, S.C. CONST., art. VIII-A § 1; but, in doing so, the ALC declined to explain why Appellants' view is incorrect.

On September 17, 2018, Appellants moved the ALC to alter or amend the Final Order (R. App. 66–96) and the motion was denied on October 3, 2018. R. App. 19. Appellants noticed a timely appeal on October 19, 2018. The Court of Appeals has jurisdiction under South Carolina Code § 1-23-610(A)(1).

REASONS FOR GRANTING THE MOTION

This case warrants certification and transfer to resolve the constitutional question presented and to decide legal issues of major importance to the alcohol beverage licensing regime. There are no less than seven (7) permitting and licensing disputes, at various procedural stages, that arise from proposed locations in Five Points and raise the issues presented here. Appellants and DOR continue to commit substantial litigation resources to adjudicating these cases in the ALC with risk of obtaining disparate legal rulings. The prospect of conflicting precedent presents challenges for DOR, which is tasked with uniformly enforcing the alcoholic beverage licensing regime. Meanwhile, public safety in Five Points remains am ongoing concern for neighbors, USC, local law enforcement, and patrons alike.[3] These considerations weigh heavily in favor of transfer.

[3] See, e.g., Andy Shain, "2 shot at SC bar near where college student was kidnapped and killed last month" POST AND COURIER, (Apr. 28, 2019), https://www.postandcourier.com/news/shot-at-sc-bar-near-where-college-student-was-kidnapped/article_8917137c-69b7-11e9-9245-

This appeal also presents two issues of major importance and significant public interest. First, the South Carolina Constitution mandates that only businesses engaged primarily and substantially in preparing and serving meals[4] can be licensed to sell liquor by the drink. Unlike other clauses within article VIII-A § 1 that expressly delegate discretion to the General Assembly on areas subject to legislative action, the primary-and-substantial requirement sets a non-negotiable regulatory floor that limits the type of establishments eligible for licensure for on-premises consumption. See S.C. CONST., art. VIII-A § 1 (detailing numerous areas where the legislature "may" act, but limiting on-premises consumption licenses to businesses primarily and

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af60c2d3f657.html; Jamal Goss, "Overserving alcohol, fake IDs remain problems in Five Points," WACH FOX 57 (Apr. 17, 2019), https://wach.com/news/local/overserving-alcohol-fake-ids-remain-problems-in-five-points; Emily Scarlett, "City leaders consider adding more safety measures to Five Points after UofSC student's death," WIS NEWS 10 (Apr. 17, 2019), http://www.wistv.com/2019/04/17/city-leaders-consider-adding-more-safety-measures-five-points-after-uofsc-students-death/; Michelle Zhu, "Study: Most U.S.C. students hospitalized after drinking came from Five Points bars," WACH FOX 57 (Oct. 8, 2018), https://wach.com/news/local/study-most-usc-students-hospitalized-after-drinking-came-from-five-points-bars; David Travis Bland, "One person shot overnight in Five Points," THE STATE (Oct. 6, 2018), https://www.thestate.com/news/local/crime/article219608045.html; Jeff Wilkinson, "USC wants to shut down these Five Points bars, might go after others," THE STATE (Sept. 25, 2018), https://www.thestate.com/news/local/article218986470.html; Sarah Ellis, "New rules slash Five Points' late-night drinking, as more bars have to close earlier," THE STATE (Aug. 24, 2018), https://www.thestate.com/news/local/article217129785.html; Wilkinson, "Columbia Mayor Benjamin: 'We'll have a new set of rules' for Five Points bars," THE STATE (Aug. 21, 2018), https://www.thestate.com/news/local/article211807309.html; John Monk, "Gang member's conviction upheld in shooting that left USC student paralyzed," THE STATE (Aug. 15, 2018), https://www.thestate.com/news/local/crime/article216728625.html; Gavin McIntyre, "How are Columbia police working to change Five Points' violent reputation?" THE STATE (March 9, 2018), https://www.thestate.com/latest-news/article204272614.html; Ellis, et al., "Lust, long lines and liquor towers: How Five Points lights up after dark," THE STATE (Mar. 9, 2018), https://www.thestate.com/news/local/article204038224.html; Ellis, "Are we losing the Five Points we love? The district's identity is at a crossroads," THE STATE (March 9, 2018), https://www.thestate.com/news/local/article204108549.html.

[4] Article VIII-A § 1 also permits licensure where the business is primarily and substantially engaged in "furnishing of lodging or on the premises of certain nonprofit organizations with limited membership not open to the general public[.]" These alternative grounds for licensure are not at issue here.

substantially engaged in preparing and serving meals). The purpose of this constitutionalized regulation of liquor is "to prevent the return of the public saloon and barroom[,]" Re: No. 5, Alcoholic Liquors, Op. No. 3277, 1972 S.C. Op. Att'y Gen. 79 (1972) (quotations omitted), and Rooftop is precisely the sort of problematic, illegal enterprise the Constitution sought to forbid.

