

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Case No. 2018-001064

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SC Court of Appeals

Five Points Roost, LLC, d/b/a Five Points Roost..... Appellant,

v.

South Carolina Department of Revenue, Respondent,

and

Thomas R. Gottshall and April C. Lucas, Intervenors,..... Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Is the Administrative Law Court's finding that Daniel Wells was an undisclosed principal clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- II. Did the Administrative Law Court make an error of law or abuse its discretion when it failed to give weight the Agency's determination that the location and principals met all of the statutory consideration for the issuance of the permit and license that Appellant sought?
- III. Did the Administrative Law Court use an overly broad definition of "the Location" in making its determination of suitability which violated constitutional or statutory provisions, in excess of the statutory authority of the agency, arbitrary, capricious and constituted a clearly unwarranted exercise of discretion?
- IV. Did the Administrative Law Court err making its consideration of findings of suitability of the location because there was no showing that conditions in Five Points were worse than they were, required more police presence or that the situation has deteriorated?
- V. Did the Administrative Law Court act in violation of statutory provisions, in excess of the statutory authority of the agency or otherwise violate the law when the Court applied case law superseded by Acts of the General Assembly to require a specific percentage of restaurant sales in order for an applicant to hold a license for the sale of on premises liquor by the drink?
- VI. Was Appellant prejudiced by the Administrative Law Court's findings that the licenses should be denied based upon a finding of that there were undisclosed principals, where such a finding violated statutory provisions, was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?
- VII. Was Appellant prejudiced by the Administrative Law Court's findings that the license should be denied because the location was unsuitable, where such finding violated statutory and case law, was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and arbitrary or capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion?
- VIII. Was Appellant prejudiced by the Administrative Law Court's findings that the Appellant was not primarily and substantially engaged in the service of meals where the Court made such a finding in violation of statutory provisions; was clearly erroneous in view of the reliable probative, and substantial evidence in the whole records or arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?

- IX. Is the ALC's decision to deny the license unsupported by substantial evidence, in violation of constitutional or stator law, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by other error of law, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?
- X. Should the Court of Appeals reverse the Order of the Administrative Law Court made findings of fact and conclusions of law prejudicial to the Appellants in violation of constitutional and statutory provisions, in excess of the statutory authority of the agency, upon unlawful procedure, affected by other errors of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?

INTRODUCTION

This case arises out of the denial of Appellant's application for licenses to sell beer, wine, and liquor by the drink at its business location in Columbia, South Carolina. Appellant purchased a going concern that held these licenses in a location where licensed establishments had operated for decades. Appellant, through its Principals, filed all appropriate paperwork and took actions to ensure that it complied fully with the local and state requirements to obtain the requested licenses. The Intervenors and others filed public protests with the Department of Revenue, which is the executive agency charged by the general assembly with issuing the licenses, objecting to the issuance of the licenses. The protests were based upon the basic claim that: the density of establishments serving alcoholic beverages in the Five Points area is too high; there is a history of problem activities in the Five Points area; and specifically at this location; the Protestant's opinions of proximity of this urban location to residential communities, and their belief that Five Points is too near to Colleges and Universities where they allege large populations of vulnerable young people live who are affected by the density of establishments .¹

¹ See e.g. Protest of Polly Felton Morrison, (ROA _____ (p. 103 of Agency Record)). Each of the protests are based on this same format. Some add a second set of grounds as exemplified by that

The protests and the hearing to frequently dealt not with the applicant or the location, but rather with the area. The City of Columbia is the political body responsible for the type of establishments allowed in the area and the Protestants readily admit that their problem is with the neighborhood as opposed to the Appellant's establishment. Their protests lie in the belief that if they can shut down establishments in the area, that they believe will be happier with their neighborhood.

Appellants believe, that the licensing law does not imbue DOR or the Administrative Law Court ("ALC") with the right or responsibility to mandate the type establishment that exists in a given area, but rather that decision is left instead to local authorities. Not the City of Columbia Official or any law enforcement agency protested this application. Instead, the record reflects, and this Court will find, that the Administrative Law Court assumed the mantle of zoning and planning board for the City of Columbia and went far afield from the established law and the record before the Court to deny Appellant's license requests on subjective grounds not reasonably founded in fact or law and certainly not grounded in the record before the Court. The Administrative Law Court's decision demonstrates how a Court acting outside of the law and the case record adversely affected the substantive rights of the Appellant when it issued an Order that violates constitutional and statutory provisions, is affected by multiple errors of law, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Moreover, this decision and the local regulatory authorities that it usurps is likely to have

of Mr. Gottshall, one of the intervenors. In addition to the first set of grounds, he adds, "Additionally, from the account in the State, Thursday, October 12, 2017, attached hereto, it appears the management is unsuitable, as an operator/manager of the proposed licensee was

a profound impact on entertainment districts and the state's top industry- Tourism if the ALC is going to make decisions about the placement of licensed establishments best left to local governments.

Appellants assert that this Court's proper application of *S.C. Code Ann.* §1-23-610(A) Supp. 2016) will yield a reversal of the Administrative Law Court's decision and an Order that the Department of Revenue issue the licenses to which the Appellants are entitled.

The record, in this case, reflects that the Administrative Law Court disregarded the findings of the Agency and made findings that are in excess of the statutory authority that DOR has been given by the General Assembly regarding the issuance of licenses to sell beer, wine, and liquor by the drink. The court also made numerous findings of fact and conclusions of Law that do not survive the tests in S.C.R.P, § 23-610(a)

STATEMENT OF THE CASE

On September 21, 2017, Five Points Roost, LLC ("Appellant") filed applications with the South Carolina Department of Revenue for permits for sale and consumption of on-premises beer and wine and liquor by the drink for its business location at 800 Harden Street, Columbia, SC. On, December 8, 2017, the South Carolina Department of Revenue ("DOR") denied those permits due to valid public protests under *S.C. Code Ann.* §61-6-1825 (Supp. 2017). Although the code required DOR to and submit the matter to the Administrative Law Court because of the public protests, the Agency determined that petitioners met all criteria to receive both liquor by drink and beer and wine permits for this location. The record before the Court documents this determination.

involved with the former Pour House, whose problem activities are referenced above." Protest of

On January 9, 2018, DOR issued its Department Determination, and on January 10, 2018, Appellant filed its Request for Contested Hearing at the South Carolina Administrative Law Court. After Judge Deborah Durden was assigned to hear the case, Five Points Roost filed a Notice of Motion for Expedited Hearing and Order Extending Temporary License pending the hearing on January 17, 2018. DOR filed a response requesting denial of the extension of the temporary license until the hearing based on *S.C. Code Ann.* §§61-4-210(B) (Supp. 2016) and 61-6-2005(B). The Administrative Law Court (“ALC”) granted Appellant’s Motion for Expedited Hearing and Order Extending Temporary License Pending the Hearing on January 18, 2018. Judge Durden (“ALJ”) issued an additional Order Scheduling Hearing and Order Granting Request to Operate on January 19, 2018. On January 22, 2018, attorney Richard A. Harpootlian filed a Notice of Appearance on behalf of Thomas Gotshall and April Lucas who moved for Intervenor status.

Judge Durden issued an Order Granting Extension of Temporary Permit and License on January 30, 2018. She also issued an Order granting the motions to intervene.

On February 16, 2018, Rory Ackerman; Richard Ackerman; Luther Battiste, III; Matt Kiser; Michael Drennan; Polly Felton Morrison; Kathryn Fenner; John J. Stucker and Karen Belser filed a notice withdrawing their Protests. Before the hearing, Appellant filed a Motion in Limine requesting the Court limit any mention in the opening statement, in questioning of witnesses, closing argument, or in any other way, of the document prepared by or for the University of South Carolina captioned, “Time for Change.” After a two-day hearing, beginning on February 20, 2018, the Court issued its Order on April 3, 2018, denying the issue of permits for liquor by the drink, and on-premises beer and wine. On April 13, 2018, Five Points Roost filed a Motion for Reconsideration with the ALC. On May 11, 2018, after receipt of the hearing

transcript, Five Points Roost's counsel supplemented the Motion for Reconsideration with a letter citing to the hearing transcript. The ALJ denied the Motion by stamping it "Denied" later on May 11, 2018, Five Points Roost, LLC filed and served its Notice of Appeal on June 7, 2018.

