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SC Court of Appeals

The State of South Carolina

In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Trial Court Case No. 20-ALJ-17-0177-CC
Appellate Case No. 2020-001691

RM and Sons, LLC, d/b/a Anderson Liquor, Petitioner/Respondent,

v.

South Carolina Department of Revenue and City of Anderson, Respondents,

Of which City of Anderson is Appellant.

INITIAL BRIEF OF APPELLANT

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February 16, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 2

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

<i>Byers v. South Carolina Alcoholic Beverage Control Comm'n</i> , 305 S.C. 243, 245, 407 S.E.2d 653, 655 (1991)	5
<i>Kan Enterprises, Inc. v. S.C. Dep't of Revenue</i> , 420 S.C. 596, 603, 803 S.E.2d 882, 886 (Ct. App. 2017)	3, 5, 9
<i>Kearney v. Allen</i> , 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985)	4
<i>Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles</i> 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct.App.2008)	3
<i>Palmer v. S.C. Alcoholic Beverage Control Comm'n</i> , 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984)	2, 8, 9
<i>Smith v. Pratt</i> , 258 S.C. 504, 507, 189 S.E.2d 301, 302 (1972)	3, 4
<i>Wall v. South Carolina Alcoholic Beverage Control Commission</i> , 269 S.C. 13, 235 S.E.2d 806 (1977)	2

OTHER AUTHORITIES

<i>Tsegay Haile, d/b/a Kezo Quick Stop, Petitioner</i> , No. 17-ALJ-17-0372-CC, 2018 WL 1900322 (Apr. 11, 2018)	8
S.C. Code Ann. §1-23-380	2, 3
S.C. Code Ann. §61-4-520(6)	5
S.C. Code Ann. §61-6-120(A)	5, 10
S.C. Code Ann. §61-6-910(2)	1, 3, 4
48 CJS <i>Intoxicating Liquors</i> §196	4

STATEMENT OF THE ISSUE ON APPEAL

The ALC erred in finding that the proposed location for Petitioner's retail liquor store was a "suitable place" under S.C. Code Ann. §61-6-910(2) and in ordering the Department to grant the Petitioner's application for a retail liquor license.

STATEMENT OF THE CASE

This matter arises from the denial of the Petitioner's application for a retail liquor license at 1311 Williamston Road, Anderson, S.C. ("proposed location") by the S.C. Department of Revenue ("Department"). The Petitioner (who is the Respondent herein) filed a request for a contested hearing before the Administrative Law Court (ALC) on July 14, 2020. On August 24, 2020, the City of Anderson (the Appellant herein) made a motion to intervene, which was granted without objection on September 29, 2020. (R. pp. ____-____, Order Granting Motion to Intervene.) A contested hearing was held before Administrative Law Judge S. Phillip Lenski ("ALJ") on November 5, 2020. (R. pp. ____-____, transcript of hearing.) The only issue before the ALC was the suitability of the Petitioner's proposed location. A Final Order was issued on November 18, 2020, finding that "the Petitioner complies with the applicable requirements for licensure at its proposed location" and ordering the Department to grant the Petitioner's application for a retail liquor license. (R. p. ____-____, Final Order.) The City of Anderson filed its Notice of Appeal on December 17, 2020. (R. p. _____, NOA.)

STANDARD OF REVIEW

“Ordinarily, the issuance or granting of a license to sell beer or alcoholic beverages rests in the sound discretion of the body or official to whom the duty of issuing it is committed; and the power to issue a license for the sale of alcoholic beverages involves the power to refuse such licenses.” *Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 248, 317 S.E.2d 476, 477 (Ct. App. 1984) (citing *Wall v. South Carolina Alcoholic Beverage Control Commission*, 269 S.C. 13, 235 S.E.2d 806 (1977)). “In South Carolina the authority to grant all licenses and permits relating to alcoholic beverages and beer has been delegated to the [Department].” *Id.* “The factual determination of whether or not an application for a retail permit is granted or rejected is usually the sole prerogative of the [Department]” and “[i]ts judgment will not be disturbed by the courts” except as provided by S.C. Code Ann. §1-23-380 of the Administrative Procedures Act. *Id.*

S.C. Code Ann. §1-23-380 of the Administrative Procedures Act provides as follows:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Pursuant to §1-23-380(5)(e), the appellate court can reverse or modify the Department's findings of fact if they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [Department] and is more than a mere scintilla of evidence." *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 603, 803 S.E.2d 882, 886 (Ct. App. 2017) (citing *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)).

