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

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

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Appellate Case No. 2020-000837
Case No. 19-ALJ-17-0001-CC

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

v.

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

and

Thomas R. Gottshall, April C. Lucas, Michael Drennan.....Intervenors, Appellants.

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# REPLY OF INTERVENORS, APPELLANTS

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March 29, 2021
Columbia, South Carolina

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## ARGUMENT IN REPLY

Group Therapy contends the ALC "properly" found the location suitable, and the court's decision was "supported by substantial evidence." Group Br. 1. That claim is unsupported by the record and, in many instances, Group Therapy's own brief. For example, Group Therapy agrees the public safety problems described by law enforcement—problems like excess alcohol use, loitering, and fighting—are not unique to Group Therapy, but are "endemic" to Five Points. See Group Br. 9. The bar agrees Chief Holbrook presented police data tying a large number of calls for service *directly* to Group Therapy *and* to the immediate vicinity surrounding it.[1] See Group Br. 9–10 (distinguishing between the 48 plus incidents tied "directly" to Group Therapy, and arrests made "on the block where Group Therapy is located"). The bar agrees one of its DJs was found by SLED drinking alcohol underage and smoking marijuana in a locked back office with three other young people. See Group Br. 5–8. It concedes that because CPD was concerned about the character of the crowd at Group Therapy, the bar was asked to stop using a DJ that might draw gang activity. Group Br. 23. And Group Therapy agrees that the road running along its western border is the most dangerous mile of roadway for pedestrians and bicyclists in the entire State of South Carolina. See Group Br. 11–12. (The 10th most dangerous is a few blocks away). Of course, Group Therapy makes no mention of the graphic body camera footage taken by SLED officers attempting to break up a brawl inside Group Therapy just weeks after the contested case hearing

[1] Group Therapy misrepresents Chief Holbrook's testimony claiming: "… Chief Holbrook characterized the calls for service as low relative to other establishments in the Five Points area." Group Br. 23–24 (citing R. App. 309–10). But the CPD chief did *not* characterize Group Therapy's calls for service as "low"; in reference to the late-night permits he explained, "when we did the analysis with Group Therapy, it was *not the highest.* … There w[ere] a couple other establishments that had some additional call volume and issues at the bar that cause us to deny those late-night permits." R. App. 309–10; see also App. Br. 28–35 (detailing inaccuracies and misrepresentations of law enforcement evidence in the Final Order).

closed—stark evidence of the dangerous conditions that caused Taneyhill to testify that Five Points is only safe "at times" and that "a few more CPD would make it safer, yes." R. App. 174. Well, CPD does not have any more officers to police the dangerous atmosphere created by Group Therapy and other Five Points bars and its drain on public resources is one of the reasons CPD joined 15 neighbors and USC to protest Group Therapy's continued permit and licensing.

Group Therapy's response here relies on notions that the ALC's suitability finding (a) fall within the administrative court's "broad discretion" and (b) was correct to ignore evidence concerning the dangerous atmosphere in Five Points. See Group Br. 26–27. Neither is correct.

Concerning the first point, the bar fails to address efforts by the ALC to contort the record by attacking Chief Holbrook's credibility, misrepresenting testimony concerning the bar's call volume and CPD's late-night permitting decision, and ignoring video evidence of a brawl inside the establishment. Cf. App. Br. 28–35 (detailing the ALC's abuse of discretion). While Appellants agree this Court reviews the ALC's decision for an abuse of discretion, the Final Order's grossly inaccurate factual findings meet that high standard.

