

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

Appeal from the  
ADMINISTRATIVE LAW COURT  
The Honorable Deborah Brooks Durden, ALC Judge

Appellate Case No. 2018-001064  
Case No. 18-ALJ-17-0005-CC

**RECEIVED**  
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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 INTERVENORS/RESPONDENTS GOTTSHALL AND LUCAS**

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October 8, 2018  
Columbia, South Carolina.

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## INTRODUCTION

“There’s nothing wrong with being 21 and wanting to get a drink and get laid,” argued Adam Ruonala, minority owner and public relations front man for Appellant Five Points Roost, LLC, d/b/a, Five Points Roost (hereafter “Roost”) in response to an exposé by THE STATE Newspaper detailing the bacchanal, late-night revelry of underage University of South Carolina (USC) students in Columbia’s Five Points district. See Sarah Ellis, et al., “Lust, long lines and liquor towers: How Five Points lights up after dark”, THE STATE (Mar. 9, 2018).<sup>1</sup> This first-hand account of over consumption, random violence,<sup>2</sup> public urination, vomiting, illegal drug use, and a constant police presence attempting to maintain order of drunken “throngs” roaming public streets all belie Ruonala’s spin: “We’re not selling drunk; we’re selling a good time[.]” See id.

That “good time” is inapposite with South Carolina law, which neither contemplates, nor allows Roost to run the sort of liquor house described during a two-day plenary hearing before the Administrative Law Court (ALC). Only a business “engage[d] primarily and substantially in the preparation and serving of meals or furnishing of lodging” can be licensed for on-premise sale and consumption of alcoholic liquors and beverages. See S.C. CONST., art. VIII-A § 1. In this respect, Roost’s application was fatally flawed as its food sales, according to manager Stephen Bland, are “truthfully around five percent” of gross receipts while statutory and regulatory indicia of a *bona fide* restaurant were found unmet. See R. App. \_\_ (Final Order, 14–16). Indeed, the alcohol-related harms flowing from Roost and other bars near the 800 block of Harden Street reinforce the wisdom behind our constitutionalized regulation of liquor by limiting its on-premises sale to restaurants

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<sup>1</sup> Available at: <http://www.thestate.com/news/local/article204038224.html>.

<sup>2</sup> There was violence as recent as this past Friday at 2:00 a.m. outside the bar in the 700 block of Harden Street. David Travis Bland, “One person shot overnight in Five Points,” THE STATE (Oct. 6, 2018), <https://www.thestate.com/news/local/crime/article219608045.html>.

and hotels. Local law enforcement and residents described the strain these illegal businesses have placed on surrounding neighborhoods and the public safety threat posed by the density of alcohol establishments offering abundant, cheap liquor to late-night hordes of underaged students and inexperienced drinkers. This uncontradicted evidence led the ALC to conclude the location is unsuitable for yet another bar that would contribute to the nuisance behaviors felt by residents, further strain on local law enforcement, and contribute to existing problems with underage USC student drinking in Five Points. See R. App. \_\_ (Final Order, 13).

The ALC was also rightly troubled by this applicant's undisclosed business relationship with Daniel Wells, owner of the Carolina Pour House (Pour House) that operated at the location until the Columbia Police Department (CPD) initiated a nuisance action to shut it down. The ALC found that "[e]ven with the astonishing differences in Bland's deposition and hearing testimony concerning the organization and financing of the business, on neither occasion did he or Ruonala offer any credible explanation as to why they agreed to the financial terms reflected in [Roost's business records]" and that the "only plausible explanation" was 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." R. App. \_\_ (Final Order, 5).

Roost asks the Court to hold that *all* of the ALC's detailed, well-reasoned conclusions are without evidentiary support or predicated on errors of law. As explained below, the Final Order is supported by substantial evidence, correct as a matter of law, and should be affirmed.

## **COUNTER-STATEMENT OF THE ISSUES**

- I. Whether two unidentified general managers and a still unexplained equity relationship allowing a third undisclosed bad actor to recoup alleged debt from the proceeds of the enterprise renders the application misstated and these principals concealed for the purpose of South Carolina Code § 61-2-100?
- II. Whether a location is unsuitable where the uncontradicted evidence indicates the area is saturated with alcohol establishments that burden local law enforcement, disturb the peace and enjoyment of nearby residents, and place university students in danger?
- III. Whether a bar that sells liquor and claims five (5) percent of its gross revenues from hot dogs and pizza prepared by another establishment is “primarily and substantially” in the business of preparing and serving meals as required by the state Constitution and statutory law?
- IV. Whether the failure to identify issues as required by Rule 208 of the appellate rules forecloses an appellant’s ability to argue them?