FACTS

The Principals

Before applying for the licenses at issue here, Petitioner, Five Points Roost, a South Carolina limited liability company (ROA ____ (Tr. P. 30 l 2.)) purchased the operating assets and equipment of a business (Carolina Pour House) located at 800 Harden Street, Columbia, SC (ROA ____ (Agency file p. 29)) In order to facilitate the sale, the former owner, Daniel Wells' mother, Brenda Wells participated in the purchase and was given a redeemable equity interest (ROA ____ (Tr. p32 ll 4 -8)) by way of a Member-Managed Limited Liability Company, B.G. Holdings, LLC. (ROA ____ (Tr. p 30 ll 15-17)). Stephen Bland is the Manager of the LLC. In the event that he is removed, Adam Ruonala is the designated manager. (ROA ____.(Tr. P. 175 ll, 5-7))

Bland testified that B.G. Holdings, LLC² was involved in the business as a means of owner financing. He stated,

We originally had two – or one investor that was going to come in for \$125,000. For other business reasons, he was not able to do the \$125,000. At that time we tried to find other investors, but it boiled down to that essentially Dan had to sell the bar, he had to get out, and we could not find other investors. So we did owner financing through equity that was to be repurchased by me and Mr. Ruonala respectively.

(ROA ____. Tr. p.31 ll19-P 32 l 3))

² This is South Carolina Manager Managed Limited Liability Company. Brenda Wells is the sole member. Stephen Bland is the Manager.

Stephen Bland and Adam Ruonala are the other two owners. Bland and Ruonala have options to purchase the equity from Wells' LLC³. While Intervenors argued that Dan Wells was involved in the business, there is no testimony in the record to that effect. In fact, the only testimony regarding Mr. Wells participation after the transfer of the assets is as follows:

Q. Okay. And, Mr. Bland, you heard Mr. Harpootlian's opening statement, and I believe

Mr. Wells is in the courtroom here. Does Mr. Wells own any interest?

A: No, he does not.

Q: In Five Points Roost? To your knowledge, does he own any interest in BG Holdings?

A: No, he does not.

Q: Does he have any role in the operation of the business Five Points Roost?

A: No, he does not.

Q: To your knowledge, has he ever been in -- in the establishment?

A: He has been asked not to be in either establishment, and he knows the toxicity that he

he would hold if that occurred, so he has not been in, no.

Q: Does he have any relevant (role in) managing or operating the business in any way?

A: No, sir.

(ROA P _____ (Tr. P 32 l. 9 – P.33 l.3))

Witnesses also testified that there have been no payments to Mr. Wells and that the business had no intention of making payments to Mr. Wells (ROA _____ (Tr. P 57 l. 22 – P. 58 l 3)). B.G. Holdings was a creditor of the seller DHW and received the equity as a way to offset some of the debt owed. (ROA _____, (Tr. P 101 ll.6-15))

The record is bereft of any evidence that Dan Wells ever set foot in the location; had any communication with any person about the management or operation of the location; received any financial benefit from the location or in any way was involved in or acted in such a way so that he was a principal pursuant to the applicable statutes.

³ Q: So, do y'all have an agreement with Ms. Wells to purchase the interests of BG Holdings in Five Points Roost?

A: Yes, sir. The agreement is a two-year option and we can both buy up to 45 percent each. (ROA _____ (Tr. P. 32.4 to 32.8)).

The Location

DOR found the location at 800 Harden Street to be a suitable location (ROA p. _____ (Tr. P. 13 ll. 13- 22)). There has been an establishment serving alcohol at that location for at least forty years. The Police presence in the general area has not increased or decreased within the past four years (ROA p. _____ (Tr. p. 266 l 12)). There have been no calls at Five Points Roost since it's been operating. (ROA p. _____ (Tr. P. 267 1.2)) Chief Holbrook speculated that "if a permit is granted to put a bar back in there" [800 Harden] it "could" place a strain upon police to adequately protect the community (ROA _____, (Tr. P. 249 l. 8 -12)). Chief Holbrook also testified that "I'm not aware of any calls for service at the location" since it reopened (ROA p. _____ (Tr P. 252 ll. 7-8)). Chief Holbrook testified that the "nuisance" finding had taken place where there was a triggering incident rather than a large number of incidents. (ROA p. _____ (Tr p. 261 1.3)). Anna Edwards, who testified on behalf of the University of South Carolina testified that she had no data directly related to consumption of alcohol by students at Five Points Roost. (ROA p. _____ (Tr p. 300 11.22-25) Leslie Wiser, who was qualified as an expert, over the objection of the Appellant, in criminology, Mr. Wiser admitted that practices at the location were beneficial. (ROA p. _____ (TR p. 381 ll. 4-8)) April Lucas testified about general complaints of activities in the Five Points area. While complaining about activities that she attributes to bars in Five Points, she asserts that she is complaining about issues that occurred over "maybe 10 to 15 years", by inebriated students. (ROA _____ (Tr p. 423 11. 11 -13.)) Ms. Lucas was unable to testify about any data as to when establishments had been added in Five Points. (ROA _____ Tr. p. 421 ll. 3-7.)) Ms. Lucas admitted that she sold a house next door to her residence approximately five years ago and that she did not disclose any concerns with problems with Five Points. (ROA _____ (Tr p. 431. 1.10)). She also admitted that she had no information about problems at 800 Harden Street. (ROA _____ (Tr p. 438. 1-

5.)) William Lamb also testified and was unable to attribute any problems or issues to the location at 800 Harden Street⁴. While complaining that establishments like Five Points Roost are attracting students, Mr. Lamb admits that there is a lot of rental student housing in his area (ROA _____ (Tr. p. 461. 1.21)) Mr. Tom Gottshall testified and he admits that he was unable to link the activities that he complains about to any activities of Five Points Roost (ROA _____ (Tr p. 493 p 15)).

The Restaurant

As a part of the determination about whether an applicant is eligible for the issuance of a liquor by the drink license, DOR and the South Carolina State Law Enforcement Divisions perform an investigation. Their investigation is contained in the record. (ROA pp. _____ (Agency record pp. 8-98)). That investigation includes an evaluation of the organization documents, principals, and the statutory requirements to ascertain whether an applicant is “primarily and substantially” engaged in the preparation and service of meals. This inspection includes a Retail Food Establishment Inspection Report from the South Carolina Department of Health and Environmental Control (“DHEC”) (ROA p. _____ (Agency record pp 61-62)); and a SLED Investigation Report for ABL Application. (ROA pp. _____ Agency record pp. 90-96)).

SLED supplemented its report after renovations were completed. The SLED report makes certain findings, to wit, the business can set at least forty or more persons simultaneously at tables for the service of meals each day it is open; does the business have a kitchen that is a separate area of the business that is used solely for the preparation, serving and disposal of meals, Does the kitchen have a working fixed grill, stove or microwave oven? Is there a

⁴ Asked about any problems with Five Points Roost, Mr. Lamb responded “No, sir. I cannot identify anything specific to them.” (ROA _____ (TR p. 446 l. 19))

functioning cold storage unit with a minimum of 21 cubic feet capacity for food storage? Does the business have a menu or sign listing the meals offered for service and available for customers? Does the location plan to have, during normal mealtimes, adequate food to serve forty people a variety of hot meals which occurs when the business plans to be open to the public? Here, after reinspection, all of those questions were answered in the affirmative as reflected by the Opening statement of DOR. (ROA p. _____ (Tr. p. 13 ll. 3-20⁵))

Moreover, the testimony in the record supports these findings. Mr. Bland testified about the food preparation, sales and hours that the business was open. (ROA _____ (Tr. P. 49 l.25 – P.50 l.4.))

ARGUMENT

I. The Court Erred in Denying the License Where It Made Numerous Findings of Fact and Conclusions of Law Which are not Supported by Evidence in the Record and Reflect Abuse or an Unwarranted Exercise of Discretion or Violate Applicable Statutory Provisions.

- a. There is no evidence in the record that Daniel Wells is a Principal, much less an “undisclosed principal.” The court found facts unsupported in the record, abused its discretion and misapplied the law.

The Court found that Daniel Wells was an undisclosed principal without factual support and without regard to the statutory definition of Principal.” *S.C. Code Ann.* §61-2-100(2) (2017) defines “Principal” of a business or entity⁶. The statutory definition includes eight categories

⁵ DOR’s Attorney told the court “Since then it is my understanding that SLED has gone back out and conducted a final inspection and SLED has determined that they – that the proposed location meets the building and restaurant requirements. So, as we’ve—we’re going to go ahead and withdraw those – those – or those grounds for denial. So, the only issue from the department determination are the public protests; . . .”