To the latter point, precedent demonstrates that conditions on the ground in the vicinity of an applicant are precisely the sort of evidence the suitability doctrine requires an ALC to weigh. It is worth repeating that, properly read, the suitability doctrine provides that even an otherwise deserving applicant might have a permit or license denied because of disturbances to neighbors, proximity to churches and schools, the burden on law enforcement, traffic safety, community character, or other public safety concerns. See App. Br. 35–36 (collecting cases). Put differently, suitability requires an ALC to balance an applicant's interest against the public interest. Compare Moore v. S.C. ABC Commission, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992) (affirming where the ABC Commission "sought to balance the respective interests of Moore and the members of

the community, and expressed the opinion that the public interest must prevail."), with R. App. 472 (urging the ALC that the suitability doctrine requires balancing the community's interest "against this one very narrow special interest."). Group Therapy does not rebut this argument; it simply concludes that what it characterizes as "generalized negative factors" (Group Br. 20) are "wholly irrelevant[.]"[2] Group Br. 27. That position is flatly wrong because community impact is precisely the sort of evidence that has informed what constitutes a "proper location" for permitting and licensure over the last 40 years. See App. Br. 26–28. To hold otherwise is a departure from precedent that Group Therapy cannot explain. Cf. Group Br. 27–28.

Group Therapy also endorses the ALC's conclusion that neighbors are unable to challenge an applicant's constitutional eligibility for an on-premises liquor license. The bar, like the ALC, relies solely on South Carolina Department of Revenue v. Sandalwood Social Club, 399 S.C. 267, 731 S.E.2d 330 (Ct. App. 2012)—a distinguishable precedent that is not germane to this appeal. Sandalwood stands for the proposition that enforcement is the province of DOR. Appellants agree. But South Carolina Code § 61-6-1825(A)(3) says a public protestant can raise "reasons why the application should be denied[.]" It does not enumerate the reasons—it simply says reasons, plural. One reason Appellants cited as grounds to deny Group Therapy a liquor license is the constitutional mandate that licensees engaged in on-premises consumption are a restaurant, hotel, or non-profit organization. See S.C. Const. art. VIII-A, § 1. The evidence would have shown Group Therapy is not primarily and substantially engaged in the preparation or service of meals (see App. Br. 23–

[2] Group Therapy inaccurately claims Appellants are motivated by a concern over "house parties"; in fact, it is motivated by the throng of intoxicated young people in Five Points late at night who burden law enforcement and neighbors with nuisance behaviors and criminal activity while placing themselves in harms way. Compare Group Br. 27, with App. Br. 10–19.

24), at least not accordingly to the only authoritative application of what those terms mean.[3] Group Therapy does not quarrel with Appellants' construction of the Constitution—it simply maintains it cannot be considered because the restaurant requirement is controlled by statute and therefore an enforcement matter. See Group Br. 29–33. However, if Group Therapy is correct, then there is no limit to the scope of "reasons" that might be included as "enforcement" matters and thus fall outside the purview of a public protestant. For example, the mandate that a location be a "proper" one stems from statute, as does the requirement that the applicant be of good moral character, and that it have a reputation for peace and good order in the community. See S.C. Code Ann. §§ 61-4-520, 61-6-120 & -1820. Accepting the rule advanced by Group Therapy and credited by the ALC reads the public protest provisions of Title 61 out of the statute entirely, which cannot be correct. It also misconstrues Appellants' constitutional eligibility argument as an enforcement matter. It is not. See App. Br. 46–49. The proper way to read Sandalwood in harmony with the statutory scheme is to allow public protestants to raise *any* reason in opposition to a permit or license request, but to reserve all enforcement *after* a permit or license is issued to DOR. To hold otherwise renders everything an "enforcement" matter, effectively denying the public an opportunity to be heard even though the statute expressly confers such a right. Thus, if the ALC's rule is correct and any objection contemplated by statute is an enforcement matter, what is left for the public to protest?