## COUNTER-STATEMENT OF THE CASE

On September 25, 2017, Five Points Roost, LLC, d/b/a Five Points Roost (Roost) filed an application for an on-premises beer and wine permit and restaurant liquor by the drink license for its location at 800 Harden Street in Columbia's Five Points business and recreation district. R. App. \_\_ (DOR File 0001-07). Thirteen residents<sup>3</sup> from neighborhoods adjacent to Five Points filed protests with Respondent South Carolina Department of Revenue (DOR). R. App. \_\_ (DOR File 99-165). On January 9, 2018, DOR denied the application citing (1) the receipt of valid public protests under South Carolina Code § 61-6-1825, (2) the unsuitability of the proposed location under South Carolina Code § 61-4-520 (2009), and (3) Roost's failure to meet the restaurant requirements in South Carolina Code § 61-6-20(2) and South Carolina Regulation 7-401.3 (Supp. 2017). R. App. \_\_ (Final Order, 1-2); see also R. App. \_\_ (DOR File 0165-71). On January 10, 2018, Roost requested a contested case hearing. On February 1, 2018, the ALC granted Mr. Gottshall and Ms. Lucas leave to intervene.

An evidentiary hearing was held before the Honorable Deborah Brooks Durden, Administrative Law Judge, on February 20 and 21, 2018, during which the ALC considered testimony from eight (8) witnesses, including Roost's manager Stephen Bland and front-man Adam Ruonala, the Columbia Police Department's (CPD's) chief, a USC administrator, a criminology expert, and three residents (see R. App. \_\_ (Hr.'g Tr. 28:1-501:15)), and admitted numerous exhibits into evidence. See, e.g., R. App. \_\_ (Hr.'g Tr. 5, 133, 176, 200, 239, 311, 373, 397, 408, 430 & 444).

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<sup>3</sup> Protests were filed by Polly Felton Morrison, April C. Lucas, John J. Stucker, James M. Daniel, III, Luther J. Battiste, III, Michael Drennen, Marilyn E. Gartley, Matt Kisner, Karen R. Belser, Kathryn Fenner, Richard and Rory Ackerman, and Thomas R. Gottshall. See R. App. \_\_ (Final Order, 1). After the ALC granted Mr. Gottshall and Ms. Lucas leave to intervene, the remaining Protestants withdrew their petitions. Id.

On April 3, 2018, the ALC entered a Final Order (R. App. \_\_) denying the permit and license for three independent reasons. On April 16, 2018, Roost moved for reconsideration, which was denied on May 11, 2018.

Roost filed a timely notice of appeal on June 7, 2018. The Court has jurisdiction pursuant to South Carolina Code § 1-23-610(A)(1).

### **FACTUAL BACKGROUND**

Until May 22, 2017, the space at 800 Harden Street (corner of Greene and Harden Streets) in Columbia's Five Points entertainment district was occupied by Pour House, a bar owned by Daniel Wells. Pour House was a popular late-night bar that "required an extraordinary amount of police service[.]" so much so that, in April 2017, CPD initiated an action to have the bar declared a nuisance and forfeit its business license. R. App. \_\_ (Hr.'g Tr. 243:11–244:11). According to Chief W.H. "Skip" Holbrook, the City of Columbia initiated that action after a comprehensive review of CPD calls for service identified Pour House's operation as a threat to public safety and quality of life in the area. R. App. \_\_ (Hr.'g Tr. 244:12–245:1). CPD's data showed more than 600 calls for service over a 10-year period, a quantity Chief Holbrook characterized as "very high[.]" R. App. \_\_ (Hr.'g Tr. 245:13–246:1). Beyond this survey, CPD tied 23 calls for service in 2016 alone *directly* to Pour House. R. App. \_\_ (Hr.'g Tr. 246:2–247:8); see also R. App. \_\_ (Hr.'g Tr. 256:16–257:5) (explaining an evidentiary nexus tying those incidents to the location). Most of these incidents were fights and assaults, one of which involved Wells choking a patron of his bar unconscious and dropping him face-first onto the public sidewalk.<sup>4</sup> R. App. \_\_ (Hr.'g Tr. 246:15–247:23). After the City initiated and litigated a nuisance action to take Wells' business license

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<sup>4</sup> See, Teddy Kulmala and Cynthia Roldan, "Video captures assault outside Five Points bar", THE STATE (March 28, 2017), <http://www.thestate.com/news/local/crime/article141214933.html>.

through the presentation of evidence at a hearing, Wells agreed to surrender Pour House's business license. R. App. \_\_ (Hr.'g Tr. 248:4–249:10).