⁶ S.C. Code Ann. §61-2-100(2) provides:

"Principal" of a business or entity means a person who is described in any one or more of the following terms:

(a) an officer of the business or entity which owns the business;

that an individual can fall into and be a “Principal” under the Act. These categories are clear, unambiguous and specific. The Court erred in finding that Mr. Wells was a Principal without finding that he met the requirements necessary pursuant to the defined statutory categories. The only evidence in the record is that Mr. Wells is not a Principal. Mr. Wells does not meet any statutory definition of being a Principal, and the Court found no facts that place him into one of the defined category. Instead, the Court simply made a conclusion based upon the Court’s belief. That is not a proper legal finding. Moreover, no evidence was offered by the Protestants or Intervenors that Mr. Wells⁷ was a Principal. Appellant was not obligated to prove the negative; DOR did not find or suspect that Mr. Wells was an undisclosed principal and the Protestants adduced no evidence to support such a contention. To the extent that the Court imposed this burden on the Appellants, it denied petitioner due process. The Court seems to have made this finding based on an apparent dissatisfaction with the consideration paid to purchase the assets from Mr. Wells. There is no statutory or case law to support such a finding or supposition. Such a conclusion is arbitrary, capricious and inappropriate. This finding exemplifies the totality of

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- (b) a partner other than a limited partner who cannot exercise any management control;
 - (c) a manager of the limited liability company which is managed by managers;
 - (d) a member of the limited liability company which is not managed by managers;
 - (e) a fiduciary, including personal representatives, trustees, guardians, committees, and receivers, who manage, hold, or control title to or who is otherwise in direct or indirect control of the business;
 - (f) a person who owns twenty-five percent or more of the combined voting power of the business or entity;
 - (g) a person who owns twenty-five percent or more of the value of the business entity; or
 - (h) an employee who has day-to-day operational management responsibilities for the business or entity.
 - (i) a license or permit may be issued to a publicly held corporation, which is deemed the applicant under Section 61-2-160 and the corporation shall designate an officer or other employee of good moral character, over the age of twenty-one and a resident of this State in whose name the permit or license must be held on behalf of the corporation and the corporation may substitute an officer or employee if the individual is of good moral character, over the age of twenty-one, and a resident of this State, and upon notice in writing of the substitution to the department.
 - (l) The department may not issue a wholesale beer and wine permit pursuant to this title unless the applicant is a legal resident of the United States and has been a legal resident of this State and has maintained his principal place of abode in this State for at least thirty days before the date of the application.

the cumulative error inherent in the ALC's findings and decision and is but one of the many reasons that this Court should reverse the ALC's decision.

- b. The Court erred in denying the license based upon the issue of Undisclosed Principals where there was no finding that the failed disclosure was willful or intentional.

The Court deviated from longstanding practice where issues arose relating to allegedly undisclosed principals. Applicable case law demonstrates that generally where the ALC has denied licenses based on undisclosed principals, DOR raised the issue in its denial. Where issues relating to undisclosed principals arose in hearings, the Court has universally remanded the case to the DOR to investigate and make a determination.⁸

This Court should overturn the findings as they relate to alleged undisclosed principals. It was improper for the Administrative Law Court to deny the license based upon these erroneous findings.

⁷ Mr. Wells has previously held Alcoholic Beverage licenses and has never had a license revoked.

⁸ See e.g. *A La Fontana, Inc. d/b/a La Fontana, Petitioner vs. South Carolina Department of Revenue*, 11-ALJ-17-591-CC, "The department further denied the application based on the moral character of the Petitioner's undisclosed principal. . . . *OTR Club, d/b/a On the Rocks, Petitioner, vs. South Carolina Department of Revenue, Respondent*, 17-ALJ-17-0222-CC "The Department determined that the applicant had not disclosed all its principals and that the undisclosed principal had their beer and wine permit . . . revoked on April 1, 2016."; *Taleb A. Abudayya d/b/a/ Swamp Fox Tobacco & Grocery, Petitioner; vs. S.C. Department of Revenue, Respondent* 14 ALJ-17-0404-CC "The Department based its denial on . . . failure to disclose all principles[sic]. See also *Greenville Bistro, LLC d/b/a Dream Girls, Petitioner, v. South Carolina Department of Revenue, Respondent*. 17-ALJ-17-0142-CC where the Court recognized that principals are as defined in 61-2-100(2) a-h and finding that "Petitioner shall amend its application to include any individual qualifying as one of its principals who are not currently listed in its applications as such Petitioner shall also complete and submit to the Department a consent-and-waiver form for a SLED background check on its undisclosed principals. The Court ordered that the Department issue the permit and license upon completion of the requirements and payment of the proper costs. This is consistent with the finding in *Hemingway's Partnership d/b/a Hemmingway's Partnership, Petitioner, v. South Carolina Department of Revenue, Respondent, John E. North and Pamela S. North, Intervenors*, 17 ALJ-17-0070-CC. These findings set precedent even in light of *S.C. Code Ann.* §62-2-100(J) which allows a misstatement or concealment of fact to be sufficient grounds to deny the application. There is no evidence or finding that such was the case.

c. The Court erred in finding that “The Only plausible explanation is that Daniel Wells is still controlling the business and has simply reorganized it and transferred his majority ownership interest into an LLC controlled by his mother.”

Like many of the Court’s findings of fact, there is not a shred of testimony or evidence in the record to support this contention. No document was offered that indicated Mr. Wells had any involvement in the business and no testimony was adduced to that effect. The only mention in the record comes from Mr. Harpootlian’s opening statement. This prejudicial finding is clearly erroneous in view of the evidence in the whole record and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court apparently leaped to this conclusion because it supported the desired outcome not because facts supported it. This finding exemplifies the errors in findings that are indeed too numerous to characterize and identify.

d. The Court made numerous other unsubstantiated findings of fact and conclusions of law which lack support in the record and demonstrated bias, an abuse of discretion and reversible error pursuant to the Administrative Procedures Act.

There is no testimony in the record to support the Court’s findings regarding the incident for which Wells is currently facing criminal charges. While the Court found (apparently from Mr. Harpootlian’s argument) that the incident occurred in February 2016, (ROA p. ____ (Final Order p. 3)) the only incident involving Mr. Wells happened March 19, 2017. *The record is bereft of any testimony or exhibit to support this finding.*

Likewise, without apparent support in the record, the Court found that “Ruonala is a longtime friend of Wells’ with no previous relationship to Bland prior to this business venture undertaking.” (ROA p. ____ (Final Order p. 4)) There is no support for this conclusion in the

Record. This appears to be another finding based upon Mr. Harpootlian's opening statement.

The record reflects exactly how Mr. Ruonala became involved in the business:

Q: How did you get involved in the purchase or the group that was purchasing the Roost?

A: Well, yet another unforeseen set of circumstances. I got a call from Stephen Bland who told me about the opportunity that had arisen.

(ROA p. _____ (Tr. p. 154 l.22- p.155 l.2))

The evidence in the record reflects that Bland contacted Ruonala about the opportunity – obviously he and Bland had some sort of relationship. There is no evidence to support a finding of fact that Bland and Ruonala had “no previous relationship.”

The Court also appears to have made the following findings of fact without any evidence supporting them in the record. The Court held:

The lack of value given in exchange for Brenda Wells' significant ownership interest in the business is the predominant fact that leads me to find that Daniel Wells is an undisclosed principal of Five Points Roost, LLC. Other relevant facts that suggest that Wells is actually exercising control over the business include:

The longstanding personal relationships between Daniel Wells and both Bland and Ruonala and the lack of prior relationship between the two men who purport to be managing the business together.”

(ROA p. _____ (Final Order p. 5))

As previously referenced, the only evidence in the record leads to the conclusion that Mr. Bland and Mr. Ruonala were acquainted and had a previous relationship. Here the Court neither finds nor cites any evidence that Wells is exercising control. In previous decisions, the Court has looked at being present in the location, being involved in financial transactions, signing documents, writing checks, making purchases and other tangible actions as indicia of the exercise of control. Adopting the Judge's ruling here literally means that being acquainted with someone is sufficient evidence for a court to conclude that that person is a control person in a

business. The outcome is absurd and evinces both the abuse of discretion and lack of substantial (even any) evidence in the record to support the vast majority – and indeed, the ones relied upon in denying the licenses – of the Court’s findings of fact and conclusions of law.

Moreover, while Intervenors argue that the business generates huge revenues⁹, which would suggest a high value, they argue that there was no value conveyed when the assets were transferred to support repaying debts owed Brenda Wells or her LLC with an equity interest. Their position and the Court’s findings are incongruous. Ruonala himself testified that he evaluated and was comfortable with the consideration paid:

So, I had talked to him, we assessed the value, and to be honest, Mr. Wells made it very clear that -- that he had debt from Ms. Wells and that one of the deciding factors in moving forward would be that he -- that he was able to relieve her of that debt however way. We were not willing to go find that kind of cash. I was not willing to assume his loan, what we were willing to do is give her equity with the opportunity to buy it back. That would kind of kill two birds with one stone.

(ROA _____ (Tr. p. 167 ll. 9-19))

While no party offered any expert testimony as to value, the purchase price or method of financing the assets, the lack of evidence to that does not give credence to any finding of fact, and it was error for the Court to attempt to substitute its judgment as to value for that of the parties. A party in South Carolina can testify about the value of his or her own assets. No evidence, aside from argument from Counsel was offered in opposition to the valuation presented by Petitioners.

The Court found that “On January 9, 2019, the Department denied Petitioner’s application for the permit and license based on the suitability of the location, . . . (ROA p. _____ (Final Order p. 2)). Again, there is no testimony or evidence of any kind to support this finding.