ARGUMENT

S.C. Code Ann. §61-6-910(2) states that the Department "must refuse" a retail liquor license if "the store or place of business to be occupied by the applicant is not a suitable place."¹ The only issue presented herein is whether the ALC erred in overruling the Department's finding that the proposed location for Petitioner's retail liquor store was not a "suitable place" under S.C. Code Ann. §61-6-910(2) and in ordering the Department to grant the Petitioner's application for a retail liquor license. See *Smith v. Pratt*, 258 S.C. 504, 507, 189 S.E.2d 301, 302 (1972) ("The cardinal question ... and the only one necessary to decide is whether the ... determination of unsuitability of the location was wholly unsupported by the evidence.")

Prior to the ALC hearing, the Department denied the Petitioner's application for a retail liquor license, finding that the proposed location was not suitable. (R. pp. _____ - _____, SCDOR_160 – SCDOR_164.) Specifically, the Department found that the

¹ As stated in the ALJ's Final Order, the statute does not set forth what constitutes a "suitable place," and the applicant for a liquor license has the burden of proving it meets all of the statutory requirements for licensure, including suitability.

proposed location: (a) is within close proximity of two churches and low-income housing; (b) is in a high-crime area with ongoing gang activity; (c) is a constant strain on law enforcement, as evidenced by the 749 calls for service to that location; (d) would increase calls for service if its license was granted due to the “increase in loitering, littering, and crime that normally accompany the operation of a liquor store;” and (e) if granted the license it seeks “would create a situation that is not conducive to the health, safety, and welfare of the community.” (R. pp. ____ - ____, pp 2-3 Final Order; R. pp. ____ - ____ SCDOR_160- SCDOR_164.)

Contrary to the ALC’s ruling, the substantial evidence shows that the proposed location is not a “suitable place” for a liquor store and that the Department is required by §61-6-910(2) to deny the license. In determining whether a proposed location is suitable, the Department “may consider any evidence adverse to the location.” See *Kearney v. Allen*, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985) (citing *Smith v. Pratt, supra*) “This determination of suitability is not solely a function of geography. It involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact on the community wherein it is to be situated.” *Id.*² Among other things, “[t]he court should weigh evidence of the location's burden on law

² See also 48 CJS *Intoxicating Liquors* §196: “The liquor licensing authority may grant or refuse a liquor license or permit for a particular place or premises, depending on the justification for the issuance of the license under the particular circumstances of the case. A liquor license or permit may properly be refused on the ground that the location of the establishment would adversely affect the public interest, that the nature of the neighborhood and of the premises is such that the establishment would be detrimental to the welfare and morals of the inhabitants, or that the manner of conducting the establishment would not be conducive to the general welfare of the community.” “The refusal of a liquor license may be based on the fact that a law enforcement problem is presented by the premises.” “A liquor license may properly be refused on the ground of the establishment's proximity to a school, church, or other protected institution” if there is “other evidence disclosing a threat to the public welfare or morals.”

enforcement in deciding its suitability.” *Kan Enterprises, supra*, at 604. In addition, “proximity of a location to a church, school or residence is a proper ground, by itself, on which the [Department] may find the location to be unsuitable and deny a permit for the sale of beer or wine at that location.” *Byers v. South Carolina Alcoholic Beverage Control Comm’n*, 305 S.C. 243, 245, 407 S.E.2d 653, 655 (1991).³