\* \* \*

Roost's application claims its owners are three limited liability companies (LLCs): (1) DEO Investments, LLC, owned by Bland; (2) Mongo, LLC, owned by Ruonala; and (3) BG Holdings, LLC, owned by Daniel Wells' mother Brenda Wells.<sup>5</sup> R. App. \_\_ (Hr.'g Tr. 31:2–17 & 32:11–15). Bland's company has a 27.778 percent interest in Roost; Ruonala's a 2.77 percent interest; and Brenda Wells owns 69 percent. R. App. \_\_ (Hr.'g Tr. 100:16–101:8). Bland is Roost's manager responsible for day-to-day operations. R. App. \_\_ (Hr.'g Tr. 30:22–31:1). He also manages Brenda Wells' company, BG Holdings, but owns no membership interest. R. App. \_\_ (Hr.'g Tr. 31:14–17 & 32:11–12). Bland told the ALC that he had a \$30,000 equity stake in Roost, but that two-thirds of that "was [a] \$20,000 debt that was owed from DHW Purchasing Group[.]" which is "the entity that owned Carolina Pour House" (R. App. \_\_ (Hr.'g Tr. 35:3–36:1))—i.e., Daniel Wells. See also R. App. \_\_ (Hr.'g Tr. 86:18–87:8). Bland claimed the genesis of this debt was a "verbal contract" for work Bland performed at Pour House, but for which he was never paid. R. App. \_\_ (Hr.'g Tr. 64:11–21 & 87:1–8).

When he was deposed just one week before the contested case hearing, Bland told an entirely different story, claiming he made no cash investment and that his (Bland's) company (DEO Investments) purportedly invested into Roost a \$125,000 debt owed by Daniel Wells to Bland as "sweat equity" in Pour House. R. App. \_\_ (Hr.'g Tr. 90:17–93:12 & 94:15–17). During his deposition, Bland claimed, "Me and Dan were under negotiations and we hadn't finalized it

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<sup>5</sup> Each of these entities is a single-member LLC and they will be referred to interchangeably with their respective owners throughout.

yet, but he was going to give me 25 percent of Pour House in lieu of [a] general manager salary.”

R. App. \_\_ (Hr.’g Tr. 91:10–17). As to how this amorphous obligation subsequently became an equity interest in Roost:

Mr. Harpootlian:      Okay. And let me -- let me -- question on Page 27, Line 2, Who was giving you that? Who gave you that -- who gave you that \$125,000?

Mr. Bland:             I said, Nobody gave me \$125,000.

Mr. Harpootlian:      Question, Who gave you the value of the \$125,000? Who said we’ll let you put this in for 125 grand in for a 27.778 percent interest? Who said that.

Mr. Bland:             That was me and Ms. Wells.

R. App. \_\_ (Hr.’g Tr. 93:13–21). In short, after testifying he invested *nothing* in Roost aside from a \$125,000 promise from Daniel Wells for Bland’s work at Pour House, Bland told the ALC he invested \$10,000 cash and a \$20,000 promise from Wells’ company DWH Purchasing Group. Thus, the explanation of BG Holdings’ (Wells’ mother’s) relationship to the other Roost equity partners that Bland settled on for the contested case hearing (as elicited by Roost’s counsel) was:

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 full \$125,000. At that time we tried to find other investors, but it boiled down to that essentially Dan [Wells] *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.

R. App. \_\_ (Hr.’g Tr. 32:16–33:3) (emphasis added); but see R. App. \_\_ (Hr.’g Tr. 88:3–92:23) (claiming the \$125,000 was “sweat equity” owed by Wells). Thus, to the extent Daniel Wells was “financing” Roost’s acquisition of Pour House, that interest was secured in two ways: first by a \$150,000 note from Roost to Daniel Wells’ company “for the purchase” (R. App. \_\_ (Hr.’g Tr. 61:8–20)), and, second, by *his mother’s* equity interest in Roost.

