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1. **THE LANGUAGE OF REGULATON 7-401.4(K) IS PLAIN ON ITS FACE AND THE SIMPLE REQUIREMENT OF A "PRIOR ARRANGEMENT" WITH MANAGEMENT CANNOT BE EXPANDED EX POST FACTO FOR THE SOLE PURPOSE OF FULFILLING SCDOR'S DESIRED RESULT OF REVOKING BLUE MOON'S ALCOHOLIC BEVERAGE LICENSE AND PERMIT.**

The language of Regulation 7-40 1.4(K) is clear on its face: a prior arrangement made by a member with management is all that is required to admit a non-member as a bona fide guest. 23 S.C. Code Ann. Regs. 7-401.4(K) (Supp. 2010) (hereinafter referred to as "the Regulation"). It is undisputed that Agent Ford made a prior arrangement with a member and with management prior to being admitted to the Blue Moon. The Regulation does not require anything further. It was improper as a matter of law for the Court of Appeals to reach SCDOR's desired result by applying an expanded definition it obtained from Black's Law Dictionary, when the Regulation itself directly establishes the only two limited circumstances under which a non-member can be considered a bona fide guest, one of which was met in this case. (See App. p. 5, citing Black's Law Dictionary 168 (7th ed. 1999»; 23 S.C. Code Ann. Regs. 7-401.4(K) (Supp. 2010).' When the language of a regulation is plain and unambiguous, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Trayelscape. LLC v. South Carolina Dep't of Reyenue, 391 S.C. 89, 98, 705 S.E.2d 28,33 (2011).

Despite clear compliance with the requirements of the Regulation, SCDOR maintains in its Brief that Agent Ford was still not "bona fide," as it asserts that term is

1 Without legal citation to any document actually stating the purpose of the regulation, and without reference to the enabling statute, the Alcoholic Beverage Control Act, S.C. Code Ann. § 61-6-10 et seq., the Court notes that "the stated purpose of the regulation is to ensure that only bona fide members of private clubs and their bona fide guests purchase and consume alcoholic beverages at those clubs." CAppo p. 6). Even assuming that this is the case, SCDOR has defmed "bona fide guests" by regulation such that Blue Moon's practices did not contravene its terms. If the regulation is "complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself." See Whitner v. State, 328 S.C. I, 6, 492 S.E.2d 777, 779 (1997).

defined by law. (Resp. Br. p. 6). SCDOR argues that "'bona fide' is a term found throughout the legal structure established to govern the existence and operation of private social clubs," yet it chooses to ignore the two specifically named designations of what constitutes a "bona fide guest" in Regulation 7-40 1.4(K), in favor of a general expanded definition from Black's Law Dictionary capable of being applied across all laws applicable to private social clubs. (Resp. Br. p. 6). SCDOR further mischaracterizes the Regulation at issue by contending-that the term bona fide "limits entry of bona fide guests of private social clubs to those accompanying bona fide members of the club onto the licensed premises (omitting the second component of the Regulation permitting those who have made prior arrangements, which is the primary portion at issue). (Resp. Br. P. 6). SCDOR also erroneously states that one must first become a bona fide guest before making prior arrangements with management, rather than follow the literal interpretation of the Regulation, which is that the existence of the prior arrangement is what qualifies someone as a bona fide guest. (Resp. Br. p. 10).[2]

The Regulation, promulgated by SCDOR, does not on its face require more than the procedure employed by Blue Moon. The Regulation does not require any degree of familiarity or camaraderie between the guest and the member. The Regulation does not on its face require that the "prior arrangement" precede the guest's admittance by some predetermined period of time. If the General Assembly or SCDOR desire to impose additional conditions upon non-profit organizations for the admittance of guests, they are

