STATEMENT OF THE ISSUES

I. **DID THE COURT OF APPEALS CORRECTLY FIND THAT REGULATION 7-401.4(J) AND (K) FORBIDS OPEN MEMBERSHIP TO A NONPROFIT PRIVATE SOCIAL CLUB?**

II. **IS EVIDENCE ENTERED WITHOUT AN OBJECTION COMPETENT EVIDENCE?**

STATEMENT OF THE CASE

Respondent, the South Carolina Department of Revenue (Department) issued a Notice of Revocation of the on premises beer and wine permit and liquor by the drink license held by Petitioner, Blue Moon of Newberry, Inc., d/b/a Blue Moon Sports Bar, a nonprofit private social club. The Notice of Revocation was based upon a South Carolina Law Enforcement Division (SLED) investigation wherein Agent Quincy Ford was admitted as a "guest" into the private social club despite the fact that he was not a member, was not invited by a club member, and no member had made prior arrangements with management for his entry. Hence, a violation of 23 S.C. Code Ann. Regs. 7-401.4(J) (Supp. 2010).

The SLED report indicated that Agent Ford was allowed to enter the Blue Moon and purchase and consume alcohol after he was directed to a sign posted by the Blue Moon which instructed nonmembers to call a telephone number. Agent Ford did so, and a male voice (unknown to Agent Ford) answered and asked for the Agent's name, which was given. Then, the male answering the call advised Agent Ford to reenter the club. Agent Ford did so by telling the doorman his name and paying the $2.00 entrance fee. Agent Ford entered the Blue Moon, spoke to no one, approached the bar and ordered a drink made of Crown Royal liquor and Coca Cola. The drink was served and Agent Ford paid $5.50 to the bartender. Ford consumed a small amount of the alcohol. All of these facts were contained in the SLED violation report and admitted into evidence at the time of hearing, without objection by either the Petitioner or her attorney. (R., pp. 26 and 28).

At the hearing of the matter before the Administrative Law Court (ALC), Denise Polifrone, as officer for the Blue Moon, testified to the fact that various parties advised

her that posting the sign and inviting members of the public with no prior affiliation with the Blue Moon was allowed under the law. None of the testimony was corroborated by anyone and none of the parties was present as witnesses.

The Court of Appeals was asked to reverse the Administrative Law Judge's finding that under Regulation 7-401.4(K) a "bona fide" guest is one merely entering under "prior arrangements" made by a club's member. The Administrative Law Judge disregarded the entirety of the legal structure of laws and regulations which differentiate a private social club from other entities that are open to the general public. As such, the lower court focused only on a sentence within Regulation 7-401.4(K) and mistakenly ruled this defined a "bona fide" guest. In reversing the Administrative Law Judge's ruling, the Court of Appeals agreed that the lower court placed an "undue emphasis" on the phrase "prior arrangement."[1] And, in doing so, ignored the clear regulatory intent of the law, which eviscerated the intent of all of the laws meant to prevent private social clubs from being open to the general public.

The Court of Appeals correctly ruled upon all issues before it and the Petitioner's arguments were given due consideration and resolved.

FACTS

On September 9, 2006, SLED Agent Quincy Ford entered the Blue Moon Sports Bar, located at 1320 Lindsay Street, Newberry, South Carolina.

The Blue Moon holds a private club on premises beer and wine permit and liquor by the drink license as a bona fide nonprofit association. As such, it may only serve alcohol to its members and bona fide guests of members.

[1](R., p. 8).

According to the SLED report, Agent James R. Causey of SLED accompanied Agent Ford to the location of the Blue Moon. At approximately 11:00 p.m., Agent Ford approached the door of the Blue Moon and was met by the doorman William Lindler. Mr. Lindler asked Agent Ford if he was a member of the club and his reply was "no". Mr. Lindler then told Agent Ford to step outside and call the number on a poster. The poster referred to was a poster sized sign located outside the Blue Moon which advised nonmembers to call a telephone number in order to be admitted to the Blue Moon. Agent Ford followed the directions on the poster and a male voice answered the call. The male asked Agent Ford's name, and it was given. The male then advised Agent Ford that when he re-entered the doorman would have his name, and Agent Ford would pay the doorman. Agent Ford followed the instructions, paying the doorman $2.00 to enter and displayed his driver's license to Mr. Lindler. He was then admitted.