Bizarrely, Roost now claims Brenda Wells' controlling equity interest was given to satisfy debt Daniel Wells incurred to his mother while running Pour House, but Bland could not explain why he and Ruonala agreed to give Brenda Wells a controlling equity interest aside from the vague assertion they "got the ability to move forward with the deal" in an "extremely fluid situation." R. App. \_\_ (Hr.'g Tr. 103:10–104:12).

Mr. Harpootlian: Okay. So why do you assume Wells' -- I mean, in fact, you're giving somebody the value of what he owes his mama. His mama is basically transferring that debt to you, isn't she?

Mr. Bland: She is getting paid back for the debt. It is not transferring to us. She is getting ---

[...]

Mr. Harpootlian: Did you agree -- Five Points Roost -- you as the managing partner agree to pay the debt that -- that Wells owed his mother out of the proceeds of the Five Points Roost?

Mr. Bland: The debt, yes. That is why she -- she received the equity because of the -- the personal loan that Daniel Wells gave to her.

R. App. \_\_ (Hr.'g Tr. 104:13–105:16; see also R. App. \_\_ (Hr.'g Tr. 107:24–108:1). While Daniel Wells' alleged debt to his mother is central to Roost's financing, Bland has never seen any evidence of it. R. App. \_\_ (Hr.'g Tr. 123:23–124:24). Bland and Ruonala have an option agreement to purchase BG Holdings' (i.e., Wells' mother's) interest in Roost (R. App. \_\_ (Hr.'g Tr. 33:4–8)), which would extinguish Wells' purported debt to his mother. So while Bland claimed Daniel Wells owned no interest in Roost or BG Holdings (R. App. \_\_ (Hr.'g Tr. 33:9–16)), he could not explain why Wells was, effectively, given a lien on Roost. This testimony was so confused, evasive, and incomplete that, in response to an objection by Roost's counsel, the ALC ruled: "Well, I -- I find

it to be relevant and I don't find it to be asked and answered. It's been asked *but it hasn't been answered.*" See R. App. \_\_\_ (Hr.'g Tr. 109:12–110:8) (emphasis added).

Roost's claims further strained credulity when Bland was pressed to explain precisely what Daniel Wells sold and the consideration Roost received. Roost's \$150,000 note to Daniel Wells is due in one year and is payable from Roost's *profits* (R. App. \_\_\_ (Hr.'g Tr. 62:8–64:6))—a limitation in recoupment akin to that of an equity partner. Bland claimed Roost gave the note as “the purchase price of [Pour House's] assets.” R. App. \_\_\_ (Hr.'g Tr. 64:22–65:3). Asked to identify those assets, Bland claimed “a multitude of things. It was the right to do business in the location.” R. App. \_\_\_ (Hr.'g Tr. 65:4–7). But Wells did not own the location (R. App. \_\_\_ (Hr.'g Tr. 106:3–6)) and Roost did not assume Pour House's lease; it negotiated a new one for \$6,400 per month—more than twice what Pour House was paying. R. App. \_\_\_ (Hr.'g Tr. 65:8–66:15); see also R. App. \_\_\_ (Hr.'g Tr. 68:17–25) (“Q. ... -- how much do you pay Mr. Wells for the right to assume his lease and then not assume it?”). Roost did not acquire the Pour House business license, Wells surrendered the license prior to Roost giving the note; nor did Roost purchase the business or the name “Pour House.” R. App. \_\_\_ (Hr.'g Tr. 66:24–67:9; 107:5–21 & 106:7–14). At most, Roost acquired some coolers and TVs that Pour House left behind (R. App. \_\_\_ (Hr.'g Tr. 67:10–19)) and did so without a written purchase agreement memorializing the transaction. R. App. \_\_\_ (Hr.'g Tr. 62:1–3).

Pressed to explain discrepancies in his testimony from just one week earlier, Bland claimed that, when deposed, he was “not concerned with the exact details” and was “not aware ... those were the actual facts.” R. App. \_\_\_ (Hr.'g Tr. 87:15–90:10; 95:10–22). However, Roost failed to produce any evidence for its claims at the contested case hearing. See, e.g., R. App. \_\_\_ (Hr.'g Tr. 81:2–3) (“Q. Did you bring any of those checks today? A. No sir.”); \_\_\_ (Hr.'g Tr. 86:4–10) (“Q.