⁹ Intervenor’s Counsel argued that “in that period of time they’re generating a [sic] \$20,000 a week in revenue, which would be a million dollars a year, ... (ROA _____, Tr. P 15 ll. 20-23. It is obvious that a

In fact, it contradicts the agency record and statements made by Agency Representatives to the court.

The Court found that Bland testified to materially different facts at the hearing in this case versus a deposition. (ROA p. ____ (Final Order p. 4.)) The Court then went on to state “Moreover, he submitted an errata sheet to his deposition making many of the same materially substantive changes to his story, claiming that the court reporter had not accurately transcribed his answers at the deposition.” (ROA p. _____ (Final Order p. 4)) This finding demonstrates that the Court made credibility determinations based upon an error of law when the Judge determined that Mr. Bland’s credibility was adversely affected by his corrections to his deposition testimony. Mr. Bland corrected his testimony pursuant to Rule 30(e), SCRC.P. Such a correction is not evidence of anything other than a desire to ensure that the deposition is correct. The Court can take notice that Rule 30(e) S.C.R.C.P. affords a witness the ability to make “any changes in form or substance which the witness desires to make.” Correcting a deposition using the errata sheet pursuant to the rule is not a proper basis for a finding that the Court reporter “had not accurately transcribed his answers at the deposition” as the Court concluded here. Rather a deponent has a right to correct, subject to the ability to cross-examine on why. Here Mr. Bland explained his corrections as generally that he “did not have the document in front of me” (ROA p. ____ (Tr p. 64 l. 18)) “To the extent that the Court weighed Mr. Bland’s credibility based upon this action, the Court erred. He was merely following the rule. Likewise, the Court questioned the credibility of both Bland and Ruanola without identifying any basis other than her feeling that “the facts they testified to concerning the ownership and control of the business are unreliable”)(ROA p. _____ (Final Order P. 4)),

business generating revenues of that magnitude has significant value. Intervenors inconsistent arguments reflect their desire to “have their cake and eat it too.”

“From what I have looked into after the deposition,” (ROA p. ____ (Tr. p. 78 ll. 20-21)); “After reading through, I mean, I was under oath, of course, I’m concerned. I want to make sure that the factual information is – is given.” ROA p. _____ (Tr. P. 83 ll. 12-15); “At the time I thought it was right, but, looking through it, it is not correct.” (ROA p. _____, (Tr. p. 83 ll. 19-23) and otherwise explains that he refreshed his recollection on matters about which he testified and corrected them.

Nevertheless, as it relates to the issues under protest, Bland and Ruonala’s business acumen is not at issue, and none of these supposed credibility findings address any material fact relating to the issues before the Court. Unfortunately, the stretch by the Court to make adverse credibility finds appears to be nothing more than window dressing in an effort to support findings of fact and conclusions of law which are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and reflect an abuse of discretion or clearly unwarranted exercise of discretion in denying the license based on criteria not in the law

Likewise, the Court found that “Five Points” is an area where underage college students congregate and loiter . . . These students and their drunken, unruly behavior become a nuisance to the surrounding neighborhoods. Of even greater concern, they are vulnerable to being victims of crime as they congregate in Five Points and travel back to their residences in an impaired state. (ROA p. ____ (Final Order P.6)). Like virtually all of the findings of fact relied upon by the ALJ in her Order, these facts are not relevant to the location, there is no evidence offered to support them – and they make the scope of examination far more than the statutory framework provides. In her order, the Court correctly states that “The department may consider, among other factors, as indications of unsuitable location, the proximity to residences, schools, playgrounds and churches. *S.C. Code Ann.* §61-4-520 (6). (2016). However, none of those

factors are applicable here and the Order makes no findings of fact relevant to that statutory provision.

Among other findings unsupported by evidence in the record, the Court concludes that “the proposed business is likely to be a nuisance to the community.” In doing so, again without any evidence to support such a finding the Court notes that “*S.C. Code Ann.* §61-4-580(5) (Supp. 2017) prohibits a permittee from knowingly allowing “any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this state” to occur on the licensed premises. (ROA p. _____, (Final Order p.11)). There is absolutely no evidence of any kind from which the Court can find that Appellants have or will allow such an act to occur.

Altogether, these many factual findings without support of the record reflect a flawed process and findings that should be reversed.

II. The Court erred in making findings of fact and conclusions of law based solely upon the potential for a change in behavior or operational method.

In making its findings of fact and conclusions of law, the ALC erroneously relied on speculated when it found that regardless of the Appellant’s testimony and the documented manner in which Five Points Roost, LLC lawfully managed its business under the temporary license, and Appellants were going to act lawlessly in the future. For example, the Court found:

However, that testimony is insufficient to convince that if the permit or license were issued, those practices would be faithfully observed or, if observed, they would be effective in identifying all of the false identification cards. Bland testified that if all the resources available were collectively used, they would have “a really good chance of catching fake IDs.” I find it improbable that while 200 people wait in line outside the bar, a doorman would scan every single ID with a black light, a separate second scanner, and reference it in a guidebook before allowing a patron to enter. Thus, I find that if the permit and license were issued the business would contribute to the problem of underage drinking in Five Points

(ROA _____ (Final Order pp. 6-7.)

The record does not contain any factual basis for such a conclusion, and the determination is legally improper. A significant portion of the Administrative Law Judge's findings of fact and conclusions of law are based upon the apparent belief that despite Five Points Root's performance on the temporary license¹⁰, upon receipt of a regular license, it would begin acting in a less careful, cautious and appropriate manner creating future violations. These conclusions are unsupported by evidence attributable to the actions of Appellants. All of the findings controvert the facts presented as to the activity at the location under the temporary license and the previous operations.

In *Circus Disco, Ltd. v. New York State Liquor Authority*, 51 NY 2d 24, 409 N.E. 963, the Court addressed the common law on this issue. There the Court held "The likelihood of future violation can furnish a basis for denial only when there are facts in the record which rationally support doing so." As was the case in *Circus Disco*, here there are none. The only facts here, as it regards Mr. Bland and Mr. Ruonala's operation of the location is that there has been no requirement of law enforcement involvement within or without the location. Neither the Respondent, the Intervenors nor any protestant offered a single instance. This was clear from the testimony of every single witness. "Denial of a license on the speculation that it will be operated in violation of law is impermissible" *Matter of Sled Hill Café v. Hostetter*, 22 NY2d 607, 612-613; *Matter of Santini Rest. v. State Liq. Auth.*, 32 AD2d 514). The ALC erred in denying the license and permit based upon concerns about future misconduct by Petitioner. This was an improper reason to deny the license and this Court should reverse the Administrative Law Court's decision on this basis.

¹⁰ There are no findings of any problems, issues at the location, violations of any law or statute and the record documents diligence in screening out potential underage customers and a general prevention of incidents of any kind. Likewise, there is no evidence to support a claim that during the temporary license period that Five Points Roost created any problems for law enforcement.

III. The Court erred when it used an overly broad definition of “the Location” in making its determination of suitability

The Court made findings of fact and conclusions of law based on evidence not specific to the location. Moreover, the Court ignored the only testimony in the record that the location, as operated by the Petitioner under the temporary license had not had a single incident or issue requiring law enforcement resources. The Court acknowledged that numerous licenses and renewals had previously been issued to the location. The Court made no finding that the suitability of the location had changed since the last renewal – or even since the State issued the first license at the location.

The Court made its findings about the Five Points area in general and not about the specific location and most importantly, the particular operation within that location. The Court misapprehended the law in doing so. The body of jurisprudence regarding suitability is indeed broad. However, the Court made its findings here on items outside of the control of Petitioner and most importantly based its decisions on facts that are without demonstrable causal connection to the location. The Court found that the location would be a nuisance based upon the following statement “I conclude that even if Petitioner makes the operational improvements it has promised, it is likely that the bar it plans to operate would continue to contribute to and encourage the late-night revelry of underage USC students and the illegal and obnoxious behavior that ensues. (ROA p. _____ Final Order p. _____)” There is no fact, evidence, exhibit or testimony to support such a conclusion.