Rooftop's business model requires the sale of a large number of cheap liquor drinks, typically between the hours of 10 p.m. and 2 a.m., to underaged and inexperienced drinkers. According to March and April 2018 sales records, Rooftop sold $54,324 and $41,668, respectively, in liquor-by-the-drink sales. See R. App. 214:17–23; 224:22–225:2 & 1002–1036. At a cost of $3 per drink for house (or "well") liquor (see R. App. 394:23–395:5), Rooftop would have served as many as 32,000 drinks during just these two months, even though the establishment's capacity is just 150 patrons at any one time. See R. App. 314:8. Over a four-month period, the bar booked $193,135 in liquor sales, but just $28,701 in beer sales and only $16,941 in food sales (R. App. 234:25–235:17 & 1002–35), meaning liquor constituted *more than 80 percent* of Rooftop's revenue. Food at Rooftop is entirely incidental; specifically, incidental to its desire to obtain a license after Rooftop's owners lost their right to operate another bar because it was "not a business that is bona fide engaged primarily and substantially in the preparation and serving of meals." See Roost, 2018 WL at *12; see also R. App. 237:1–18 (noting Rooftop only bothered to classify food sales data for March and April, but had been selling liquor and beer since January). Rooftop sought to boost food sales prior to the ALC hearing by creating an "image" around the sale of grilled cheese sandwiches (see R. App. 272:22–273:18), however its prior food offerings were limited to re-heating and re-selling pizza from a nearby Five Points pizza parlor. R. App. 274:14–17; 275:9; 342:1–7; 344:7–13. Initially, one of Rooftop's owners conceded the business's food sales were "under ten percent," but he subsequently sought to revise that number upward claiming at the ALC

hearing that food was 15 percent of gross receipts. See R. App. 380:3–13; 382:6–8; 417:22–419:1; 420:9–18. The ALC considered this testimony (and deposition testimony conceding food sales were really just five (5) percent (see R. App. 417:24–418:4; 908:6–9)) and concluded Rooftop's food sales were approximately 12 percent of gross sales. R. App. 4.

The Constitution's primary-and-substantial standard imposes a qualitative and quantitative standard that should ask whether an enterprise is primarily in the business of preparing and serving meals and substantially engaged in doing so. In Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Commission, 273 S.C. 782, 260 S.E.2d 452 (1979), the Court construed a statute with nearly identical language and held a bowling alley that derived just 10 percent of its revenue from the preparation and service of meals fell short of the primary-and-substantial requirement. See id. at 783–84; 260 S.E.2d at 453. Thus, gross receipts from food and non-alcoholic beverages as a percentage of overall alcohol sales are necessarily part of the constitutional inquiry. Brunswick is instructive for the proposition that 10 percent is insufficient. The 12 percent food sales the ALC credited to Rooftop is a distinction without a difference, particularly in light of other evidence indicating the enterprise's primary engagement is the late-night sale of cheap liquor.

The disagreement between Appellants and DOR is most acute as to this issue. DOR does not read article VIII-A § 1 to impose *any* food preparation or service requirement. In its view, "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. 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. Thus, under DOR's formulation of the constitutional and statutory scheme, a liquor-by-the-drink applicant *must* be a

restaurant to obtain a license, but that "restaurant" need not sell any food. DOR's position is absurd on its face, gives no credence to the constitutional regulation of liquor, and is responsible for the lawless atmosphere in Five Points. A ruling from the Court is necessary to clarify what has become a confused and ineffectual enforcement regime.

Second, the ALC's application of the suitability doctrine misapplies precedent by requiring a causal connection between the applicant and public harms that are themselves sufficient to deny permitting or licensure. An administrative law court considers the suitability of a proposed location before granting a permit or license. See S.C. Code Ann. §§ 61-4-520, 61-6-120 & -1820; see also Schudel v. S.C. ABC Comm'n, 276 S.C. 138, 276 S.E.2d 308 (1981). An applicant need not be found to have acted lawlessly or immorally (although those are also grounds for denial); a location can be found unsuitable for permitting or licensure based upon geography, traffic risks, nature of the business vis-à-vis the neighborhood, proximity to churches and schools, community impact, public safety, and strain on local law enforcement. See, e.g., Moore v. S.C. ABC Comm'n, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); Byers v. S.C. ABC Comm'n, 305 S.C. 243, 246, 407 S.E.2d 653, 655 (1991); Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985); Schudel, 276 S.C. at 141–42, 276 S.E.2d at 309–10; Palmer v. S.C. ABC Comm'n, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984); Terry v. Pratt, 258 S.C. 177, 185, 187 S.E.2d 884, 888 (1972); Barfly Enter., LLC v. S.C. Dep't Rev., 13-ALJ-17-0452-CC, 2013 WL 6620406 at *5 (S.C. Admin. Law Ct. 2013); Zodiac Private Club v. S.C. Dep't Rev., 08-ALJ-17-0054-CC, 2008 WL 2300384, at *3–4 (S.C. Admin. Law Ct. 2008). Denial can be appropriate even through "no formal complaints had been filed against his previous establishment[,]" Schudel, 276 S.C. at 140–

