

MAY 02 2016

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

**SC ADMIN. LAW COURT**

The Hunter-Gatherer, LLC, d/b/a The  
Hunter-Gatherer Brewery,  
  
Petitioner,  
  
vs.  
  
South Carolina Department of Revenue,  
  
Respondent.

Docket No. 16-ALJ-17-0031-CC

**ORDER GRANTING  
PETITIONER'S MOTION  
FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Petitioner:  
Respondent:

Burnet R. Maybank, III, Esquire  
Lauren Acquaviva, Esquire

**STATEMENT OF THE CASE**

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to a Request for Contested Case Hearing filed by The Hunter-Gatherer, LLC, d/b/a The Hunter-Gatherer Brewery ("Petitioner") challenging the final determination of the South Carolina Department of Revenue ("the Department") denying Petitioner's application for a brewery permit. In addition to the brewery for which Petitioner seeks a license in this case, Petitioner also owns the Hunter-Gatherer Brewery ("the Brewpub"), which is located on Main Street in Columbia. The Brewpub has a brewpub license issued pursuant to Article 17 of Title 61 ("Article 17"). While holding the brewpub license, Petitioner filed an application on November 19, 2015 for a brewery permit in order to open a "microbrewery" ("the Brewery") at a separate location in Columbia while continuing to operate the Brewpub. By letter dated January 5, 2016, the Department denied taxpayer's request for a brewery permit based on the three-tier law, which prohibits individuals from owning interests in businesses on different tiers (i.e., retail, manufacture, wholesale) simultaneously. According to the Department, the taxpayer would not be permitted to simultaneously own a brewpub, which it considers to be in the retail tier, and a brewery, which it considers to be in the manufacturer tier. Petitioner contested the Department's denial, and the Department's initial determination was upheld in a Final Determination issued on January 28, 2016. A hearing on the matter was held on March 9, 2016 before this Court. Because the parties stipulated to the facts and contest only the legal issues in this case, the hearing was in the manner of oral arguments in support of summary judgment.

## FACTUAL BACKGROUND

The parties stipulated to the following undisputed facts, which the Court incorporates in whole:

1. The Hunter-Gatherer Brewery is an existing brewpub located at 900 Main Street in Columbia. The owner/licensee is The Hunter-Gatherer, LLC. The Hunter-Gatherer, LLC holds a South Carolina Brewpub License and a Business Liquor by the Drink License at the 900 Main Street facility. The facility also has a current federal Brewery License. The brewpub manufactures approximately 1000 gallons of beer per month. In addition to manufacturing beer, the existing facility is a DHEC approved eating and drinking establishment. The brewpub has retail sales of food, wine, liquor, and the beer manufactured on-site.<sup>1</sup> The existing business has been in operation since October, 1995.

2. The Hunter-Gatherer, LLC has applied for an In-State Brewery License and an On-Premise Beer and Wine License for a separate facility located at 1402 Jim Hamilton Blvd. in Columbia. The Hunter-Gatherer, LLC is also applying for a federal Brewery License for the new location. The new facility will manufacture approximately 5000 gallons of beer per month to be sold to Southern Wines and Spirits, a distributor in South Carolina. The new facility will also have an area within the premises approved by the regulations of the Department of Health and Environmental Control governing eating and drinking establishments. Within the DHEC- approved area, the new facility will have retail sales of food, wine, and beer manufactured on-site (approximately 1000 gallons per month). The new business plans to open in August 2016.

3. The Hunter-Gatherer, LLC filed applications for a Brewery License and an On-Premises Beer and Wine License for the 1402 Jim Hamilton Blvd. property on or about November 19, 2015. After review, the Department of Revenue denied the application for the Brewery License, taking the position the applicant was not eligible to obtain a Brewery License because the applicant has an ownership or a financial interest in a business with a Brewpub License (i.e., The Hunter-Gatherer Brewery). The Department is holding the application for an On-Premises Beer and Wine License as well as the brewery license pending the determination regarding eligibility for the Brewery License.

4. The Hunter-Gatherer, LLC timely appealed the Department of Revenue's denial of the Brewery License application.

## ISSUE

Whether an individual with a brewpub license issued under Article 17 may concurrently hold a brewery permit.