In deciding whether a location is a proper one, the fact-finder may consider any evidence showing adverse circumstances. *Palmer v. S.C. Alcoholic Beverage Control Comm'n*, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984). Thus, “[t]his determination of suitability is not

solely a function of geography but involves an infinite variety of considerations related to the nature and operation of the proposed business and its impact upon the community." [emphasis added] *Id.* The court should weigh evidence of the location's burden on law enforcement in deciding its suitability [emphasis added]. *See Moore v. S.C. Alcoholic Beverage Control Comm'n*, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); *Fowler v. Lewis*, 260 S.C. 54, 57, 194 S.E.2d 191, 192 (1973). In this instance, the Court erred by dealing with general complaints and perceptions that it could not attribute to the location. The local authorities best address those questions. Instead, it made its decision without considering the applicant business location and its impact upon the community, the Court essentially decided that the community was bad and because of that, the business would make it worse. This is a substantial deviation even from the law available in *Kan Enters v. S.C. Dept. of Revenue*, 420 S.C.596, 803 S.E.2d 882 (Ct. App. 2017). In *Kan*, the Court found that A1 was no longer a suitable location based upon occurrences in the record specifically occurring on its premises. The Court noted "A1 had significantly more calls for police services and arrests than any of the three nearby convenience stores from 2011 to 2014 and nighttime calls for police services increased during that period. The Court did not analyze the area convenience stores and their impacts, because it doesn't undertake zoning and those locations were not at that time seeking licenses. Furthermore, local community members testified A1 had not improved." *Kan, supra* at 420 S.C. 606. While the Court in *Kan* noted the while considering law enforcement presence in the area, the primary (and proper) consideration was the activities on the premise of the Petitioner.¹¹ Those findings are wholly inconsistent with the testimony of the Intervenor's witnesses that the type changes that the Petitioners were making to the operation of the business

¹¹ "The Court should weigh evidence of the location's burden on law enforcement in deciding its suitability." *Kan* 420 S.C. at 606 citing *Moore v. S.C. Alcoholic Beverage Control Comm'n*, 308 S.C. 160,

are the changes needed to improve the operation of similar establishments and help alleviate problems as opposed to increasing them. By failing to consider the impact of this business (and the likely positive one at that) the Court misapprehended the law and facts in this case. These findings establish *prima facie* that the Administrative Law Court's denial of the license on the finding that the location was not suitable is in violation of statutory provisions, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Basically, the Court arbitrarily blackballed the location because of a single incident – which the Court mischaracterized in the Order. Findings based upon activities that were wholly unrelated to the location – was not a proper basis to deny Appellant its licenses. The Court also created a test which essentially makes the issuance of any license in an entertainment district unlikely. If upheld this decision will have a profound negative impact on business and tourism in our State by extending the zoning and planning duties and responsibilities to the DOR as it evaluates licenses to sell beer, wine, and liquor. The Court's decision does not target problem operators – but makes it impossible for any operator to be licensed. The Court should consider the guidance in the statutes which prohibits the department from, for example, requiring a subsequent licensee to pay a fine where a previous licensee fails to pay a fine and ceases doing business on the premises where the violation occurred. *See, e.g., S. C. Code Ann.* §61-2-150. The evaluation of the location should be based upon the location and business being operated thereon. Otherwise, every decision is arbitrary or capricious because it holds an applicant responsible for the actions of people and entities outside of his, her or its control.

162, 417 S.E.2d 555, 557 (1992); *Fowler v. Lewis*, 260 S.C. 54, 57, 194 S.E.2d 191, 192 (1973).

IV. The Court's finding about the number of incidents at the location reflects its abuse of discretion and numerous findings that are clearly erroneous in light view of the reliable, probative and substantial evidence in the record or are arbitrary or capricious.

For example, the Court found as a fact that: "William Holbrook, Columbia Chief of Police, testified that there have been 623 arrest, or citations issued at this specific location over the past ten years by the Columbia Police Department."

Chief Holbrook never testified to that exact number. He testified about calls on a block, not a location. On direct examination, he discussed calls for service. He stated:

Q: Now, did you at some point prior to April begin a process that ended up with, culminated with you filing a petition to declare it a nuisance?

A: We did.

Q: When did that begin?

A: We were beginning, probably about a couple of years ago we began pretty comprehensive review of all the calls for service for bars that we felt like were inconsistent with our expectations of just safety and quality of life in that particular area we started compiling notebooks when we would have a call - call for service or a serious incident that was documented in a report and we would maintain those notebooks in the region office.

Q: What's a call for service, what does that mean?

A: Officers receive a call over their radio where a crime is being reported or a disturbance, or it was something that they would observe first hand.

Q: And -- and did you put together numbers, **I'm not talking about the specific establishment**, but it's located at 800 Harden Street which would be the corner of Harden and Greene, correct? [Emphasis added]

A: Correct.

Q: And did you receive -- have you looked at numbers on how many calls for service over a one-year period back when you were doing this research?

A: Well, I don't -- I couldn't tell you over a one-year period, I, we looked at over a ten-year period

Q: Okay.

A: --- at that particular area.

Q: Okay.

A: It was over 600 calls for service.

Q: 600 calls for service, is that high for a specific geographic?

A: It seemed to be very high to me.

Q: Okay. Did you record any specific criminal conduct at the Pour House, inside 800 did you have any involvement in criminal activity there?

A: We did.

Q: And over what period of time and how many?

A: So, when -- when we began more of a comprehensive review for the Pour House, in particular, we found focused on when the business, the last business license was awarded in 2016 we focused on that period of time up and to the event where the individuals seriously assaulted in front of the Pour House.

Q: And you're speaking of the incidence on Saint Patrick's Day which I think we've all seen on television where Mr. Wells was accused of breaking the jaw of a patron of his bar, is that correct?

A: That's correct.

Q: I'm not saying whether it was justified, these are the charges, but I'm not saying whether that was justified or unjustified, but that was the -- somebody signed -- signed a warrant for him, right?

A: Yes, sir.

Q: -And he was arrested?

A: Yes, sir.

Q: But you had how many instances there culminating with that?

A: We -- we had 23 calls for service that resulted in a report being made and some type of action taken.

Q: And that's not just an I need a ride home, or there's this drunk girl it's a, there's a -there's got to be some sort of criminal activity.

A: The majority were fights and assaults.

Q: Fights and assaults in the bar or outside, just outside the bar?

A: In the bar, something that again these -- these 23 incidents were incidents that we attributed specifically to the bar through investigation. There is numerous more calls for service, but we -- we really aired on -- on the side of caution in our investigation to do our due diligence, we focused on those 23 specific incidents.

So rather than the 623 items mentioned in the Court's finding of fact, the Chief testified that there were 23 incidents over 18 months prior to May 2017. That is far different from what the Court found. Moreover, he testified that the information was hearsay, no records were admitted to support that hearsay and make it subject to an applicable exception and that there was a question of reliability in the data as it required a person to decide to classify it.

His response to cross-examination demonstrates this: He testified:

Q How many incidents do you know of occurred there in 2017?

A: I don't know off the top of my head.

Q: Okay. And did you personally prepare any of the documents or give you the numbers or was that done for you?

A: That was done for me.

Q: So, what you're testifying to is what someone told you or provided?

A: Correct.

Q: And any report you have that's written up is often based upon again, what someone told your officer unless the officer's there in their own presence, isn't it?

A: That's correct.

Q: So, there's a certain issue of reliability that's inherent in every one of those reports, isn't it?

A: Sure.

Q: And do you know on an annual basis when you talk about 600 calls for service over the course of that ten years, do you know on an annual basis what those numbers were?

A: I'm not sure I understand what you're asking.

Q: Well, do you know in any given year what the number was rather than this aggregate 600 number?

A: Not off the top of my head I don't.

Q: Okay. And would it be important if you were looking at the effect of a location to look at what happened in any given year so you could say who was running it and what they were doing there?

A: Specific to a location?

Q: Yes, sir.

A: Sure, you would look at trends.

Chief Holbrook had no idea of the number of incidents or the trend in incidents in Five Points over the last three years.

Q: Okay. Have your -- what's your incident count down there over the last three years? You don't know that?

A: I don't have any idea.

Q: Okay. Do you know if your officers -- what establishments your officers are welcome in and what establishments don't like them to come in?

A: I couldn't tell you that.

Q: Do they know?

A: I'm sure they would have an opinion.

Q: Do they report any of that opinion to you?

A: I'm not aware of any particular establishment that's more officer friendly than another one.

Q: Okay. And that's because no one's expressed that to you or you haven't inquired or what's the basis for that?

A: Bases is I don't know of an establishment that has a reputation for that or not.

Q: Okay. And what have you undertaken if anything to learn about what establishment might have a reputation or not, anything in particular?

A: Just what I previously stated, what's reported to me.

While Chief Holbrook testified that there have been 600 calls for service reported in the 800 block of Harden Street over a ten-year period, he noted that citywide that there are about 165,000 calls for service each year. No analysis was offered as to the significance of sixty calls in a block versus 165,000 in the city. Likewise, no meaningful information was conveyed about the nature of these calls for service.

Q: Chief, how many calls for service do you have in the City of Columbia on an annual basis?

A: About 165,000.

The Court also found that Chief Holbrook testified that the prior establishment at the location had been declared a nuisance. His testimony reveals that it, in fact, was not.

A: Yes, sir.

Q: And when was that?

A: In March of 2000 -- or excuse me, in, we took official action in April of 2017.

Q: When had -- when had you begun -- and when you say official action, you sought to declare it a nuisance; is that correct?

A: That's correct.

Q: Which would eliminate the business license; is that correct?

A: That's correct.