The uncontradicted evidence presented by the Appellant clearly supports the Department’s determination that the proposed location is not suitable for a liquor store, supports the denial of the Petitioner’s application, and requires reversal of the ALC’s ruling. The Appellant’s Motion to Intervene was granted without objection and the Appellant appeared at and offered testimony and evidence at the contested hearing.⁴ The Appellant presented significant information and documentation to the ALC regarding the unsuitability of the proposed location. Chief James Stewart, who has been with the Anderson Police Department for 29 years and the Chief since 2012, testified, *inter alia*, to the following:

- The proposed location is on Williamston Road, which is approximately 1.5 to 2 miles long.

³ While §61-6-120(A) requires a denial if the proposed location in a municipality is within 300 feet of a church, school, or playground, §61-4-520(6), dealing with retail permits for the sale of beer and wine, provides that the Department “may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds, and churches” and does not reference a minimum distance. Thus, the ALJ erred in suggesting, at FN 10 of its Final Order, that the Department is required to show that “the proposed location is within the minimum distance from the childcare center, the churches, or Anderson University.” (R. p. ____, FN 10 of Final Order.) In addition, the ALJ erroneously stated that the license “must be granted” if the establishment is outside of those established parameters.

⁴ A transcript of the hearing can be found at R. pp. ____-____. In addition, slides of the PowerPoint presentation can be found at R. pp. ____-____ (Respondent’s exhibit 1) and the actual PowerPoint can be found at R. p. ____.

- There is a residential community (Cedar Ridge) 100-200 yards from the proposed location.
- The Southerner Motor Lodge is directly across the street from the proposed location.
- Fairview Gardens apartments, which are low-income, Section 8 housing with approximately 150 apartments, are 200 yards from the proposed location.
- Anderson University, with approximately 4000 students, is also located on Williamston Road.
- There is a daycare center diagonally across from the location.
- There are also 3 churches and a DMV office in the general area.
- The area concentrated around the proposed location, particularly the Fairview Gardens apartments and the Southerner Motor Lodge, is a “high-crime area.”
- In 2019, there were 1,022 calls for service in the immediate area of the location, including 7 sexual assaults, 12 overdoses, 5 drive-by shootings, and 2 murders.⁵ 749 of those calls were to Fairview Gardens, which is “a large amount of calls for one apartment complex.”
- Crime analysis from January 2017 – October 2020 shows that there were 701 incident reports taken on Williamston Road, 102 at the

⁵ Chief Stewart also testified that there was an additional murder in the County’s jurisdiction near the proposed location and that, although there are typically 2 murders in Anderson per year, there were 3 in the immediate area of the proposed location in 2019 alone.

proposed location. The top four offenses were drugs/narcotics, assaults, trespassing, and vandalism. 98 of the calls involved weapons, 35 were guns.

- Between October 2019 and October 2020 in the Williamston Road area, there were 40 incident reports for assaults, 40 for drugs/narcotics, 23 for larceny and theft, 12 for burglary, 12 for drunkenness, and 12 for weapons violations, among others.
- A liquor store at the proposed location would “exacerbate the problem” with crime in the area and would be like “putting gasoline on a fire.”

(R. pp. ____-____, transcript p. 57, l. 2 – p. 81, l. 23, Respondent’s Exhibit 1, PowerPoint.)⁶

Tony Stewart, who has represented the area on City Council for 24 years and lives approximately 1.5 miles from the proposed location, also testified at the hearing.⁷ (R. pp ____-____, transcript p. 82, l. 21 – p. 87, l. 16.) He testified that his district “is primarily low-income residents, a lot of Section 8 housing, a lot of social ills in the community, high crime, high drugs, other crimes that most of our other counsel (sic) members don't get to hear all the time.” (R. p. ____, transcript p. 83, l. 20 – p. 84, l. 9.) He also testified to his opinion that the proposed location is not suitable for a liquor store and that a liquor store at the proposed location “would only contribute to the social ills in the community.” (R. p. ____, transcript p. 84, l. 13 – p. 85, l. 22.)⁸

⁶ Plaintiff did not dispute the testimony or crime statistics offered by Chief Stewart.