So last week under oath you said one thing, this week under oath you say something else and you say you went and checked it out, but you brought nothing to this court to show that you're telling the truth today; is that correct? A. I was not asked to bring anything.") & \_\_ (Hr.'g Tr. 95:4–22) ("Q. ... you never mentioned he paid you any money and only today do you come up with this \$30,000. Did you bring copies of those checks? A. I did not. I can provide them to you --- ... I was not aware when I gave the deposition that those were the actual facts."). Instead, Bland claimed he relied on opposing counsel's advice as an intermediary representing both him *and* Daniel Wells when negotiating the Pour House-Roost transactions. R. App. \_\_ (Hr.'g Tr. 97:2–23). A more credible theory (and the one the ALC adopted), is that Daniel Wells is a principal in and owner of Roost whose interest is protected by his mother's suspicious "equity" interest and a sham promissory note. Cf. R. App. \_\_ (Hr.'g Tr. 102:6–103:9) (claiming not to know what Daniel Wells owed his mother, but that Roost's equity arrangement would allow Ms. Wells to be "paid back" money her son owed her through "repurchasing" by Bland and Rounala). While the machinations surrounding this illegal business are complex, the motive is simple: greed.

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There is no dispute that late-night liquor sales to USC students is big business. Roost's \$6,400 per month in rent pales in comparison to the \$20,000 per week/\$1 million per year it generates in gross receipts. R. App. \_\_ (Int.'s Ex. 1 at 113:13–20). That lucrative revenue stream is predicated on a business model offering cheap, abundant liquor to large crowds during peak late-night drinking hours (10:00 p.m. to 2:00 a.m.). See R. App. \_\_ (Hr.'g Tr. 138:23–139:6) ("Last call" at Roost occurs at 1:30 a.m.). Roost's capacity is 275 people, but a throng of eager bar-goers routinely line the public sidewalk waiting to enter—a crowd that sometimes equals the number of people inside. R. App. \_\_ (Hr.'g Tr. 478:1–23 & 501:16–502:6). Overconsumption at Roost is a

fact. According to Ruonala, during the two-month period when Roost was operational, its corporate Uber account was used more than 200 times to transport patrons who needed an Uber “to take them home safely.” R. App. \_\_ (Hr.’g Tr. 478:24–480:10). The bar’s liquor sales during these late nights are so reliable, its distributor allows Roost to “float” checks for inventory until after weekend sales closed. R. App. \_\_ (Hr.’g Tr. 79:7–85:9) (“Q. Okay. So you told me that you were giving them checks for which there was insufficient funds ... correct? A. At the time that is what I was under the influence.”).

On its DOR application, Roost purports to be a “restaurant/hotel/motel” seeking a liquor by the drink license. R. App. \_\_ (DOR File 0001). In fact, Roost is anything but a restaurant. Bland told the ALC that Roost’s food sales “are about 8 to 10 percent” (R. App. \_\_ (Hr.’g Tr. 49:7–25)), an upward adjustment from his deposition when he swore that food sales are “truthfully around five percent” of the bar’s revenue. R. App. \_\_ (Hr.’g Tr. 73:20–74:6; Int.’s Ex. 1 at 118:6–8). If true, that 10 percent food amounts to \$2,000 per week in hot dogs and pizza sales, but Bland declined to say what Roost was actually selling in terms of its hot dog and pizza offerings. R. App. \_\_ (Hr.’g Tr. 76:9–17 & 78:20–22). Even crediting Bland’s self-serving testimony (which the ALC declined to do), Roost’s food sales pale in comparison to the 65 percent of its revenue derived from liquor, 25 to 30 percent from beer. R. App. \_\_ (Hr.’g Tr. 69:19–24).