Q: Now, did you at some point prior to April begin a process that ended up with, culminated with you filing a petition to declare it a nuisance?

A: We did.

Q: Okay. And after you did that did you file and I'm not sure if you actually are the decider on it, public nuisance statute on the business license, is that correct?

A: Yes, sir.

Q: And I guess there's some sort of new process involved and you notified Mr. Wells - that's 6 Mr. Wells back there (indicating), do you remember him?

A: I do.

Q: Okay. Did you notice Mr. Wells that you were going to declare him a nuisance?

A: We did.

Q: And did he -- did you afford him a hearing?

A: We did.
Q: Did he come to the hearing?
A: Yes, sir.
Q: And did you complete the hearing?
A: We did.
Q: And what was the result?
A: They agreed to surrender their business license
Q: They, Mr. Wells?
A: --- Mr. Wells and his attorney agreed, provide a specific date to surrender that license, we agreed to those terms.
Q: Do you remember when that was, what the date
A: The date of surrender was May 22nd of 2017.

V. The Court erred in not applying the Taylor v. Lewis in this instance.

Here, the Court failed to consider the evidence surrounding the Appellant's business and location. Whether the location has been licensed in the recent past and whether the location is now more or less suitable than it was in the past is a relevant factor. *Taylor v. Lewis*, 261 S.C. 168, 198 S.E.2d 801 (1973). Furthermore, in considering the suitability of a location, "it is error to find a location unsuitable when the relevant testimony of those opposing the requested permit or license consists entirely of opinions, generalities, and conclusions not supported by the facts." *Id.*

Findings may never be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 443, 458 S.E. 2d 76, 83 (S.C. App. 1995)

The ALJ abused its discretion and made findings that are in violation of stator provisions and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion when the Court adopted the Intervenor's theory that USC students are dangerous, causing problems and that the reason for this is the number of establishments in Five Points. All of the evidence presented was conjecture or speculation. No

scientific evidence was offered to show a correlation between Appellant's business and any incident in the area. The report and survey data admitted by the Court over objection are not scientifically valid or accurate. The testimony at the hearing affirms the suitability of the location. The Court further erred when it refused to acknowledge or consider the state of the art safeguards undergirding the operation of Appellant's business as Petitioner's proposed licensees testified is designed to ensure a safe, smooth and neighborly operation. Most importantly, no evidence was offered that those procedures were not consistently followed.

The record reflects that Petitioner implemented and will continue to utilize state of the art safeguards relating to underage drinking, overserving, security, avoiding nuisance and other problems. The Court could have conditioned the license on one or more of these safeguards. Instead, the Court dismissed them and found, without any evidence in the record whatsoever to support the conclusion, that Five Points Roost would cause and increase problems in the Five Points area.

While the Court relied on Chief Holbrook's testimony to make its findings, it ignored his statement that there had been no calls for services at 800 Harden Street during its operation under the temporary permit. It also ignored Chief Holbrook's and every other witness' inability to offer any evidence to support a position that granting a license at this location would have an adverse impact on the community. The facts established in Chief Holbrook's testimony contrast markedly from the testimony which led to the specific findings in the *Kan Enterprises* case¹² where the evidence showed that there were 324 problems at that location in 2014 alone and that law enforcement officers were injured at the *Kan* location while making arrests. Neither Chief Holbrook nor any other witness was able to produce evidence linking the Petitioner's location

with increased demand for law enforcement. Nor was any able to provide a scintilla of evidence that Petitioner's establishment created a "constant and increasing undue burden on law enforcement or had become a detriment to the surrounding community" which would be the legal requirement set up in *Kan* for the Court to deny the permits. The Court seems to have arrived at this conclusion absent facts in the record and should reconsider its findings.

Likewise, the Court seems to have ignored the testimony of Ms. Edwards and Mr. Wiser which supports the petitioners. Ms. Edwards was unable to present direct evidence that Five Points Roost was a cause of or involved in any of the alcohol-related incidents about which she testified. She acknowledged student growth at USC over the last ten years. Her numbers indicated a 2% reduction in the number of students who reported a last drink at a Five Points establishment in 2017-18 over 2016-17. (ROA p. ____ Tr. p. 1.) The numbers of incidents originating at on and off-campus residences exceeded Five Points establishments, and 9% of the incidents occurred at the stadium or tailgate. This fact is particularly telling since it demonstrates that 9% of the episodes occurred on 6 or 7 days of the year – a far higher statistical frequency than any of the other sources -- which are available 365 days a year. Like Chief Holbrook, Ms. Edwards acknowledged that Five Points Roost's state of the art practices ought to limit overconsumption and underage drinking. (ROA p. ____ Tr. p. ____))

VI. The Court erred in adopting expert testimony

Leslie G. Wiser, Jr. also testified for the intervenors. The Court qualified him as an expert in criminology over the objection of Counsel for the Petitioner. In opposing Mr. Wiser's qualification, Counsel argued that Mr. Wiser had no educational background in criminology, had

¹² *Kan Enterprises Inc. v. South Carolina Department of Revenue*, (ROA p. ____ Tr. p. 11)) 14-ALJ-17-0571-CC, March 19, 2015 This case was affirmed by the Court of Appeals in *Kan Enters*

never been qualified as an expert in Criminology by any Court, and among other factors had no published work or specialized training in the area. Counsel also argued that his report “A Time for Change” failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) because it was not peer-reviewed, there were no survey control groups or known potential error rates and that its conclusions had not attracted acceptance within a relevant scientific community. For example, while Mr. Wisner testified that there was a correlation between the density of establishments serving alcohol and crime¹³, he admitted that his source studies reflected a much higher correlation between the use and availability of illegal drugs to crime than alcohol. Mr. Weiser, like Chief Holbrook and Ms. Edwards, agreed that Five Points Roost’s practices relating to ID checking, service, security, and training were the kinds of practices that would likely reduce these type problems. Mr. Weiser was unable to provide any evidence that this location was explicitly unsuitable or that there was any causal link between this location and requirements for additional law enforcement in the area. (ROA p. ____) His opinion was based on the concentration of locations and disregarded questions or practices at the establishments. Likewise, he failed to consider alcohol consumption in off-campus residences, on campus and their effects on the neighborhoods. Naturally, given Chief Holbrook’s testimony that he had not increased law enforcement presence in the Five Points area during his tenure (ROA p. ____) Mr. Wisner confirmed the Holbrook testimony. It is clear that there has been no demand for increased law enforcement presence, no stress to law enforcement and that the Intervenors were unable to adduce testimony that the location is unsuitable as a matter of law, however much they do not like Five Points as a student-focused area. Unfortunately, the Protestants and Intervenors do not like the businesses that operate in their neighborhood. They

v. *S.C. Dep’t of Revenue*, 420 S.C. 596, 803, S.E.2d 882 (S.C. App. 2017).

¹³ Which he could not link other than as a generality to Five Points

are trying to use this Court to zone the area of Five Points improperly usurping the municipal authority which created the zoning and allows the establishments in the area. Neither Ms. Edwards, Mr. Wisner nor Chief Holbrook offered any scientifically valid evidence linking Petitioner to any problem identified in Five Points.

The Intervenors presented general complaints about problems that they contend are the result of activities in Five Points because of the number of licensed establishments therein. This is a complaint which should have been diverted at the City. The Court accepted those general complaints, such as vandalism, drunkenness and the like often nothing more than repeating what a neighbor heard or said. After it accepted those complaints, the Court found that Petitioner's business was the genesis of those complaints without any testimony in the record to substantiate that Petitioner's location was the source of a single incident reported or that Petitioner's business would in any way increase the likelihood that such events occurred. Neither the Intervenors nor the Protestants demonstrated an increase in any problem in the area during the last ten years by introducing reliable, probative evidence to support their claims.¹⁴ The Court simply adopted their argument and made findings and suppositions based thereon that are unsupported in the record. The Court should have followed statute and case law and applied proper standards and require the presentation of evidence which is relevant to the location and the Appellants. Instead, the Court relied on generalities, conclusions, and arguments not supported by facts.

The evidence submitted by the Intervenors consists entirely of factually unsupported opinions and conclusions. Essentially, the Intervenors contended that all of their complaints result from the presence of licensed establishments in Five Points that overserve underage and naïve University Students. At one point it was suggested that these students were coerced by

¹⁴ The Court will take judicial notice that multiple licenses have been issued and renewed in the area during this ten-year period-even at the location in question.

establishments in Five Points to come to the village and misbehave. The Court erroneously adopted these, assertions and allegations in making findings of fact and conclusions of law. The overwhelming evidence that Petitioner has in place and follows enhanced policies regarding admission and serving patrons designed to address those concerns should have weighed heavily against the credibility of these general, unsubstantiated allegations.

VII. The Court Misapplied the Applicable Law as it relates to the Service of Meals and Deviated from the Requirements of Applicable Statutes in Violation of the Law.