Once inside the Blue Moon, Agent Ford approached the bar and ordered an alcoholic drink of Crown Royal and Coca Cola. The drink was served by Jessica Hammond in exchange for $5.50. Agent Ford consumed a small portion of the drink. Agent Ford knew no one in the Blue Moon at that time and had no idea to whom he spoke on the telephone when he was advised to re-enter the Blue Moon. Further, Agent Ford had no conversations or interaction with any member in the Blue Moon prior to or subsequent to ordering the alcoholic drink.

According to the report and the exhibits at the ALC hearing of the matter, the poster in front of the Blue Moon read "If you are not a member call before you get to the door 276-7282". This is the telephone number called by Agent Ford.

Testimony was offered by Ms. Denise K. Polifrone at the ALC hearing. Ms. Polifrone is the manager and license holder for the Blue Moon, and was present at the time of the violation and SLED investigation. In her testimony, Ms. Polifrone acknowledged that the Blue Moon did indeed use the poster and did admit Agent Ford after he telephoned the Blue Moon.

Ms. Polifrone gave significant testimony as to the purpose for establishing the Blue Moon as a bona fide nonprofit organization. First, Ms. Polifrone did not know what a nonprofit organization was.[2] Second, when asked what benevolent purpose was furthered by the Blue Moon, Ms. Polifrone testified that she was providing a valuable service. She also gave testimony this it was the current practice to admit guests of local hotels unaccompanied by any members.

Orders issued by the ALC are subject to review for errors of law by this Court.[3] Questions of statutory interpretation are questions of law, which the Court is free to decide without deference to the court below.[4]

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[2]See (R., p. 55).

[3]S.C. Code Ann. § 1-23-380(5)(d) (Supp. 2010).

[4]City of Rock Hill v. Tyler M. Harris, 391 S.C. 149, 705 S.E.2d 53, (2011).

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY FOUND THAT REGULATION 7-401.4(J) AND (K) FORBIDS OPEN MEMBERSHIP TO A NONPROFIT PRIVATE SOCIAL CLUB.

"Bona fide" is a term found throughout the legal structure established to govern the existence and operation of private social clubs in South Carolina. However, the Petitioner seeks to force this Court's attention upon its use in one subsection of that unified legal framework. And, in doing so, exposes its attempt to legitimize an illegitimate act as an absurdity. In short, Regulation 7-401.4(K) does not define the term "bona fide", it limits entry of bona fide guests of private social clubs to those accompanying bona fide members of the club onto the licensed premises.

The Petitioner takes the position that Regulation 7-401.4(K) defines "bona fide guest". It clearly does not. The constitutional, legal, and regulatory context of Regulation 7-401.4(K) reveals that it does no more than to limit "bona fide" guests of private social clubs, to those bona fide guests either accompanying a club member onto to the licensed premises, or entering upon prior arrangements made by the club member. To accept the Petitioner's contention would have the effect of opening private social clubs to the general public, and this is forbidden by South Carolina Constitution,[5] the South Carolina Code,[6] and the policy of the Department in Regulation 7- 401.4(J) and (K).

This Court has definitively established an analytical framework to reconcile legitimate issues of statutory interpretation from absurd attempts to legitimize the illegal. First, this Court recognizes that a statute must be reviewed as a whole to insure a

[5]S.C. Const. art. VIII-A.

[6]S.C. Code Ann. § 61-6-20(1)(a) (2009).

"practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers".[7] Second, this Court has espoused the principal that "identical words and phrases within the same statute should normally be given the same meaning".[8] As such, this Court has held that "words in a statute must be construed in context, and their meaning may be ascertained by reference to the meaning . . . may be ascertained by reference to words associated with them in the statute".[9] Finally, this Court has ruled that reliance on secondary, non-legal sources, are to be used if no statutory definition is apparent.[10] A basic analysis of the Petitioner's argument reveals it misapprehends this Court's established precedent.

In its opinion, the Court of Appeals correctly noted that Regulation 7-401.4(J) prevents a private nonprofit social club from opening its doors to the general public. The requirement that members and guests be "bona fide" is the limiting factor. The Department simply follows the directive of the South Carolina Constitution and the General Assembly when limiting those permitted to consume alcohol at a nonprofit private social club. The import of the myriad of constitutional provisions, statutory, and regulatory law is that bona fide members of a nonprofit organization cannot unilaterally guarantee a guests' rights to consume alcohol unless they personally chaperone their

[7]Sloan v. S.C. Bd. Of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598 (2006).

[8]Powerex Corp. v. Reliant Energy Serv., Inc., 551 U.S. 224, (2007).

