

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson

RECEIVED
Oct 05 2020
SC Court of Appeals

Appellate Case No. 2020-00837
Docket No. 19-ALJ-17-0001-CC

Eighteen Ink, LLC, d/b/a Group TherapyRespondent,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall, April C. Lucas, and Michael DrennanIntervenors, Appellants.

**INTERVENORS, APPELLANTS RESPONSE IN
OPPOSITION TO MOTION TO DISMISS APPEAL**

On September 24, 2020, Respondent Eighteen Ink, LLC, d/b/a Group Therapy moved to dismiss this appeal as moot. According to Group Therapy, “this issue has been rendered moot by the expiration of Group Therapy’s permit and license.” Mot., 2 That is not correct and, even if it is, this case falls within one or more of the three mootness exceptions recognized by South Carolina courts. For the reasons that follow, Intervenors, Appellants Thomas R. Gottshall, April C. Lucas, and Michael Drennan respectfully submit the motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Licenses and permits to sell alcohol are the property of the State of South Carolina, the receipt of which is contingent on the applicant demonstrating eligibility based on qualifications,

fitness and character, and the suitability of the proposed location to ensure the sale of alcohol does not have a deleterious effect on the community. See Kan Enterprises, Inc. v. S.C. Dep't of Revenue, 420 S.C. 596, 607, 803 S.E.2d 882, 888 (Ct. App. 2017). Presently, that is *not* what happens in Columbia, South Carolina in the business and hospitality district known as Five Points. Instead, lax regulatory enforcement have allowed a proliferation of the late-night dive bars in Five Points making huge sums of money selling cheap liquor to a young and underage college crowd that drinks to excess and then spills out onto the Columbia streets creating nuisances for neighboring residents and a public safety nightmare for local law enforcement. This is one of several licensure and re-licensure protest cases brought by residents with the assistance and support of the Columbia Police Department (CPD), and the University of South Carolina (USC) urging the Administrative Law Court (ALC) to simply enforce the law. Specifically, Appellants challenged Group Therapy's application to renew its on-premises beer and wine permit and liquor-by-the-drink license arguing (1) the bar was constitutionally ineligible to receive a liquor license because it is not "engage[d] primarily and substantially in the preparation and serving of meals" as required by article VIII-A, § 1 of the South Carolina Constitution and (2) the location was not "suitable" as contemplated by precedent because of the public safety and nuisance concerns tied specifically to Group Therapy and generally to Five Points. The ALC avoided the substance of Appellant's constitutional claim by suppressing all meal preparation and service evidence and dispensed with the suitability claim by ignoring evidence and applying the incorrect legal standard.

On July 17, 2018, Group Therapy filed the renewal applications at issue here for an on-premises beer and wine permit and restaurant liquor-by-the-drink license. On February 4, 2019, the ALC granted leave for Appellants to intervene. Thereafter, the ALC scheduled the contested case hearing for April 22, 2019 (Order (filed Feb. 4, 2019)), however the hearing was continued

(without objection) to accommodate a time-consuming family obligation of Group Therapy's counsel. Eventually, the contested case hearing was set for and held on February 11 and 12, 2020. On April 29, 2020, the ALC entered a Final Order. A timely appeal was noticed on May 26, 2020. One day before Appellants filed their initial brief, Group Therapy filed this motion.

ARGUMENT

Mootness occurs when a judgment would not have any practical legal effect in light of intervening events. City of Charleston v. Masi, 362 S.C. 505, 508, 609 S.E.2d 301, 303 (2005). Here, while Group Therapy is correct that the two-year period for the underlying permit and license has expired, that does not warrant dismissal because (1) the underlying dispute remains a live controversy notwithstanding expiration of the license and permit period and (2) one or more of the three exceptions to the mootness doctrine apply such that the Court should retain jurisdiction and decide the merits.

I. The appeal is not moot.

This appeal is not moot because a decision in Appellants' favor will have an immediate and concrete effect on the underlying dispute in two ways.

First, a favorable decision here should result in a remand to the ALC with instructions that it revise the Final Order consistent with the appropriate legal standard. Specifically, this would require the ALC to address Group Therapy's constitutional eligibility to receive a liquor-by-the-drink license and to consider overwhelming evidence that the location is not suitable for on-premises alcohol consumption based on the myriad of factors that typically weigh on such an inquiry. See 48 C.J.S. Intoxicating Liquors § 196 (Sept. 2016 update) (license may be refused on grounds location "would adversely affect the public interest, ... 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.”). Geography, traffic risks, nature of the business vis-à-vis the neighborhood, community impact, and strain on local law enforcement have all been cited as proper adverse considerations by courts conducting a suitability analysis. 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 v. S.C. ABC Comm’n, 276 S.C. 138, 141–42, 276 S.E.2d 308, 309–10 (1981); Palmer v. S.C. ABC Comm’n, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984); 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). Thus, a favorable decision for Appellants as to either of these issues would effectively foreclose Group Therapy’s ability to pursue a license and permit and require judgment entered in Appellants’ favor. Put differently, it would give Appellants the very relief they sought from the ALC.