Roost’s so-called restaurant business is a façade intended to placate DOR inspectors. Its kitchen is “essentially a preparation table with a microwave.” R. App. \_\_ (Int.’s Ex. 1 at 39:9–11). There is no stove or industrial refrigerator. R. App. \_\_ (Int.’s Ex. 1 at 39:19–40:2). Roost uses this “kitchen” to prepare hotdogs. R. App. \_\_ (Int.’s Ex. 1 at 38:10–12). While it also sells pizza, the work of preparing and baking those pizzas has been “outsource[d]” to the Village Idiot, a Five Points pizza restaurant. R. App. \_\_ (Int.’s Ex. 1 at 38:10–19); but see R. App. \_\_ (Hr.’g Tr. 76:20–

77:15) (claiming to do “final preparation” of pizza). Upon delivery to Roost, Village Idiot’s pizzas are placed in “a warmer that we keep the pizza warm in.” R. App. \_\_\_ (Int.’s Ex. 1 at 38:17–19) (“Q. So you don’t fix the pizza there? A. No. We just sell it.”). At the end of the night, the bar gives its pizza away for free. R. App. \_\_\_ (Int.’s Ex. 1 at 39:4–6). To run an operation akin to Bourbon, a whiskey bar and Cajun-Creole restaurant located on Columbia’s Main Street, Roost would need a “significant remodel” to its kitchen. R. App. \_\_\_ (Int.’s Ex. 1 at 40:6–12); cf. R. App. \_\_\_ (Hr.’g Tr. 50:17–24) (same).

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The public area surrounding 800 Harden Street has been a constant source of law enforcement problems, public intoxication, and a location where young people congregate and loiter. R. App. \_\_\_ (Hr.’g Tr. 249:22–250:7). Late night, students crowd the public streets, discouraging residents from driving through Five Points. R. App. \_\_\_ (Hr.’g Tr. 460:21–461:4 & 461:12–462:2). As one Protestant recounted, “a lot of kids [are] out on the streets, you’re not sure who’s drinking, who’s – who’s sober, who’s not, who’s going to walk out in front of you, [I] just don’t like going through there.” R. App. \_\_\_ (Hr.’g Tr. 461:5–11); see also R. App. \_\_\_ (Hr.’g Tr. 490:13–491) (“... it’s incredible the sidewalks are absolutely crowded, streets, people back and forth across .... People are jaywalking all the time.”). At least one pedestrian was struck by a vehicle near the location. R. App. \_\_\_ (Hr.’g Tr. 250:13–251:4). Bland put it even more bluntly when describing the scene on the public’s streets at bar closing: “I’m not sure if you’ve been down there on Saturday night, but ... it get’s pretty aggressive.” R. App. (Hr.’g Tr. 137:13–22).

In Chief Holbrook’s view, allowing a bar back into 800 Harden may strain CPD’s ability to adequately protect the community. R. App. \_\_\_ (Hr.’g Tr. 250:8–12). In terms of trends, Chief Holbrook explained there has been a decrease in calls for service, but an increase in “self-

generated” calls, meaning CPD officers already patrolling Five Points requesting backup to respond to an incident. R. App. \_\_ (Hr.’g Tr. 264:4–14). To track these trends, CPD keeps notebooks on “most” Five Points bars, but none for the 50-some off bars in the Vista, Columbia’s other entertainment district. R. App. \_\_ (Hr.’g Tr. 265:13–266:8). When pressed to explain the discrepancy, the police chief explained, “[i]f we would have a -- a bar that would have repeated calls for service then we would.” R. App. \_\_ (Hr.’g Tr. 266:1–4).

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The Five Points’ drinking culture has become a source of concern to USC administrators tasked with promoting healthy student life. According to a 2016–17 survey of first-year USC students concerning alcohol use, 25 percent of 5,433 students surveyed self-reported “high risk” drinking habits.<sup>6</sup> R. App. \_\_ (Hr.’g Tr. 273:9–275:1; 277:20–279:14; 282:24–283:11). Most high-risk drinking occurs in bars and nightclubs. R. App. \_\_ (Hr.’g Tr. 284:21–285:4). This behavior resulted in 254 USC students being transported to a medical facility for over consumption. R. App. \_\_ (Hr.’g Tr. 286:9–24). USC’s Associate Vice President for Student Life, Anna Edwards, explained that her staff interviewed these 254 students and found that 40 percent admitted overconsumption in Five Points caused their hospitalization. R. App. \_\_ (Hr.’g Tr. 288:23–289:24). “[M]ost” were under the age of 21. R. App. \_\_ (Hr.’g Tr. 289:25–290:3). In 2013, the number of USC freshman (typically, 18 years old) who drink at bars as their primary venue was 39 percent—twice the Southeastern Conference (SEC) average. R. App. \_\_ (Hr.’g Tr. 348:22–349:7; 500:24–501:10). USC did not file a formal protest to Roost’s permit and license application because the University missed the deadline; but Ms. Edwards was unequivocal in the University

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<sup>6</sup> “High-risk” drinking is either heavy episodic drinking, meaning four drinks per sitting for women/five for men, or problematic drinking, meaning six drinks per sitting for women/eight or more for men. R. App. \_\_ (Hr.’g Tr. 282:12–18).

opposition. R. App. \_\_\_ (Hr.'g Tr. 290:4–19 (“Q. Okay. Would you have objected to the Roost? A. Yes.”)).