41, 276 S.E.2d at 309; because, unlike criteria focused on the applicant, suitability analysis requires consideration of the public's interest based on the myriad of factors that might weigh on it.[5]

Here, the Final Order is replete with factual findings that the high density of bars in the 600 block of Harden Street has transformed Five Points into a place where throngs of underaged and inexperienced drinkers overconsume cheap liquor late at night while burdening local law enforcement and neighbors with anti-social behavior. Notwithstanding these findings, the ALC mistakenly required Appellants to tie these public harms specifically to Rooftop. See R. App. 8. This conclusion is a departure from statute and precedent that has always treated suitability analysis as an inquiry that looks to the applicant's prospective impact on the community without concern for whether the applicant is deserving. The ALC's reasoning renders suitability a dead letter, particularly where (as is the case here) a first-time applicant has a limited or no track record to which public harms might be attributed. There is no authority for this approach which, if left uncorrected, will confuse distinct analytical concepts designed to ensure an administrative law court considers suitability of the applicant *and* suitability of the proposed location before granting a permit and license.

CONCLUSION

Briefing in this matter is closed and final briefs are on file with the Clerk for the Court of Appeals. For the reasons set forth here, this motion should be granted, and the case should be transferred to this Court's docket.

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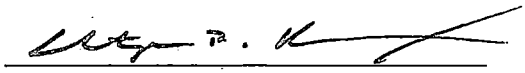
[5] See 48 C.J.S. Intoxicating Liquors § 196 (Sept. 2016 update) (license may be refused on grounds location "would adversely affect the public interest, that the nature of the neighborhood and .... premises is such that the establishment would be detrimental to the welfare ... of the inhabitants, or ... the manner of conducting the establishment would not be conducive to the general welfare of the community.").

Respectfully submitted by,



Richard A. Harpootlian (Bar No. 2725)
Christopher P. Kenney (Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

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

May 1, 2019
Columbia, South Carolina.

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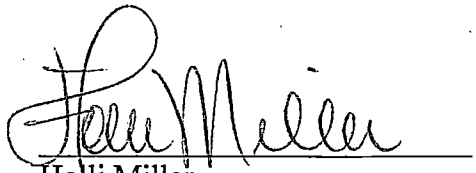
CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for Richard A. Harpootlian representing Intervenors, Appellants Thomas R. Gottshall and April C. Lucas, with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on May 1, 2019, served the following document to the below mentioned person:

Document: Intervenors, Appellants Gottshall and Lucas's Motion to Certify and Transfer Under Rule 204

Served: Michael H. Montgomery, Esquire
Post Office Box 11886
Columbia, South Carolina 29211-1186

Patrick McCabe, Esquire
S.C. Department of Revenue
Post Office Box 12265
Columbia, South Carolina 29211



Holli Miller

HARPOOTLIAN
ATTORNEYS AT LAW

RICHARD A. HARPOOTLIAN
RAH@HARPOOTLIANLAW.COM

CHRISTOPHER P. KENNEY
CPK@HARPOOTLIANLAW.COM

PHILLIP D. BARBER
PDB@HARPOOTLIANLAW.COM

JAMIE L. HARPOOTLIAN*
OF COUNSEL
*ADMITTED ONLY IN LOUISIANA

OFFICE
1410 LAUREL STREET
COLUMBIA, SC
29201

MAILING ADDRESS
POST OFFICE BOX 1090
COLUMBIA, SC
29202

DIRECT CONTACT
TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810
TOLL FREE (866) 706-3997

ONLINE
HARPOOTLIANLAW.COM

May 1, 2019
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

In re: Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge v. South Carolina Department of Revenue
Court of Appeals Appellate Case No. 2018-001870

Dear Mr. Shearouse:

Enclosed please find the original and 10 copies of Intervenors, Appellants Gottshall and Lucas's motion to certify and transfer under Rule 204(b) of the South Carolina Appellate Court Rules in connection with the above-referenced matter. Please clock-in the original and copies and return the copies to my courier.

To give notice of the motion to the Court of Appeals, I intend to file a clocked copy of the motion with the Clerk of the Court of Appeals.

Further, by copy of this letter I am serving opposing counsel with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Christopher P. Kenney

/hm
Enclosures
cc: Mike Montgomery, Esq.
Patrick McCabe, Esq.
The Honorable Jenny Abbott Kitchings, Clerk of the Court of Appeals