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<sup>1</sup> "The Hunter-Gatherer, LLC is licensed . . . to sell beer of other beverage manufacturers[,] but does not do so at this time."

## LEGAL STANDARD

This Court has jurisdiction to hear this contested case pursuant to Section 12-60-30 of the South Carolina Code (2014). Generally, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (quoting 73A C.J.S. Public Administrative Law and Procedure § 128 at 35 (1983)). Here, Petitioner requested a contested case hearing and, therefore, has the burden of proof to show by a preponderance of the evidence that the Department's determination was incorrect. See id.; Anonymous (M-156-90) v. State Bd. of Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (quoting 2 Am.Jur.2d Administrative Law § 363 (1994)) (holding that the standard of proof in "administrative hearings is generally a preponderance of the evidence").

The ALC Rules provide "[t]he South Carolina Rules of Civil Procedure . . . in contested cases . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." ALC Rule 68. The Court thus applies Rule 56(c) of the South Carolina Rules of Civil Procedure, which provides that summary judgment<sup>2</sup> is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." See Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009) (quoting Rule 56(c), SCRCP). In determining whether summary judgment is proper, the Court construes all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992) (citation omitted).

"If a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Id. (citation omitted). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. (citation omitted).

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<sup>2</sup> Although neither party filed a formal motion for summary judgment, I find the parties agreed there are no material facts at issue and the dispute could be properly determined as a matter of law.

## DISCUSSION

Based upon the arguments presented by the parties, and a thorough examination of the applicable statutes and jurisprudence, I conclude the following as a matter of law:

### A. Background Regarding Three-Tier Statute in South Carolina

The Department has denied the taxpayer's permit application based on Section 61-4-940(D) of the South Carolina Code, which provides:

A manufacturer, brewer, and importer of beer are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. A person or an entity in the beer business on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in the beer business operation on another tier. This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business.

The statute creates three tiers for beer: one for manufacturers, brewers, and importers; one for wholesalers; and one for retailers.

#### 1. Three-Tier System

##### a. Generally

This case involves a single narrow issue: whether the owner of a brewpub may also own a brewery under the state's three-tier statute for beer. "South Carolina, like many other states, regulates the commerce in alcoholic beverages through a three-tiered distribution and licensing scheme that separates manufacturing, wholesaling, and retailing interests into distinct tiers of operation in order to prevent 'tied houses' and other forms of vertical integration in the commerce in alcoholic beverages." John D. Geathers & Justin R. Werner, The Regulation of Alcoholic Beverages in South Carolina 241 (SC Bar 2007) (hereinafter "Geathers Treatise").

This three-tiered system of regulation, which traces its roots to the alcoholic beverage control acts passed in the wake of the repeal of Prohibition, is intended "to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to [P]rohibition" and is "aimed at two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced

by the overly aggressive marketing techniques of larger alcoholic beverage concerns.” Accordingly, under this three-tiered system, the licenses issued under Title 61 are generally divided into retail licenses that authorize the sale of alcoholic beverages to the public, wholesale licenses that authorize the purchase of alcoholic beverages from producers for resale to retailers, and manufacturing and importing licenses that authorize the production or importation of alcoholic beverages into the state.

Id. at 12. Further, according to the Geathers Treatise:

South Carolina’s alcoholic beverage licenses are also generally classified by the type of beverage they regulate. The two principal types of beverages regulated in this state are the beer and wine defined as “nonintoxicating” and “nonalcoholic” beverages and full-blooded “alcoholic liquors.” The manufacture, distribution, and sale of beer and wine are regulated by the brewery, winery, wholesale, and retail beer and wine permits authorized under Chapter 4 of Title 61, while the manufacture, distribution, and sale of alcoholic liquors are governed by the liquor manufacturers’, wholesalers’ and retail dealers’ licenses and the liquor-by-the-drink licenses authorized under the ABC Act in Chapter 6 of Title 61. These references to tier and beverage type are the principal means by which alcoholic beverage licenses are identified in South Carolina—e.g., “retail liquor license,” or “a wholesale beer permit,” or “a liquor manufacturer’s license.”