The Court found that Petitioner is not bona fide engaged primarily and substantially in the preparation and serving of meals. (ROA p. ____ (Final Order p. 16)) Petitioner would submit that the Court erred as it failed to properly consider the applicable law, applied a case that has been overturned by legislative action and failed to afford proper deference to the findings of DOR. The General Assembly charged DOR with determining as to whether the Petitioner complies with the statutory requirements. In this case, DOR found that Five Points Roost, LLC met the statutory requirements¹⁵.

"Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (alteration by court) (internal quotation marks omitted).

¹⁵ And while the Court allowed it, no Protestant raised this ground of protest.

Here, DOR followed the clear and unambiguous legislative directive as to the requirements for an entity to be determined to be bona fide engaged primarily and substantially in the preparation and serving of meals. Those requirements are enumerated explicitly in *S.C. Code Ann. §61-6-20(2)*. The statute contains three specific conditions. DOR found that Petitioner met each of those requirements. The Court afforded no weight to the Agency's proper determination – one that is applied hundreds of times each year and which the Court has heretofore respected. Instead, the Court found:

In this case, Bland testified at his deposition that food sales make up only five percent of revenue to Petitioner's business and I have found that estimate to be more credible than his hearing testimony that food sales constitute ten percent of their business. Given all the circumstances and facts in this case, I conclude that the Petitioner is not a business that is bona fide engaged primarily and substantially in the preparation and service of meals.

(ROA _____, (Final Order p. 16)).

This finding demonstrates the ALC's failure to follow the statutory framework and the return to the percentage of sales method advocated in *Brunswick*. The only way that the Court reached this conclusion was by ignoring the clear, unambiguous definitions enacted by the General Assembly, signed by the Governor and codified in Statute.

Intervenors question whether or not Five Points Roost is engaged primarily as a Restaurant. None of their protests raised this ground as a reason for denial. However, the facts are that the business fulfills the statutory criteria established by the General Assembly to be determined to be “bona fide engaged primarily and substantially in the preparation and serving of meals.”¹⁶

¹⁶ The Court admitted that it added requirements to the statute and interpretation thereof. The Court notes, “Petitioner agrees that it meets the technical requirements of the statutes by maintaining all of the physical accouterments required by statute. (ROA p. ____ Final Order p. 15)

Here, despite the finding by the Agency and the evidence supporting the Agency's conclusion, the Court added additional requirements to be evaluated (the percentage of revenue related to food sales) and more fuzzy requirements like the courts own definition of a stove¹⁷. Notably, her definition of stove – used as a basis to deny the license, differs markedly from that utilized and applied by the Agency charged with administering the Act. Her percentage analysis is apparently based on a 1979 case, *Brunswick Capitol Lanes v. South Carolina Alcoholic Beverage Control Comm.*, 273 S.C.782, 260 S.E. 2d 452 (1979) which found that ten percent revenue from food sales was inadequate for an entity to be a bona fide restaurant¹⁸.

In that case, the Alcoholic Beverage Control Commission (predecessor to DOR as the licensing agency) denied Brunswick a license on the ground that it was not engaged “primarily and substantially in the preparation and serving of meals.” A Circuit Court Judge reversed this finding and ordered the issuance of the license. Our Supreme Court reversed the Circuit Court. In its brief opinion, the Court relied and ultimately decided the case on a definition of “primarily.” It held that “The word ‘primarily’ means ‘of first importance or ‘principally’ *Brunswick, supra* at 273 S.C. 783, 260 S.E.2d 453. The Court then acknowledged that “the legislature has stated that the critical test is whether the business is engaged ‘primarily and substantially in the preparation and serving of meals.’” *Brunswick, supra* at 273 S.C. 783, 260 S.E.2d 453.

The Constitution afforded the General Assembly exclusive and broad powers to regulate the retail sale of alcoholic liquors and beverages in the state¹⁹. The only limitation in the

¹⁷ Merriam-Webster defines “Stove” as “a portable or fixed apparatus that burns fuel or uses electricity to provide heat (as for cooking or heating).

¹⁸ Interestingly, the Court's findings of fact and conclusions of law about sales percentage – and weight of credibility fall precisely into the *Brunswick* criteria.

¹⁹ S. C. Const. art. VIII(A) provides:

Constitution is that 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, during such hours as the General Assembly may require. The Constitution leaves this determination to the Legislature.

Before 2008 *S.C. Acts* 287 the General Assembly codified the definition of 'Bona fide engaged primarily and substantially in the preparation and serving of meals' at *S.C. Code Ann.* §61-3-20²⁰. That definition was the one the Court used in *Brunswick*. The definition provided that the term: "means a business which has been issued a Class A restaurant license prior to issuance of a license under Article 5 of this chapter, and in addition provides facilities for seating not less than forty persons simultaneously at tables for the service of meals." When the Court decided *Brunswick*, the Code did not contain a definition of "Primarily."

SECTION 1. Powers of General Assembly.

In the exercise of the police power the General Assembly has the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State. 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. The General Assembly may prohibit the manufacture, sale, and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it considers expedient. However, a license must not be granted to sell alcoholic beverages in less quantities than one ounce in licensed retail stores, or to sell them between seven o'clock p.m. and nine o'clock a.m., or to sell them to be drunk on the premises; however, the General Assembly shall not delegate to any municipal corporation the power to issue licenses to sell alcoholic liquors or beverages. However, 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 [emphasis added]

²⁰ In 1979, this section was codified at §61-5-10(1).

In 2008 *S.C. Acts* 287, the General Assembly Amended *S. C. Code Ann.* §61-6-20(2) to further define that constitutional term. The Title of the Act reflected the legislative intent. Act 287 was titled:

“An Act to . . . Amend Section 61-6-20, as amended, relating to definitions for purposes of the Alcoholic Beverage Control Act, so as to revise the definition for an establishment serving meals; and to Amend Section 61-6-1610, As Amended, relating to food service establishments licensed for on-premises consumption of liquor by the drink, so as to provide additional requirements relating to food service.”²¹

The Act changed the definition to read as follows:

(2) 'Bona fide engaged primarily and substantially in the preparation and serving of meals' means a business that provides facilities for seating not fewer than forty persons simultaneously at tables for the service of meals and that:

- (a) is equipped with a kitchen that is utilized for the cooking, preparation, and serving of meals upon customer request at normal meal times;*
- (b) has readily available to its guests and patrons either menus with the listings of various meals offered for service or a listing of available meals and foods, posted in a conspicuous place readily discernible by the guest or patrons; and*
- (c) prepares for service to customers, upon the demand of the customer, hot meals at least once each day the business establishment chooses to be open."*

That legislation also added *S.C. Code Ann.* §61-6-1610(I) further defining these terms

That section provides

²¹ The full text of the Legislative synopsis reads: [emphasis added]

AN ACT TO AMEND SECTION 12-33-245, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE FIVE PERCENT EXCISE TAX ON THE SALE OF ALCOHOLIC LIQUORS FOR ON-PREMISES CONSUMPTION AND THE DISTRIBUTION OF THE REVENUES OF THE TAX, SO AS TO PROVIDE THAT THE MINIMUM DISTRIBUTION TO STATE AGENCIES, COUNTIES, AND LOCAL ENTITIES MUST BE BASED ON REVENUES RECEIVED IN FISCAL YEAR 2004-2005, RATHER THAN REVENUES ALLOCATED AND TO IMPOSE ADDITIONAL PENALTIES FOR TAX VIOLATIONS; TO AMEND SECTION 61-6-20, AS AMENDED, RELATING TO DEFINITIONS FOR PURPOSES OF THE ALCOHOLIC BEVERAGE CONTROL ACT, SO AS TO REVISE THE DEFINITION FOR AN ESTABLISHMENT SERVING MEALS; AND TO AMEND SECTION 61-6-1610, AS AMENDED, RELATING TO FOOD SERVICE ESTABLISHMENTS LICENSED FOR ON-PREMISES

(1) For purposes of this section:

...

(3) “Primarily” means that the serving of the meals by a business establishment is a regular source of business to the licensed establishment, that meals are served upon the demand of guests and patrons during the normal mealtimes that occur when the licensed business establishment is open to the public, and that an adequate supply of food is present on the licensed premises to meet the demand.

A plain reading of the Act and Amendments make it clear that the language placed in the statute responded to the Court’s points in *Brunswick*. The General Assembly defined “Primarily” in a way that would change the outcome of *Brunswick*²². Moreover, it added additional requirements for clarity. DOR has followed this licensing scheme and granted licenses according to these requirements ever since. The Court failed to acknowledge this change or afford proper deference to DOR’s interpretation thereof²³. Essentially, the Court overturned Act 287.