Second, while the current license and permit period may have expired, alcohol licenses and permits are routinely extended during the pendency of a contested case under South Carolina Code § 1-23-370. That section provides in relevant part that,

When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

S.C. Code Ann. § 1-23-370(b). Accordingly, when Respondent South Carolina Department of Revenue denied Group Therapy’s applications in this case due to the existence of valid public protests, the bar’s prior permit and license remained in effect during the pendency of the contested case hearing. That same procedure applies now where Group Therapy’s permit and license have

expired, but valid public protests exist. If past is prologue, the resolution of that contested case could take years (particularly in light of the coronavirus pandemic). Meanwhile, the permit and licenses *at issue in this appeal* remain indefinitely in place, meaning this Court can (and should) grant Appellants relief notwithstanding expiration of the two-year period.

II. Alternatively, one or more exceptions to the mootness doctrine apply here.

Even if the Court disagrees, this appeal should still go forward under one of the three exceptions to the mootness doctrine. An appellate court can retain jurisdiction over an otherwise moot appeal (1) when the issue is capable of repetition yet evading review; (2) where it is urgent to establish a rule for future conduct in matters of important public interest; and (3) when the decision by the trial court can affect future events or have collateral consequences to the parties. Tourism Expenditure Review Comm. v. City of Myrtle Beach, No. 2011-UP-464, 2011 WL 11735725, at *3 (S.C. Ct. App. Oct. 21, 2011) (collecting cases). All three exceptions apply here.

First, under Group Therapy's formulation of the mootness doctrine, few (if any) alcohol licensing disputes could ever make their way to this Court's and be decided within the two-year deadline Group Therapy asks the Court to set here. Accordingly, finding this dispute moot ensures it will repeat over and over again as neighbors, local law enforcement, and USC administrators repeatedly protest Group Therapy's reapplications without any final, authoritative guidance concerning the underlying legal issues raised by this appeal.

Second, it is for that very reason the Court should hear this appeal and hand down an opinion that resolves the constitutional eligibility and suitability issues Appellants advance here. Indeed, this is not the only appeal raising these issues, see Rooftop Bar, LLC v. S.C. Dept. Rev., Case No. 2018-001870 (S.C. Ct. App.), and there are dozens of forthcoming ALC contested cases that could likely be settled, abandoned, narrowed, or expedited with some additional guidance to

the ALC from our appellate courts. But until that happens, there remains a multiplicity of alcohol licensing and permitting disputes arising from the public safety threat present in Five Points. Appellants, with the support and assistance of local law enforcement agencies, are attempting to ameliorate that public safety threat through this case and others like it. That, respectfully, makes it a matter of important public interest that will not simply vanish by holding this dispute moot.

Finally, until this Court rules, the ALC's decision below will control the conduct of the parties and, presumably, serve as the justification to reject future challenges to Group Therapy's continued licensure and permitting. Accordingly, to hold this appeal moot is to effectively foreclose Appellants' right to any appeal altogether since it will leave a flawed decision in place on which Group Therapy and other Five Points bars can draw support for future re-applications—i.e., it will both affect future events and have collateral consequence.

Thus, the Court should conclude that even if it believes the appeal is moot, all of the mootness exceptions apply such that it should retain jurisdiction and proceed to the merits.

CONCLUSION

For the foregoing reasons, the motion should be denied. Further, in denying the motion, Appellants respectfully ask that the Court add five (5) calendar days to Appellants' deadline to file an initial brief and designation of matter. This motion was filed the day before that deadline, which tolled Appellants' briefing deadline. See Rule 240(b), SCACR. Granting Appellants five (5) additional calendar days will help ensure their briefing deadline is not inadvertently missed by the resumption of the tolling period prior to counsel receiving notice from the Court.

[signature page follows]

Respectfully submitted,

s/Christopher P. Kenney

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of Intervenor, Appellants’ response in opposition to motion to dismiss appeal has been served upon John R. Alphin, Esq., Bakari T. Sellers, Esq., and Patrick McCabe, Esq. at the primary e-mail address listed in the Attorney Information System on this 5th day of October 2020.

Respectfully submitted by,

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