Moreover, neither Group Therapy nor DOR offer a convincing case for why Appellants ought not be permitted to challenge the bar's eligibility under the Constitution to receive a liquor

[3] Group Therapy and DOR misapprehend the rule advanced by Appellants to say the Constitution requires some bright line percentage of gross revenue from the sale of food. See Group Br. 34–35; DOR Br. 3. That is *not* Appellants' position. Instead, Appellants read Article VIII-A, § 1 to "impose a qualitative and quantitative standard that asks whether an enterprise is primarily engaged in the business of preparing and serving meals, and substantially engaged in doing so." App. Br. 41. Gross revenue from food sales are but one component of that analysis.

license. Both litigants appear to believe that the General Assembly can replace a constitutional mandate with statutory rules. See Group Br. 33–39; DOR Br. 3–13. That is incorrect. As argued, the legislature is free to regulate the sale of alcohol up to the ceiling but cannot authorize any licensure that falls below the constitutional floor. See App. Br. 42–46. Thus, if the Court believes the statutory scheme authorizes a protestant to raise any reason, then it should also conclude that constitutional eligibility is one potential reason to deny a license and the ALC was incorrect to short circuit that inquiry by excluding evidence that would have shown Group Therapy is nothing more than the modern iteration of the public saloon.

Finally, Group Therapy's leading argument is one presented for the first time on appeal: mootness. 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). Group Therapy contends that its 2018–20 permits and licenses have expired and (going outside the record) that the bar "has already initiated the renewal process for the licensing period beginning in August 2020 and ending in August 2022." Group Br. 17–18. The bar argues that because it has already initiated the renewal process and because DOR has already received valid protests from Appellants and others, this appeal should be dismissed as moot because any decision here will have no practical effect on the establishment's ability to obtain a permit and license in the future. See Group Br. 18–19. Not so. The Court should reject the Group Therapy's argument because (a) the underlying dispute remains a live controversy notwithstanding expiration of the license and permit period and (b) one or more of the three exceptions to the mootness doctrine apply such that the Court should retain jurisdiction and decide the merits.

This appeal is not moot because a decision in Appellants' favor will have an immediate and concrete impact on the underlying dispute. A favorable decision here should result in a remand

to the ALC with instructions to find in Appellants' favor or to develop the evidentiary record consistent with the appropriate legal standard. Specifically, as to Appellants' suitability argument, the Court should find an abuse of discretion and direct judgment be entered consistent with that finding. Alternatively, the Court could (if necessary) remand for further evidentiary proceedings to develop the proffered evidence in furtherance of obtaining a ruling on the merits of Appellants' constitutional argument.[4] In either case, a decision for Appellants would foreclose Group Therapy's ability to continue operating because, while the bar's 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 DOR 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 the permit and license granted by the ALC have expired, but new public protests exist. (DOR is also opposing Group Therapy's latest renewal.) If past is prologue, the resolution of this new contested case could take some time, meaning the permit and license *at issue in this very appeal* remain indefinitely in place. Thus, this remains a live controversy and the Court is capable of giving Appellants the very relief sought from the ALC.

[4] It is typically improper to do as the ALC did here, namely, to resolve novel question of law when the claim turns on the undeveloped underlying facts. E.g., Palmer v. State, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019).

Even if the Court disagrees, the 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, few (if any) alcohol licensing disputes could ever make their way to this Court and be decided within the two-year deadline. Accordingly, this is a classic example of a dispute capable of repetition while still evading review. Holding 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. Such a result would ensure that, in effect, the ALC is the court of first *and last* resort on these issues. Such a result cannot be correct.

Second, future guidance is desperately needed here and on other similar ABL matters concerning the issues raised by this appeal. 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. Until that happens, there remains a multiplicity of ABL disputes arising from Five Points with neighbors, local law enforcement, and USC attempting to ameliorate the public safety threat to their neighborhoods

through this case and others like it. That, respectfully, makes this a matter of great public interest that will not simply vanish by holding this dispute moot.

Finally, until this Court rules, the ALC's decision 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 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 to the parties.

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

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATION OF COUNSEL

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The undersigned certifies that the Reply Brief of Intervenors, Appellants Thomas R. Gottshall, April C. Lucas and Michael Drennan filed on March 29, 2021, complies with Rule 211(b), SCACR.

[signature page to follow]

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