Likewise, former FBI station chief, former assistant CPD Chief, and USC faculty member Leslie Wiser<sup>7</sup> testified about his report—Time for a Change: An Evidence-Based Approach to Crime Prevention and Environmental Change—detailing the rise of under-age drinking among USC students. During his stint with CPD from 2010 until August 2013, Wiser became aware of “widespread” problems in Five Points with “particularly intoxicated students, but also inexperienced drinkers, underaged drinkers.” R. App. \_\_\_ (Hr.'g Tr. 309:21–311:11). As a member of the USC faculty, Wiser co-authored Time for Change in October 2015, which, with the assistance of USC’s Office of Student Life, studied risky student behavior involving alcohol. R. App. \_\_\_ (Hr.'g Tr. 312:14–313:4). More specifically, Wiser sought to “understand this effect of alcohol on these students in the context of [the] immediate[ ] area of the hospitality district in which these students went and it’s [e]ffect on the community.” R. App. \_\_\_ (Hr.'g Tr. 322:1–323:3). In doing so, Wiser relied on survey data (Alcohol EDU); CPD crime statistics; interviews with students, bar owners, law enforcement, and neighbors; observation in Five Points and the Vista; and his professional expertise and judgment as a criminologist with decades of law enforcement experience. R. App. \_\_\_ (Hr.'g Tr. 323:11–326:14); see also R. App. \_\_\_ (Hr.'g Tr. 339:15–24 (finding Mr. Wiser qualified as an expert in criminology)).

Wiser described the unintended consequence of a USC shuttle bus service transporting students to and from Five Points following the October 2013 shooting of a USC student. R. App. \_\_\_ (Hr.'g Tr. 342:16–343:9). According to 2012–13 survey data from shuttle riders, the shuttle

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<sup>7</sup> Prof. Wiser’s professional experience includes counter-intelligence work that exposed CIA officer Aldrich Ames and FBI agent Robert Hanson as double-agents for the former Soviet Union. R. App. \_\_\_ (Hr.'g Tr. 304:14–308:17).

caused a “significant” and “alarming” increase in the number of students drinking in bars: from 14 percent of alcohol using students to 29 percent in just one year. R. App. \_\_\_ (Hr.’g Tr. 342:16–344:1). More recently, that figure jumped to 39 percent. R. App. \_\_\_ (Hr.’g Tr. 349:1–7 & 386:19–25). Physical observation of behavioral cues by riders indicated students were sober when the shuttle transported them to Five Points and intoxicated on the ride back to campus. R. App. \_\_\_ (Hr.’g Tr. 344:11–19). Of the 160 students interviewed as part of Wiser’s study, 77 percent reported going to Five Points to drink (as opposed to eat, shop, and socialize) with 69 percent of respondents under the age of 21. See R. App. \_\_\_ (Hr.’g Tr. 344:23–347:3 & 376:7–21).

More troubling still is the correlation between the number of alcohol establishments and the rise of criminal activity in Five Points and the adjacent neighborhoods. Prof. Wiser opined there is a correlation between the density of establishments that allow on-premise alcohol consumption and crime in an area, including predatory violent crime. R. App. \_\_\_ (Hr.’g Tr. 349:12–352:12 (“...it’s overwhelming all the studies suggest that positive correlation because it provides opportunities for crime for both perpetrators and victims as well.”) & 355:2–8 (“--- more populated the area is with alcohol establishments the more likely there will be alcohol related harms and crime.”)). Concerns about crime are not limited to predatory crimes. As Prof. Wiser explained, “alcohol is the drug most consistently related to aggression,” and that “half of all violent events either the -- either the offender, the victim or both have prior use of alcohol[.]” R. App. \_\_\_ (Hr.’g Tr. 341:4–8).