⁷ Councilman Tony Stewart is no relation to Chief James Stewart.

⁸ Councilman Stewart, acting as Mayor *pro tem* for the City of Anderson, also submitted a letter of protest to the Department wherein he expressed his concern about the suitability of the liquor store based on the area’s high crime and gang activity and his beliefs that “the licensure of the

The ALJ did not properly apply the suitability requirement to the facts of this case. In support of his decision to reverse the Department's denial of the Petitioner's application, the ALJ cited (and attempted to distinguish) only one "suitability" case, a prior decision of the ALC that was not appealed, *Tsegay Haile, d/b/a Kezo Quick Stop, Petitioner*, No. 17-ALJ-17-0372-CC, 2018 WL 1900322 (Apr. 11, 2018). In that case, the ALJ upheld the Department's denial of a beer and wine license based on the location's unsuitability. In support of the denial, the ALJ cited the following facts, among others: the area had been the site of frequent criminal disturbances for many years; the volume of criminal offenses requiring police response was very high; and the City of Anderson Police Department recorded over 700 calls seeking police assistance between 2013 and 2017 within a five-block radius of the proposed location. The ALJ found that, although "neither the Petitioner nor his business [were] the cause of the community's crime problem ... the licensing of the Petitioner's store to sell beer and wine would do nothing but exacerbate the already bad situation" and that "[t]his, in turn, would add to the police department's already significant burden of patrolling the area." Applying the same analysis herein, the facts of *Kezo Quick Stop* actually support the Department's denial of the Petitioner's application for a liquor license based on unsuitability.

In addition, cases of this Court support the denial of the Petitioner's application. In *Palmer, supra*, the Court upheld a denial based on findings that the location was situated in a rural residential area, in close proximity to other residences, and there had

proposed location would be detrimental to the community," and "the sale of alcohol close to a low-income housing project exacerbates conditions for children growing up in that area that is already considered high risk and compromises children's safety." (R. p. _____, SCDOR_40.)

been law enforcement problems in the area. While the Petitioner herein testified and argued that he was not involved in the area's crime, *Palmer* makes it clear that the Department may consider crime and the stress on law enforcement near the location, as well as the impact adding a liquor store in that area would have on the community. In *Kan Enterprises, supra*, the Court specifically stated that the ALC should weigh evidence of the location's burden on law enforcement in deciding its suitability.

Here, the Appellant presented substantial evidence of crime and law enforcement involvement in the area with specific statistics regarding the number of calls and incident reports and the types of crimes occurring. These appellate cases contain no requirement that the evidence include "some evidence of how dangerous it is compared to other parts of the city," which the ALJ's Final Order appears to require. In addition, the statute(s) and cases contain no requirement that the nearby daycare center, churches, and Anderson University, to which the Appellant's witnesses testified, must be within the statutorily required minimum distance of the proposed location to be considered by the Department.⁹ Because the ALC improperly weighed the evidence and placed improper requirements on the Appellant in showing that the proposed location was not suitable and because the substantial evidence, in fact, supports the Department's decision to deny the license, the ALC's decision should be reversed.

⁹ See FN 3 hereinabove.

CONCLUSION

The Appellant presented substantial evidence that the proposed location is not “suitable” for a liquor store. In contrast, there was not substantial evidence that the location is suitable, as is required for the Court to affirm the ALC’s decision to overrule the Department’s decision to deny the Petitioner’s application. In addition, the ALC committed an error of law in not taking into consideration the proximity of the childcare center, the churches, or Anderson University simply because they are outside of the required minimum distance set forth in 61-6-120(A). Based thereon, the ALC’s Final Order should be reversed and the Department’s decision to deny the Petitioner’s application for a liquor license at the proposed location should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Initial Brief and Designation of
Matter was served by electronic mail this 16th day of February, 2021, upon the following:

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