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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Chief Administrative Law Judge

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Case No. 2019-ALJ-17-0001-CC
Appellate Case No. 2020-000837

Thomas R. Gottshall, April C. Lucas, and Michael Drennan (Intervenors) ..... Appellant,

v.

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

and

Eighteen Ink, LLC d/b/a Group Therapy ..... Respondent.

SOUTH CAROLINA DEPARTMENT OF REVENUE'S INITIAL BRIEF

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Columbia, South Carolina
February 4, 2021

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STATEMENT OF THE CASE

Eighteen Ink, LLC, d/b/a Group Therapy ("Respondent") applied for an on-premises beer and wine permit and business liquor by the drink license on July 17, 2018. The Department denied the application because it received several valid public protests, which were made 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"). The ALC then conducts a contested case hearing involving the applicant, the protestants, and the Department. In this type of public protest case, it is the ALC's responsibility to make the determination as to whether the applicant's location is suitable for licensure and, therefore, whether the license and/or permit should be issued.

But in this case, based information acquired after the initial denial, the Department amended its position as expressed in its prehearing statement and informed the Court that the location was unsuitable for the renewal of a license and permit. The Department changed its position based on an administrative violation issued to Respondent for the violation of S.C. Code Ann. §61-4-580(A)(5) (Supp. 2018), which prohibits a licensee from permitting "any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State." SLED's administrative citation was the result of finding individuals smoking marijuana in a back room of Respondent's establishment. SLED issued the citation after the Department initially concluded that the public protest was the only bar to granting the renewal application.[1]

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[1] The Administrative Law Court declined "to prematurely address and adjudicate what equates to an enforcement action under the guise of an additional factor pertaining to suitability in a license renewal matter." Adding that, "the Court will only address the suitability arguments presented by the Protestants and the Intervenors opposing the renewal of Group Therapy's

The ALC ultimately granted Respondent's application for a permit and license. 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 constitutional requirements of a Business Liquor by the Drink ("LBD") License is one of utmost importance to the Department. Since they were enacted, the Department has interpreted the General Assembly's 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 sell a minimum amount of food as a prerequisite to licensure.

The Department submits this brief as explanation to the Court of the relevant law and the Department's interpretation. Ultimately, the Department contends that its longstanding interpretation of the 2008 amendments to Title 61 are correct: a specified minimum amount of food sales is not a factor in determining whether a licensee is primarily and substantially engaged in the preparation and serving of meals.

ARGUMENT

South Carolina law permits only three organizations 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). Since its amendment in 2008, Chapter 6 of Title 61 delineates the requirements for obtaining a LBD License when the applicant is a business that serves and prepares meals. Although a business may qualify for an LBD license only if it is "bona fide engaged primarily and substantially in the preparation and serving of meals. . . .", S.C. Code Ann. § 61-6-1610, a minimum percentage of food sales is not

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permit and license." Final Order, Eighteen Ink, LLC d/b/a Group Therapy v. S.C. Dep't of Revenue and Thomas R. Gotshall, April C. Lucas, Michael Drennan, Docket No. 19-ALJ-17-0001-CC (April 29, 2020)

one of the statutory requirements for obtaining an LBD license. In fact, § 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".

Prior to the 2008 amendments to Chapter 6 of Title 61, the Department considered the amount of food sold by the applicant because of the Supreme Court's decision in Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Comm'n, 273 S.C. 782, 260, S.E.2d 452 (1979). However, since 2008, the Department's practice is to issue a LBD License to a business that prepares and serves meals so long as the business meets all of the requirements of §§61-6-20 and 61-6-1610. The 2008 amendments to these sections was the General Assembly's effort to undo the holding in Brunswick. Thus, consistent with the amended statutes, the Department no longer requires an applicant to sell a minimum amount of food to obtain or keep an LBD License. Likewise, based on the statutory amendments, the ALC had rejected the finding in Brunswick.

The Appellant argues that the Court should ignore more than a decade of administrative practice and find that a business must meet both the statutory requirements *and* exceed ten percent of food sales as suggested 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 obvious intent of the Legislature to eliminate consideration of a minimum amount of food sales from the list of LBD qualifications.

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 . . . ."

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).[2] 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 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

[2]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).

§ 61-6-1820(2)), has not been convicted of a felony within ten years of the application (see S.C. Code Ann. § 61-6-1820(8) (2009) and others). S.C. Code Ann. § 61-6-1820 (2009).

Prior to 2008 the General Assembly did not provide criteria for determining whether a business is "primarily" engaged in the preparation and serving of meals. 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).

ii. 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 examined what it meant for a business to be "bona fide 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."[3] 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,[4] 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 ten percent of its gross revenues to food preparation and sale

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

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

does not fulfill the "primarily" and "substantially" requirement of the statute." Id. at 784, 260 S.E.2d 453.