[2] Paragraph 1 of Page 10 of Respondent's Brief incorrectly asserts that "[r]ead literally, the conclusion is that once you are a 'bona fide guest' you can only enter ... if the member has received prior approval from the nonprofit organization." This suggests that an individual must first become a bona fide guest and then make a prior arrangement with management. The language of the Regulation does not require this two-step process, but instead defines the prior arrangement as the act which qualifies the guest as a "bona fide **guest.**"

free to do so by properly enacting or modifying applicable regulations. However, until they do so, the clear language of the Regulation must be given its plain and ordinary meaning. (See Converse Power Com. v. South Carolina Dep't of Health and Enviro. Control, 350 S.C. 39,48,564 S.E.2d 341,346 (Ct. App. 2002) (clear regulations require no statutory construction and must be applied according to the literal meaning of their terminology without resort to subtle or forced construction to limit or expand the regulation's operation) (emphasis added). Regardless of whether the Court of Appeals or SCDOR disagree with the extent or duration of the relationship between Agent Ford and Blue Moon, no such analysis is necessary or justified when the Regulation merely requires that a prior arrangement be made before entry. As Judge Pieper appropriately stated in his dissenting opinion,

> [i]f the Department of Revenue has an issue with how the regulation itself defines 'bona fide guest' then it may promulgate a new regulation as appropriate upon proper notice to the public. Until then, other businesses which follow the unambiguous language of the regulation should not be punished as a result.

(App., p. 8).

In opposition to Blue Moon's argument that the Court of Appeals improperly relied upon Black's Law Dictionary to define a regulation already plain on its face, SCDOR tactlessly criticizes Blue Moon's own use of secondary sources help define Regulation 7-401.4(K). (Resp. Br., p. 10). While Blue Moon acknowledges that it cited a secondary source to help define the word "prior" contained Regulation 7-40 1.4(K), SCDOR's contention of impropriety is misguided. The word "prior" is neither modified, explained, nor defined by the language contained in the Regulation, therefore, the use of a secondary source to help interpret the literal meaning of this term would be appropriate.

(See Heilker v. Zoning Board of Appeals, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) (applying definitions found in secondary sources appropriate when terms not readily defined by applicable law). Conversely, the use of secondary sources to interpret the term "bona fide" under these circumstances is improper because the Regulation itself specifically defines the two limited conditions under which a non-member can attain this designation. As a matter of undisputed fact, a prior arrangement was made between Agent Ford, a member, and management before permitting entry, therefore SCDOR's self-promulgated requirement of what constitutes a "bona fide guest" has been satisfied.

SCDOR also argues throughout its Brief that a decision in favor of Blue Moon would produce an "absurd" result. (Resp. Br. pp. 6, 11, 12). In contrast, when viewed from the perspective of Blue Moon and those businesses similarly situated, the absurdity existing in this matter is that Blue Moon has followed the plain language of a Regulation promulgated by SCDOR, and it sought advice and obtained approval from SLED agent John Kirkland on the procedure for admitting guests before employing the above procedure, only to have SLED turn around and issue a citation for that very procedure and have SCDOR attempt to revoke their alcoholic beverage license and permit for following the clear wording of its own Regulation. Should the decision of the Court of Appeals stand, there would be no limitation on the ability of SCDOR to declare, in its absolute discretion, that any and all guests admitted to any particular private social club on the basis of a prior arrangement are not "bona fide," thus subjecting them to fines and forfeitures of State issued licenses. If SCDOR wishes to impose additional requirements on admitting guests, beyond that which is listed in the clear language of the Regulation, it

is free to do so by properly modifying any applicable regulations with proper notice to the public. Until that time, the Regulation must be given its plain and ordinary meaning.

2. SCDOR FAILED TO PROFFER ADMISSIBLE EVIDENCE OF ALCOHOL CONSUMPTION BY A NON-MEMBER, WHICH IS REQUIRED TO SUSTAIN A VIOLATION OF REGULATION 7-401.4(J).