The Court ignores traditional rules of statutory construction that apply here. It is well-settled law that “specific laws prevail over general laws, and later legislation takes precedence over earlier legislation” *Lloyd v. Lloyd*, 295 S.C. 55,57-58, 367 S.E.2d 153, 155(1988) (citing *Duke Power Company v. South Carolina Public Service Comm’n*, 284 S.C. 81, 326 S.E.2d 395 (1985)). See also *Wooten v. Wooten*, 333 S.C. 357,372, 688 S.E. 2d 355,355 (1999) (“A specific statutory provision prevails over a more general one.”) There can be little doubt that the legislative intent of 2008 Act 287 was to amend the law such that the definitions used to decide

CONSUMPTION OF LIQUOR BY THE DRINK, SO AS TO PROVIDE ADDITIONAL REQUIREMENTS RELATING TO FOOD SERVICE.

²² Had the Court simply adjusted the findings to address the change in *S.C. Code Ann.* §61-6-1610(I)(3) in analyzing *Brunswick* it would have not looked at whether the purpose of the business was principally the sale of food but whether the sale of food was “a regular source of business, meals were served upon the demand of patrons during the normal mealtimes that occur when the licensed business establishment is open to the public and whether or not the business had an adequate supply of food”. Those criteria being met, the business meets the primary test. It is also of interest to note that the Act repeatedly refers to the establishment as a “business” rather than as a “restaurant”.

Brunswick were obsolete and the outcome, applying the identical analysis would be different. Had that not been the case, setting criteria and changing the definition of “primary” would lead to the conclusion that the Legislature changed the statute for no purpose and that the change in language was without effect. Here the Court has ignored those statutory changes and made them of no effect. In doing so, the ALC ignored the will of the Legislature. The Court of Appeals should not let that error stand as it stands to have a profound public impact. Our Supreme Court’s comments in *Weston v. Board of Commissioners*, 196 S.C. 491, 494, 13 S.E.2d 600 (SC, 1941), are equally applicable here. There the court stated “there is no ambiguity in the act before us. It is perfectly plain, and there is no room or occasion for interpretation or construction other than the ordinary meaning of the words employed”. “Primarily” means what the Legislature says it means, not what the Court found in *Brunswick* nor what the ALJ found in the case at bar.

In *Beaty v. Richardson*, 56 S.C. 173, 180, 34 S.E. 73, 76, 46 L. R. A. 517, (SC 1899) Chief Justice McIver quoted with approval the following: "The legislature must have intended to mean what it has plainly expressed, and consequently there is no room for construction. Where the words of a statute are plainly expressive of intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be."

Here, the Administrative Law Court’s failure to apply the definitions enacted by the General Assembly amounts to a finding that the Statute is unconstitutional or a ruling on the legality of the statute which is outside the legal jurisdiction of that Court. It is also a clear legal error mandating reversal. The General Assembly intended the consequences of 2008 Act 287 to alter the requirements for licensing. This Court’s Order ignores that clear legislative intent.

²³ DOR’s regulations affirm the interpretation as we assert herein.

VIII. The Court Committed an Error of Law When it Failed to Give Required Deference to the DOR's Interpretation of the Statute it is Administering.

The Court also failed to demonstrate compelling reasons for overruling the construction of the statute by the Department. First, the Court must determine whether the language of a statute or regulation directly speaks to the issue. Here, there is no question that the definitions of “Bona fide engaged primarily and substantially in the preparation and serving of meals” and “Primarily” are defined by the General Assembly after *Brunswick* and directly speak to the issue. If so, the court must utilize the clear meaning of the statute or regulation. *See, e.g., Chevron, U.S.A., Inc. v. Nat Res. Def. Council., Inc.*, 467 U.S. 837, 843, 104 Sc.D. 2778, 81 L. Ed. 2d 694 (1984), *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (“The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.”; *Hiawa Dev. Partners, II*, 411 S.C. at 355, 766 S.E.2d at 719 (“We defer to an agency interpretation unless it is ‘arbitrary, capricious or manifestly contrary to statute.’”) In this instance, it appears that the Court erred in its statutory interpretation by disregarding the statute and reverting to the Common law.

The language adopted in the Order reflects that the Court interjected requirements beyond those required by the statute to meet the restaurant requirements. Here, the Department of Revenue determined that Petitioner's establishment met the applicable criteria. Both Mr. Bland and Mr. Ruonala testified that their business was open for lunch from 12:00 PM until 5:00 PM and serves food during all business hours. (ROA p. ____ (Tr. p. 48 l.8 – p. 50 l.4, p.202 ll. 9-10)) There is no contrary evidence in the record. Petitioner's witnesses testified that they were looking for ways to increase its food sales by developing new menu items and offering new and

different foods. Petitioner not only serves upon the demand of guests and patrons during the regular mealtimes but that Petitioner offers meals and food during all hours that the business establishment is open to the public. The establishment maintained an adequate supply of food on the premises to meet the demand. The location maintains a separate and distinct area used solely for the preparation of the solid foods that make up meals and that the area is adequately equipped and includes more than twenty-one cubic feet of refrigerated space and a steamer, commercial oven and other cooking items available for food preparation. (ROA p. ____ (Tr. P. 49 ll. 17-24)) Meals include a recreation of the famous “Frank’s” hot dog and sandwiches prepared and served on premises, pizza, and other menu options. (ROA p. ____ (Tr. p.48 ll. 10-25)) Intervenors argued that the Court should adopt a definition of “Primarily” different than the one adopted by the General Assembly in the applicable law. To them, “Primarily” should mean the items sold that generate the largest or greatest share of revenue. That is not the definition adopted by the General Assembly. The Court should construe the plain language of the law as written and disregard Intervenors argument as to the proper definition of “Primarily.”

Five Points Roost is a *bona fide* restaurant that meets the statutory criteria. The record is bereft of evidence that demonstrates otherwise. This Court has held that a snack bar can meet the restaurant criteria, *see, e.g., Be Mi, Inc. v. S.C. Dep’t of Revenue*, 408 S.C. 290, 758 S.E. 2d 737 where the Court affirmed the Administrative Law Court’s decision regarding seating requirements based upon the Applicant’s testimony and SLED’s final report that *Be Mi* met the statutory requirements.

The General Assembly has statutorily defined what is required to meet the restaurant requirement. The DOR has verified that Five Points Roost meets this requirement. The evidence before the Court confirms that Petitioner fulfills the statutory restaurant requirements.

SLED and the DOR have independently made this determination. The Petitioner satisfies the statutory condition that it is bona fide engaged primarily and substantially in the preparation of meals. The ALC's reliance on *Brunswick* is both erroneous and misplaced. This Court should reverse the ALC's findings or the same determination that *Brunswick* applies and that Five Points Roost does not meet the clearly violates the statutory provisions, is an error of law, is clearly erroneous in view of the record and is arbitrary or capricious. The Court should clearly affirm the General Assembly's ability to legislate and the DOR's ability to regulate based upon the statutory framework that has been in place for more than ten years. The ALC is in error on this issue, and its decisions should be reversed.

CONCLUSION

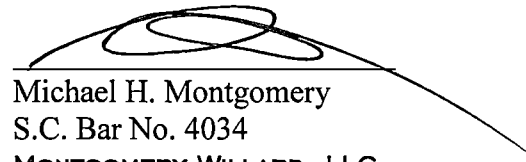
The Final Order of the Administrative Law Court denying Appellant's application for licenses to sell alcoholic beverages is fatally flawed. The Court abused its discretion when it first failed to give deference to the Agency interpretation of the legislation and its findings that Petitioner met the criteria for the issuance of a license. The Final Order is filled with errors of fact, law, and abuses or unbridled discretion which when viewed through the lens of the Administrative Procedures Act commands reversal.

Appellants operated a safe, clean, well-managed business at the location where liquor, beer, and wine had been sold for decades. They took and agreed to continue implementation of state-of-the-art safeguards to guard against problems at the location including providing enhanced security, state of the art identification screening, engaging in practices to prevent overserving and striving in every way to provide a safe, secure, and compliant location.

The fact that the Petitioner operated the business for months without incident demonstrates that the Court's findings of prospective harm are error, and should be overturned.

For the preceding reasons, this Court should reverse the lower court's Final Order and Order that the licenses be issued as applied for and approved by DOR.

Respectfully submitted,



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August 8, 2018

VIA HAND DELIVERY

South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

**Re: Five Points Roost, LLC dba Five Points Roost v. South Carolina
Department of Revenue
Case Number: 18-ALJ-0005-CC
Our File number: 2176157**

RECEIVED
AUG 08 2018
SC Court of Appeals

Dear Ms. Kitchings:

Attached is the original and three copies of the Initial Brief of Appellants for the above referenced matter.

Please clock the original and return the copies to the individual that has hand-delivered this package.

By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions or concerns, please do not hesitate to contact our office.

With kind regards, I am

Very Truly Yours,

Montgomery Willard, LLC

Cristy M. Bradley
Cristy M. Bradley
Paralegal for
Michael H. Montgomery

Enclosures

cc:

Patrick A. McCabe, Esquire

Richard A. Harpootlian, Esquire