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.[5] 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.

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

The expressed purpose of 2008 Act No. 287 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:

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[5]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, v. S.C. Dep't of Revenue, 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 v. S.C. Dep't of Revenue, 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 v. S.C. Dep't of Revenue, 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, S.C. Code Ann. § 61-6-1610(I) (2018) 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 used to determine 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 statute 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 (Admin. Law Ct. Apr. 4, 2006) (noting that a licensed business cannot "force people to eat"). 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 sells a minimum quantity of food.

B. Based On The Plain Language Of The Relevant Statutes And The Intent Of The Legislature In Its 2008 Amendments, There Is No Mandatory Minimum Amount Of Food Sales 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 requirements set forth in §§ 61-6-20, 1610, and 1820, the Department may issue a LBD License. Accordingly, the Department does not require an applicant to demonstrate a minimum amount of food sales before granting an 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 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.[6]

However, 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[7] would erroneously expand the 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.

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[6]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. N.C. 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 the 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).

[7]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 S.C. Code Ann. § 61-5-20(4)(a) (2009), only that 10% of gross sales attributed to food preparation did not meet the requirements.

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 and substantially 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, once the General Assembly amended § 61-6-1610, the term "primarily" was established by statute and the decision in Brunswick is no longer applicable.

iii. The Legislature's "restaurant requirements" are not contrary to the State's Constitution.

"The General Assembly has the power to prescribe legal definitions by statute, and such definitions are binding upon courts and should prevail" Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 288, 403 S.E.2d 662, 665 (Ct. App. 1991) (quoting Brown v. Martin, 203 S.C. 84, 88, 26 S.E.2d 317, 318 (1943). "The Constitution grants a legislative body the power, within reasonable limitations to prescribe legal definitions of its own language". Malone v. Edwards, 271 S.C. 401, 404, 247 S.E.2d 454, 455-56 (1978) (quoting Windham v. Pace et.al., 192 S.C. 271, 6 S.E.2d 270 (1939)). See also Bell Finance v. South Carolina Dep't of Consumer Affairs, 297 S.C.111, 374 S.E.2d 918 (Ct. App. 1988) (statutory definitions should be followed in interpreting the statute); Fruehauf Trailer Co. v. South Carolina Electric Gas Co., 223 S.C. 320, 75 S.E. 2d 688 (1953) (lawmaking body's construction of its language by means of definitions of the terms employed should be followed when interpreting the act). Even the Federal Courts have held that "[w]hen a Legislature acts pursuant to a mandatory constitutional direction, it does not thereby exhaust its powers, but may from time to time amend, extend, or restrict the original enactment provided it keeps within the constitutional bounds. It may change its mind as to what is the public welfare; public policy itself changes from decade to decade." Miles Labs. v. Seignious, 30 F. Supp.

549, 557 (E.D.S.C. 1939). When the General Assembly created a statutory definition for a previously undefined term, it did not exceed the constitutional bounds of the requirement; but rather, it provided additional clarification for licensure.

iv. 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 to 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 Pa 436, 440, 581 S.E.2d 836, 838 (2003).

The Department does not require an applicant to establish a minimum food sales percentage to obtain a LBD License because 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.[8] 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 decision is still good law. In order to accept the Intervenors' position that the Brunswick decision is binding on the Department this Court would have to disregard the General Assembly's clear decision to depart from the judicially created definition.

v. *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 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).[9] In that 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 approximately 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 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 §§ 61-6-20 and 61-6-1610. The ALC granted the Motion to Reconsider and allowed 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). The ALC considered and applied the new statutory

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

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

definitions and chose not to rely on the Brunswick decision. In the end, 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 originally found dispositive against Tavern on Greene, the ALC eventually concluded that Tavern on Greene met the statutory requirements for an LBD License 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 significant because it established the ALC's recognition that the 2008 amendments eliminated analysis of actual food sales 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.[10] Based on the Tavern on Greene decision, the Department no longer considered food sales as a factor in whether to grant an LBD License. The amended statutes do not require an applicant to meet a threshold of food sales to be primarily and substantially engaged in preparing and serving meals.

C. The Addition Of A Minimum Food Sales Percentage As A 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 Brunswick and the imposition of a food sales threshold will likely lead to unintended consequences and enforceability problems that would result from imposing a required minimum food sales percentage.

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

i. A minimum food sales requirement cannot be applied consistently between new applications and renewal applications.