Id. at 12–13. Additionally:

Title 61 provides for several types of permits, licenses, and certificates that are required for various activities related to the manufacture, production, and importation of beer and wine in South Carolina. These several permits, licenses, and certificates can be divided into two basic categories: those related to the operation of breweries and wineries within the state, and those related to the importation of beer and wine into the state from out-of-state manufacturers and importers.

Id. at 125.

A person must obtain a permit from the Department prior to constructing, maintaining, or operating a brewery or winery in South Carolina. These brewery and winery permits allow the holders of the permits to manufacture the beer and wine defined as nonalcoholic and non-intoxicating beverages under Title 61, and to sell the beer and wine they produce to permitted wholesalers in the state. Despite being classified in the manufacturing tier of the three-tiered distribution system, these domestic producers are freed from some of the typical requirements placed upon manufacturers of beer and wine.

Id. at 126.

#### **b. Rationale**

The Geathers Treatise goes on to state:

In addition to broad violation provisions preventing unlicensed activities and enforcing general compliance with the regulatory scheme, Title 61 contains a

multitude of more narrow violation provisions and quasi-violation regulatory provisions that target specific, prohibited activities. One category of these specific violation provisions and regulations is that set of provisions designed to ensure the integrity of the alcoholic beverage industry. In contrast to violation provisions primarily focused on protecting public health and morality in retail sales of alcoholic beverages, such as prohibitions upon sales to intoxicated persons and restrictions on Sunday sales, these provisions seek to regulate the business practices of the alcoholic beverage industry so that the industry operates in a manner that best serves the public interest. *These provisions, which trace their roots to the alcoholic beverage control acts passed in the wake of the repeal of Prohibition, are intended “to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to [P]rohibition” and are “aimed at two particular dangers; the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns.”*

Id. at 240–241 (emphasis added). The Geathers Treatise further notes:

These prohibitions and regulations related to the three-tiered scheme *are not, however, without exception*. Certain retail interests owned by beer and wine wholesalers are grandfathered into the three-tiered scheme; wineries may retail wine directly to customers in certain circumstances; and it is questionable as to whether domestic manufacturers of alcoholic liquors are prohibited from holding interests in wholesale or retail liquor businesses.

Id. at 242–43 (emphasis added).

**B. The Brewpub License is a “Hybrid Permit” outside the Three-Tier System**

Petitioner owns and is licensed to operate a brewpub. In 1994, the General Assembly enacted special legislation for brewpubs. The brewpub legislation follows in part:

Section 61-4-1700. Definitions.

For purposes of this article:

- (1) “Brewpub” means a tavern, public house, restaurant, or hotel which produces on the permitted premises a maximum of two thousand barrels a year of beer for sale on the premises.

S.C. Code Ann. § 61-4-1700 (2009).

Section 61-4-1720. Permit in Lieu of Certain Other Permits.

The brewpub permit provided for in this article *is in lieu of a permit required for the manufacture of beer or sale of beer and wine including, but not limited to, a brewer’s and retailer’s permit*. The sale of alcoholic liquors for consumption on the premises by the drink requires an appropriate license which may be issued to the holder of a brewpub permit who meets all other qualifications for the license under this title.

Id. at § 61-4-1720 (2009) (emphasis added).

Section 61-4-1740. Authority of Permittee.

A brewpub permit authorizes the holder to:

- (1) produce on the permitted premises a maximum of two thousand barrels a year of beer for sale:
  - (a) on draft for consumption on the premises;
  - (b) in a sanitary container brought to the premises by the purchaser and filled at the tap by the permittee at the time of sale; and
  - (c) in bottles for consumption by the purchaser off the premises;
- (2) sell the beer of a producer which has been purchased from a wholesaler through the normal three-tier distribution chain set forth in Section 61-4-940;
- (3) serve food or otherwise be qualified as a public eating establishment. This provision may not be construed to exempt a permittee or licensee from the requirement that food must be served in order for a license for the consumption of alcoholic liquors on the premises to be issued.