[9]Eagle Container Co., LLC v. Cty. Of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008).

[10]Sonoco Products v. S.C. Dept. of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008).

guest. In their absence, the bona fide member must receive approval from the nonprofit organization in advance if the bona fide guest is to lawfully consume alcohol on the licensed premises. This denies the general public the right to enter a licensed nonprofit social club without gaining acceptance of those who abide by the organization's "social, benevolent, patriotic, recreational, or fraternal purposes."[11]

S.C. Const. art. VIII-A, provides the parameters for the South Carolina General Assembly's regulation of alcoholic beverages in the State of South Carolina. S.C. Const. art. VIII-A, entitled "Alcoholic Liquor and Beverages" provides in relevant part:

> The General Assembly may license persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State under the rules and restrictions as it considers proper, including the right to sell alcoholic liquors or beverages in containers of such size as the General Assembly considers appropriate . . . **licenses may be granted to sell and consume alcoholic liquors and beverages on the premises** of businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging or on the premises **of certain nonprofit organizations with limited membership not open to the general public**, during such hours as the General Assembly may provide.

Act No. 19, 2005 S.C. Acts, § 1, eff. March 17, 2005.[12] (Emphasis added). Moreover, the General Assembly recognized the importance of discerning between restaurants, which can serve the general public, and nonprofit social clubs when it passed S.C. Code Ann. § 61-6-1820 (2009):

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[11]S.C. Code Ann. § 61-6-20(6) (2009).

[12]At the time of the Department's imposition of the violation here, this constitutional provision referred to the sale of liquor in containers of two ounces or less. The constitutional amendment replacing that language with that stated above does not affect the issues before the Court.

Criteria for license; notice.

> The department may issue a license under subarticle 1 of this article upon finding:
> (1) The applicant is a bona fide nonprofit organization or the applicant conducts a business bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging.

(Emphasis added). Furthermore, § 61-6-20(6) provides: "'Nonprofit organization' means an organization not open to the general public, but with a limited membership and established for social, benevolent, patriotic, recreational, or fraternal purposes." Clearly, the legal framework of the state distinguishes between nonprofit organizations and restaurants in terms of who may consume alcohol on licensed premises. And, this is done by use of the term "bona fide".

To that end, Regulation 7-401.4(J) was promulgated and duly approved by the General Assembly in accordance with the Administrative Procedures Act. Once legislatively approved, regulations of state agencies have the full force and effect of law. S.C. Code Ann. § 1-23-160 (2005); see also, Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006) (regulations have the force and effect of law). This Regulation entitled: "Nonprofit Organizations," provides at subsections (J) and (K):

> (J) Only bona fide members and bona fide guests of members of such organizations may consume alcoholic beverages sold in sealed containers of two ounces or less upon the licensed premises.
>
> (K) Bona fide guests shall be limited to those who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization.

Significant is the language of (K) because it is conjunctive with (J) and does not define "bona fide guests" but states that "bona fide guests" shall be limited to those ("bona fide guests") who either accompany a member onto the premises or are entering under prior arrangements. Read literally, the conclusion is that once you are a "bona fide guest" you can only enter with the member onto the premises or if the member has received prior approval from the nonprofit organization. Clearly, this forbids a member of the nonprofit from making a unilateral determination that her or his "guests" can enter the licensed premises without a chaperone or prior approval. Hence, the language of Regulation 7-401.4(K) does not define a "bona fide guest" but provides them with two means to enter a licensed location and consume alcohol.

The Petitioner relied upon secondary sources[13] to define provisions of Regulation 7-401.4(K), but alleges error on behalf of the Court of Appeals for doing the same. The Petitioner takes issue with the Court of Appeals' reliance upon secondary sources to define "bona fide" while arguing that Regulation 7-401.4(K) defines "bona fide guests". The conceptual issue posed by the Petitioner is that the Court somehow caused a misapprehension of the law.[14] If the Petitioner's argument is accepted as sincere, the Court of Appeals has done no more to vary the plain and ordinary language of the regulation than it did in its brief. Petitioner itself found it necessary to resort to the use of secondary sources to elucidate the term "prior" in the same sentence of Regulation 7-

[13]Final Brief of Blue Moon, p. 8, paragraph 3, citing Miriam-Websters' Collegiate Dictionary, 988 (11th Ed. 2004).

[14]Petition for Writ of Certiorari, p. 8, sentence 3.