The Department receives and reviews both new applications for applicants seeking to obtain a first LDB license and renewal applications for licensees that already have LBD licenses. To require an inquiry into food sales 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. The Department routinely receives LBD License applications for businesses that are not yet open because an 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. The Department cannot mandate a food sales threshold because the applicant's business is not yet opened. Even if the Department mandated that the establishment be opened and operating before submitting an application that still would not work because there would be no liquor sales to compare to the food sales.

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).[11] Under these circumstances, the Department would be required to determine

[11]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:

whether an applicant satisfies the Brunswick rule based solely on sales made either before the applicant began operating the establishment or 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. See §§ 61-4-210 and 61-6-2005. Neither is an appropriate analysis because the Department is applying information about another business to the new applicant or the period to be evaluated is too short.

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 analysis of food sales 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 contribute to low food sales.

The minimum food sales established by Brunswick do 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

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> (1) the applicant currently holds a valid beer or beer and wine permit; or
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> (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.

food, while 80% of its gross sales derived from Brunswick's bowling operation. Brunswick at 783, 260 S.E.2d at 452.[12] 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 suggests 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. The definition of "primarily" in § 61-6-1610 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

[12]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.

*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.

D. The Department, Through SLED, Conducts Regular Inspections of LBD Licensees To Determine If They Are Primarily And Substantially Engaged In The Preparation And Serving Of Meals.

The Respondent's brief implies that once a LBD License is issued, the Department fails to ensure the Licensee's continued compliance with § 61-6-1820. This is categorically false. A condition of holding a LBD License is that the Licensed Premises is subject to regular inspection by an officer or agent of the Department. Furthermore, any person who refuses to allow a full inspection of the premises or any part of the premises licensed to alcohol or prevents or hinders an inspection is guilty of a misdemeanor, and upon conviction must be fined not more than two hundred dollars or imprisoned for not more than sixty days or both. S.C. Code Ann. § 61-6-4190 (2009). SLED conducts routine inspections of the 3,458 LBD Licensees throughout the state. If SLED determines that a licensed establishment is unable to serve a meal[13] upon demand during normal meal times or that the licensed establishment lacks an adequate supply of food, the SLED

[13] "Sandwiches, boiled eggs, sausages and other snacks prepared off the licensed premises but sold thereon, shall not constitute a meal" S.C. Code Ann. Regs. 7-401.3(B)(1) (Supp. 2018).

agent will issue an administrative violation. SLED will also issue an administrative violation if it determines the licensed establishment is not adequately equipped for the cooking, preparation, and serving of solid foods.[14] Pursuant to S.C. Dep't Rev. Procedure 13-2 (April 16, 2013) the recommended penalty for failure to be primarily engaged in the preparation and serving of meals as required by §§ 61-6-1820, 61-6-1610 and Reg. 7-401.3 is revocation of the LBD License.[15]

CONCLUSION

The plain language of the statutory requirements for a LBD License do not impose a minimum food sales threshold 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 inappropriately 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 engaged primarily and substantially 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 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

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[14] Any business establishment that holds a LBD and is not engaged in the furnishing of lodging must "Be equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals...." S.C. Code Ann. Regs. 7-401.3(A)(1) (Supp. 2018).

[15] The ALC affirmed the Department's revocation of a LBD License for failure to comply with Sections 61-6-1610, 61-6-20(2) and Regulation 7-401.3. See S.C. Dep't of Revenue v. JOD, Inc. d/b/a Lady Godiva's, 20-ALJ-17-0189-CC (2020).

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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Columbia, South Carolina
February 4, 2021

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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Chief Administrative Law Judge

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Case No. 2019-ALJ-17-0001-CC
Appellate Case No. 2020-000837

Thomas R. Gottshall, April C. Lucas, and Michael Drennan (Intervenors) ..... Appellant,

v.

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

and

Eighteen Ink, LLC, d/b/a Group Therapy ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the South Carolina Department of Revenue's Initial Brief complied with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Respondent South Carolina Department of Revenue's Initial Brief via electronic mail and by depositing a copy of the Brief in the United States Mail, postage prepaid, on February 1, 2021, at the following address(es):

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The Honorable Jenny Abbott Kitchings
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SC Court of Appeals
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Re: Eighteen Ink, LLC d/b/a Group Therapy v. South Carolina Department of Revenue
ALC Docket No: 19-ALJ-17-0001-CC
Appellate Case No.: 2020-000837

Dear Ms. Kitchings:

Enclosed please find the South Carolina Department of Revenue's Initial Brief and Proof of Service, in the above-referenced matter.

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

If you have any questions or need anything further from me please do not hesitate to contact me at 803-898-5056 or Patrick.McCabe@dor.sc.gov. If I am not available you can reach my paralegal, Herman Harrington, at 803-898-5363 or Herman.Harringtn@dor.sc.gov.

With my regards, I am

Sincerely,

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