Id. at §61-4-1740 (2009). The clear purpose of this legislation is to foster the growth of brewpubs by allowing them to lawfully engage in both manufacturing and retail activity which might otherwise run afoul of the state's three-tier statute. The Geathers Treatise describes the enabling legislation as follows:

*In addition to the basic hierarchy of beer and wine permits described above—i.e., retailers', wholesalers', and manufacturers' permits—Title 61 provides for a hybrid permit that authorizes the operation of a brewpub in which a permittee may both manufacture and retail beer as part of the same business on the same licensed premises.*

Geathers Treatise at 131 (emphasis added).

A person wishing to operate a brewpub must obtain a permit from the Department to do so. As defined by the licensing statutes, a brewpub is a tavern, public house, restaurant, or hotel that produces and sells beer on the permitted premises. A brewpub permit authorizes its holder to produce a maximum of two thousand barrels of beer per year on the permitted premises, to sell the beer it produces and other beers and wines on the premises, and to serve food or otherwise be qualified as a public eating establishment . . . . Given the nature of the activities authorized under these brewpub permits, the permits are declared to be “in lieu of a permit required for the manufacture of beer or sale of beer and wine including, but not limited to, a brewer's and retailer's permit . . . . Moreover, the brewpub statutes specifically acknowledge that, although the *brewpub permit is a distinct permit under Title 61*, it authorizes activities that would ordinarily be covered by a retail beer and wine permit.

Id. at 131–32 (emphasis added).

According to Section 61-4-1720: “The brewpub permit . . . is in lieu of a permit required for the manufacture of beer or sale of beer and wine including, but not limited to, a brewer’s and retailer’s permit.” The Court concludes that this sentence means the holder of a brewpub permit needs only one permit, whereas normally their actions would require two separate permits: a brewer permit and a retailer permit.

Nothing in Article 17 directly addresses whether a person may own a brewpub and a separate interest elsewhere in any one of the three tiers. The issue does not seem to implicate Section 61-4-940(D), for brewpubs constitute an exception allowing one to essentially straddle two tiers, rather than identifying themselves with any one tier.

Based on the foregoing, a brewpub appears to be neither a manufacturer, nor a wholesaler, nor a retailer for purposes of the three-tier system. The three-tier prohibition does not refer to “brewpubs.” And nowhere in Article 17 does the South Carolina Code define a brewpub as either a retailer or a manufacturer. Because the three-tier system does not identify a brewpub within the three-tier system, and because Section 61-4-1720 acknowledges that brewpubs both manufacture and conduct retail sales of beer, the Department appears to have incorrectly determined that a brewpub falls exclusively in the retail tier.

Brewpubs are, by definition, simultaneously manufacturers and retailers. Instead of altering the three-tier system, Article 17 created an exception to the normal three-tier system; allowing a brewpub to manufacture and retail beer as an exception to, and outside of, the normal three-tier system in South Carolina. There is no language in Article 17 that states or implies that a brewpub operates in the retail tier.

A review of other jurisdictions confirms that many states treat brewpubs as an exception outside the three-tier system. See, e.g., David R. Scott, Comment, [Brewing Up a New Century of Beer](#), 3 Wake Forest J. L. & Pol’y 417, 418 (2013) (“The three-tier distribution system is a product of state law, which frequently provides for certain exceptions to the general rule, most common of which is the brewpub exception.”) (citing Andrew Tamayo, [What’s Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina’s Craft Breweries](#), 88 N.C. L. Rev. 2198, 2201 (2010)).

Moreover, to the extent other states using the three-tier system identify a brewpub within the three-tier system, there is a statute which explicitly makes that designation. For example, the Texas statute provides:

(d) The holder of a brewpub license may not hold or have an interest either directly or indirectly, or through a subsidiary, affiliate, agent, employee, officer, director, or other person, in a manufacturer's or distributor's license or any other license or permit in the manufacturing or wholesaling levels of the alcoholic beverage industry regardless of the specific names given to permits or licenses in Title 3 of this code. *The holder shall be considered a "retailer" for purposes of Section 102.01 of this code.*

Tex. Alco. Bev. Code Ann. § 74.01 (West 2015) (emphasis added). South Carolina has no such provision. Based on the foregoing, it is reasonable to conclude that the General Assembly intended on fostering the growth of brewpubs by keeping them as an exception separate and apart from the three-tier system.