401.4(K).[15] In short, the Petitioner calls the use of Black's Law Dictionary improper as it argues "bona fide guests" was defined in the regulation, while by its conduct has committed the same alleged impropriety in the same sentence of the regulation in seeking to clarify the term "prior" with legal precision. Therefore, the Petitioner provided the Court with fortified justification to "glean an appropriate definition by reviewing secondary sources".[16]

In Sonoco, this Court found that when no statutory definition is apparent, the use of secondary sources is necessary. The Court of Appeals sought to define the term "bona fide" as a means of excluding the general public from who could enter a licensed nonprofit social club as a guest. As such, the Court did not define "bona fide guest," only "bona fide." And, this was done to show consistency between Regulation 7-401.4(K) and the related constitutional and statutory laws.

The Petitioner's strategy is clear--separate Regulation 7-401.4**(J)** from **(K)**, and limit the discussion to the logistics of entry into a private social club. Of course, this attempted is blunted by the absurd result it produces.

This Court has recently fortified the application of the "absurd result" rule by stating:

> However plan the ordinary meaning of the words in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.[17]

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[15]Final Brief of Blue Moon, p. 8, third paragraph.

[16]Sonoco Products v. S.C. Dept. of Revenue.

[17]City of Rock Hill v. Tyler M. Harris, 391 S.C. 149, 705 S.E.2d 53 (2011).

Clearly, to ignore the legal infrastructure of the law of private social clubs in South Carolina, as did the ALC at the urging of the Petitioner, would be antithetical to the principal that private social clubs should not be open to the public. To rule otherwise would lead to an absurd result.

In conclusion, the Court of Appeals committed no error. The opinion of the Court provides ample and definitive guidance to both regulators and licensees who choose to do business as a nonprofit social club. The guidance is clear--admittance and consumption of alcohol at a private social club is not open to the general public.

II. EVIDENCE ENTERED WITHOUT AN OBJECTION IS COMPETENT EVIDENCE.

Although presented in terms of a "due process" violation, the Petitioner cites no law to support its claim. It cites no case, statutory or constitutional standard by which to quantify its argument. This argument is ostensibly posed to this Court for serious consideration, however the Petitioner does not present this issue with the seriousness required as it lacks good grounds for support. As an attorney attempting to seriously discuss this matter with a learned tribunal, one must first attempt to discern the Petitioner's legal argument, and then discredit the same.

The Petitioner makes assertions of "fact" which are not contained within the record or are contradicted by the record. First, Petitioner intimates that "due process" rights (ostensibly procedural) were violated because it was somehow not permitted an opportunity to be heard on the issue of the admissibility of the SLED report, trial exhibit

2.[18] Indeed, the record demonstrates that the Petitioner reviewed the SLED report and stipulated to its admission into evidence without objection.[19] Second, the Petitioner stated "The Court of Appeals noted, and the ALC correctly found that no evidence of alcohol consumption was presented by Respondent at trial."[20] In fact, the Court of Appeals decision, in footnote 6, states that evidence was contained within the record and recites the issue of the ALC's Order failing to note the Department presented no such evidence. Third, the Petitioner intimates that it objected to the admission of the SLED Report as exhibit 2 as hearsay. No objection can be found anywhere in the record. In fact, the record clearly states the SLED Report was admitted into evidence without objection. (R., pp. 26 and 28). Fourth, the Petitioner erroneously intimates that Agent James Causey had no personal knowledge of Agent Ford's consumption of alcohol.[21] As support it cites its own brief wherein it writes: ". . . Causey did not observe Ford consume alcohol inside the Blue Moon". Again, there is no evidence in the record to support this statement. Finally, the Petitioner makes the erroneous statement that competent evidence cannot be found in the record to support the fact that Agent Ford sipped a drink of the alcohol. This Court has ruled that "[t]he failure to make an

[18]Petition for Writ of Certiorari at p. 9, paragraph 1, argument 2.

[19]R., p. 26, sentence 25--"Mr. Breibart: We have no objection to any of those documents, Your Honor just for the record."

[20]Id. at p. 10, paragraph 2, sentence 3.

[21]Id. at p. 10, paragraph 2, sentence 5.

objection at the time evidence is offered constitutes a waiver of the right to object".[22] To that end, the Petitioner has raised an argument which is unsupported by fact or law.