Blue Moon's only charge results from an alleged violation of Regulation 7-104.4(J), which requires a finding that a non-member consumed an alcoholic beverage upon Blue Moon's premises. 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2009). This alleged violation represents the only basis upon which Blue Moon's license to sell alcoholic beverages could be revoked. While the decision of the Court of Appeals focused primarily on whether Agent Ford should be considered a "bona fide guest," it held that SCDOR had abandoned its argument regarding the lack of evidence of alcohol consumption. (App., p. 7). In its Order, the Administrative Law Court held that SCDOR failed to establish that Blue Moon violated Regulation 7-401.4(J), and the Court of Appeals declined to reach the consumption issue because it was abandoned on appeal by SCDOR. Without a finding of actual alcohol consumption, no violation of7-401.4(J) can exist and Blue Moon's license cannot be revoked.

Although SCDOR argues that a footnote in the decision by the Court of Appeals states that the record contains evidence of alcohol consumption, this is not an issue ruled upon by the Court of Appeals. (Resp. Br., p. 13). Conversely, the Court of Appeals expressly states in its Order that they "decline to reach" this issue. (App., p. 7). Blue Moon maintains that the Order of the Administrative Law Court accurately pointed out that there was no testimony regarding alcohol consumption by a non-member on Blue Moon's premises. The only evidence of consumption in the record consisted of hearsay

contained in the violation report. While SCDOR cites to a portion of the Record in which the violation report was admitted into evidence, Blue Moon contends that it was allowed as an exhibit simply for jurisdictional purposes, not to establish the truth of its contents.

Although actual consumption of alcohol was not established such that a violation of Regulation 7-401.4(J) can exist, Blue Moon contends that a finding in SCDOR's favor regarding this issue still does not support the ultimate conclusion reached by the Court of Appeals. Regardless of whether alcohol was, or was not, consumed by Agent Ford at the Blue Moon on September 9, 2006, a prior arrangement with a member and management existed which would otherwise allow him to consume alcoholic beverages as a bona fide guest. For this reason alone, a violation of Regulation 7-401.4(1) cannot exist.

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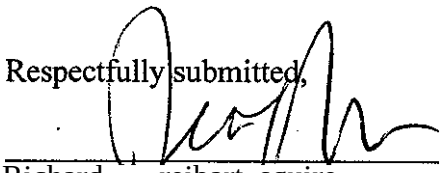
CONCLUSION

The South Carolina Court of Appeals erred by ignoring the plain language of Regulation 7-401.4(K) defining "bona fide guests," while instead applying its own definition obtained from Black's Law Dictionary to reach its decision that Blue Moon's alcoholic beverage license and permit should be revoked. The existence of a prior arrangement between Blue Moon and Agent Ford falls with the plain language of Regulation 7-40 1.4(K), designating a bona fide guest as one who has made prior arrangements with a member and management to gain entry. The March 24, 2010 decision by the South Carolina Court of Appeals also deprived Blue Moon of due process in granting SCDOR's request to revoke Blue Moon's alcoholic beverage license and permit when SCDOR failed to proffer any admissible evidence of actual alcohol consumption by a non-member. For these reasons, Blue Moon respectfully requests that the Court reverse the March 24, 2010 decision of the South Carolina Court of Appeals.

Respectfully submitted,



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November 14, 2011

3.

THE STATE OF SOUTH CAROLINA In
The Supreme Court

APPEALED FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Opinion No. 4661 (S.C. Ct. App. filed March 24, 2010)

Blue Moon of Newberry, Inc., d/b/a Blue Moon Sports Bar, ...Petitioner,

V.

South Carolina Department of Revenue, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief complies with Rule 211 (b), SCACR.

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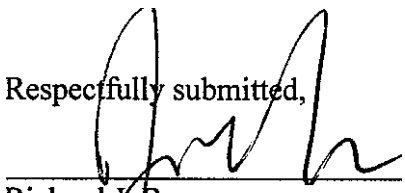

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