### **C. Effect on Three-Tier System**

The Department has expressed grave concerns about the far-reaching effects of a finding that the General Assembly intended brewpubs to be an exception outside the three-tier system. I find their concerns unfounded based on the extremely limited nature of this Court's ruling. Article 17 is substantively different from other statutes within the three-tier system, which tend to permit off-tier activities. Most importantly, Article 17 specifically identifies the required licensure as a "brewpub permit" which is required "instead of or in place of" a permit within the three-tier regime. See Black's Law Dictionary, "in lieu of" (10th ed. 2014). This implies the brewpub permit is a separate permit outside the system, and thus not tied to any one tier.

While the three-tier statutes have been amended through the years to allow greater off-tier activity, those increasingly allowed activities do not affect either the identification of the business within or the limitations enforced under the three-tier system. For example, in 2014, the General Assembly enacted legislation authorizing South Carolina breweries to "sell beer produced on its licensed premises to consumers on site for on-premises consumption within an area of its licensed premises approved by the rules and regulations of the Department of Health and Environmental Control governing eating and drinking establishments and other food service establishments." S.C. Code Ann. § 61-4-1515(B) (Supp. 2015). "These establishments also may apply for a retail on-premises consumption permit for the sale of beer and wine of a producer that has been purchased from a wholesaler through the three-tier distribution chain set forth in Section 61-4-735 and Section 61-4-940." Id. However, while the amendment increased retail activities of breweries on the manufacturing tier, it did not go so far as to create a hybrid permit which is required "instead of or in place of" a permit on the three-tier system. In fact, the General Assembly codified the

continued application of the three-tier statute by providing: “[c]hanges to the brewery laws pursuant to subsection (B) and this subsection do not alter or amend the structure of the three-tier laws of this State, and the wholesalers and the breweries must not discriminate in pricing at the producer or wholesaler levels.” *Id.* at § 61-4-1515(C)(5). *See also id.* at § 61-4-720 *et seq.* (winery authorized to conduct retail sales to consumers) & § 61-6-1120 *et seq.* (micro-distilleries authorized to conduct retail sales to consumers).

Moreover, Section 61-4-1720, which provides that “the brewpub permit provided for in this article is in lieu of a permit required for the manufacture of beer or sale of beer and wine including, but not limited to, a brewer’s and retailer’s permit,” can be differentiated from other statutes within the three-tier system which permit off-tier activity. For example, Section 61-6-1120, which addresses micro-distillery licenses, provides that “[a] micro-distillery is not required to obtain an additional manufacturing and retail liquor license required pursuant to this title.” *Id.* at § 61-6-1120(B) (Supp. 2015). While these sections may appear similar, Section 61-6-1095(A) specifically defines a “Micro-distillery” as “a *manufacturer* who distills, blends, and bottles alcoholic liquors on the licensed premises.” *Id.* at § 61-6-1095(A) (Supp. 2015) (emphasis added). Thus, there can be no confusion as to whether a micro-distillery is outside the three-tier system. The General Assembly could have similarly classified brewpubs within the three-tier system but did not. Stated another way, brewpubs are a narrow exception to the three tier statutes, which otherwise remain in full force and effect.

### **ORDER**

**THEREFORE, IT IS HEREBY ORDERED** that the Department’s Determination regarding a violation of the three-tier statute in this matter is **REVERSED**.

**IT IS FURTHER ORDERED** that the Department of Revenue shall complete the standard investigation of the proposed location to determine compliance with the statutory requirements for licensure, as outlined in the Department’s Final Determination.

AND IT IS SO ORDERED.

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

May 2, 2016  
Columbia, South Carolina

CERTIFICATE OF SERVICE  
This is to certify that the undersigned has this date  
served this order in the above entitled action upon all  
parties to this cause by depositing a copy hereof  
in the United States mail, postage paid, or in the Interagency  
Mail Service addressed to the party(ies) or their attorney(s).

This 2 day of May 2016  
By: Jeckelyn Henderson  
Judicial Law Clerk