It has been noted: "In addition to the pleaded theories of the case, issues may arise out of objections either party may have concerning different aspect of the trial or hearing. In order for an appellate to consider such issues, the objecting party must have properly preserved them for trial."[23]

In order to properly preserve an issue for appellate review, the issue must: ". . . (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity."[24]

In this case, the Petitioner has intimated that it objected to the admission of the SLED report as trial exhibit # 2. A review of the record reveals that it did not object, but in fact stated that it had no objection. At the time the SLED report was introduced, the trial transcript reads:

> **Q:** [Hancock to Agent Causey] And I believe you had offered a report detailing your visit to that location?
> **A:** Yes, sir.
> **Q:** [Hancock] If I, Your Honor, may I have permission to approach the witness?
> **The Court:** Certainly.
> **Mr. Breibart: We have no objections to any of those documents, Your Honor just for the record**.[25]

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[22] State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981).

[23] Appellate Practice in South Carolina (1999). Toal, Vafai, and Muckenfuss, Chapter 3, § III-A, p. 66.

[24] Id.

[25] R., p. 26, final 4 sentences, and p. 27 first sentence.

(Emphasis added). Then, as the foundation was laid for the SLED report and the report was entered into evidence, the transcript reads:

> **Q:** [Hancock asking Agent Causey] All right. I want to show you these two pieces of paper. One is marked as Petitioner's Exhibit One and Petitioner's Exhibit Two and I just want to make sure that you recognize those and they are authentic?
> **A:** Yes, sir.
> * * *
> **Q:** And what is the second Exhibit?
> **A:** It is the details of the operation for that night.
> **Q:** Okay. Mr. Causey, I note that you have the original with you; is that the case?
> **A:** Yes, sir.
> **Q:** And is it SLED policy not to release those originals?
> **A:** I keep the originals in my files and we send copies to headquarters.
> **Q:** Okay. And you've looked at those. Are those copies, exact copies of the original that you have?
> **A:** Yes, sir.
> **Q:** Okay. Your Honor, at this point, I would move for those stipulated Exhibits [I and II] to entered into evidence.
> **THE COURT:** And I think they're without objection, they're entered.[26]

Clearly, no objection was raised by the Petitioner, and ruled upon by the Court. As such, the Court of Appeals correctly ruled that the issue raised by the Petitioner was abandoned.[27] There is no need for the Court to entertain this issue as it has been correctly, fully, and definitively ruled upon by the Court of Appeals.

[26]R., p. 27, lines 2-7; pp. 27-28, lines 13-6.

[27]Appendix, p. 7, first paragraph.

More curious is the Petitioner's recitation of law which suggests in criminal matters a written report by itself is not competent evidence[28]--which suggests that the Petitioner had full knowledge of this defense and yet waived it. That is, if it truly believed the objection was applicable to the case at hand, it had full knowledge of the law which would have supported the objection. And, it inexplicably waived the objection at the appropriate time only to bring it up on appeal. Indeed, the Petitioner did exercise culpability in failing to make a timely objection. And, instead of taking responsibility for recognizing the relevance and admissibility of the SLED report, seeks to mischaracterize its stipulation with full knowledge as a violation of its client's rights of procedural due process.

This Court has definitively announced the standard for protecting the procedural due process rights of litigants. Most recently, the Court has reiterated the standard as including: "procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses."[29] The Petitioner's overly broad assertion of a "due process violation" not only fails to note the proper standard adopted by this Court, but also fails to show how its consent and failure to lodge any objection to the SLED report (as exhibit 2) shows a derogation of this standard. Indeed, this argument has no merit in either fact or law. Therefore, there is no credible claim requiring the further attention of this Court. The Court of Appeals committed no error in noting the Petitioner's waiver of objections

[28]Final Brief of Blue Moon at p. 10, paragraph 2, citing In re Newberry County Magistrate English, 367 S.C. 297, 625 S.E.2d 919 (2006).

[29]Tobias v. Rice, 386 S.C. 306, 310, 688 S.E.2d 552 (2010).

which led to the admission into evidence of the SLED report, hence making it competent evidence of the consumption of alcohol by Agent Ford.

CONCLUSION

The arguments posed by the Petitioner do not amount to a credible challenge to the ruling of the Court of Appeals. First, the Petitioner's allegations that the Court applied an erroneous standard in determining that Regulation 7-401.4(K) would not permit the general public to enter and consume alcohol does not have support in binding law. Second, the assertion that "due process" rights were denied its client is not supported by facts or law. Therefore, the ruling of the Court of Appeals is properly supported by the law and the facts of the case.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL 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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