As to Five Points, Prof. Wiser found student transit from Five Points through adjacent neighborhoods has diminished the quality of life for residents. R. App. \_\_\_ (Hr.’g Tr. 353:10–22). More pointedly, he opined that alcohol establishment density is the “central variable” in discerning the level of crime committed against students and by students. R. App. \_\_\_ (Hr.’g Tr. 358:7–14).

These concerns are heightened further still by a City ordinance permitting some establishments to continue serving alcohol from 2:00 a.m. until sunrise, which increases concerns stemming for alcohol-establishment density. R. App. \_\_\_ (Hr.'g Tr. 370:22–371:5). Finally, asked to compare Five Points-related crime to that in the Vista district (an area that does not cater to USC student and where on-premises consumption occurs in bona fide restaurants), Prof. Wisner opined that overall crime rates in the Vista was less than Five Points. R. App. \_\_\_ (Hr.'g Tr. 353:23–354:12).

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While the immediate area surrounding Roost is commercial, the perimeter of Five Points is residential, including the University Hill, Martin Luther King Park, Wale's Garden, Hollywood Rose Hill, Shandon, Old Shandon, and Waverly neighborhoods. R. App. \_\_\_ (Hr.'g Tr. 251:20–24 & 415:5–416:17); see also R. App. \_\_\_ (Int.'s Ex. 5 (map of neighborhoods surrounding Five Points)). The ALC heard from three residents, all of whom repeated concerns voiced by law enforcement and USC that bar density has resulted in raucous, degenerate behavior by intoxicated USC students spilling out of Five Points and into adjacent neighborhoods. April Lucas, a University Hill resident for the last 31 years, lives just two blocks from Roost. R. App. \_\_\_ (Hr.'g Tr. 392:2–17). Ms. Lucas offered a map evidencing the location of establishments with liquor licenses in Five Points alongside Five Points Merchant's Association data to distinguish between "bars" and restaurants. R. App. \_\_\_ (Hr.'g Tr. 397:13–400:22 & Int.'s Ex. 4). Roost's location in the 800 block of Harden Street shares a common wall two other bars and is located across the street from two more. R. App. \_\_\_ (Hr.'g Tr. 401:12–25) ("Q. And that's just in one very small area, is that correct? A. That's correct."). Pedestrians traveling from Roost have direct access to the University Hill neighborhood via a walking path or "cut through" that begins on Greene Street and

crosses the railroad tracks into the neighborhood. R. App. \_\_ (Hr.'g Tr. 402:22–403:11); see also R. App. \_\_ (Hr.'g Tr. 406:3–17).

Ms. Lucas explained that the alcohol-related problems stemming from Five Points have “intensified greatly” over the last 10 years such that “we now frequently get intoxicated pedestrians [ ] roaming though our neighborhoods at all hours.” R. App. \_\_ (Hr.'g Tr. 417:15–418:6). Referring to a USC dorm near her neighborhood, Mr. Lucas explained the “Capstone [dormitory] fire drill” begins on Thursday night at approximately 10:30 p.m. with a parade of students: “so they make noise on the way down to Five Points and they make noise coming back at all hours of the night[.]” R. App. 418:1–6. With its comes vandalism (like when a cement urn was thrown onto the roof and windshield of a neighbor’s car), littering, public urination, indiscernible shouting (that could be evidence of an ongoing assault), trespassing, and violence. R. App. \_\_ (Hr.'g Tr. 418:7–419:6, 434:17–437:21, 434:17–437:21 & 438:4–11). Ms. Lucas has had her parked vehicle sideswiped *five* times by inebriated students. R. App. \_\_ (Hr.'g Tr. 423:23–424:13). Approximately two years ago, she and her husband awoke at 2:30 a.m. to the sound of an inebriated student pounding on her front door—a “common occurrence” on University Hill. R. App. \_\_ (Hr.'g Tr. 436:1–437:21). In Ms. Lucas’s experience, the ubiquity and concentration of Five Points bars has become an “attractive nuisance” that has dramatically diminished the quality of life on University Hill (R. App. \_\_ (Hr.'g Tr. 420:24–423:2)), so much so that one neighbor attempting to sell her house asked Ms. Lucas not to say anything about Five Points out of fear it will diminish the prospect of a sale. App. R. \_\_ (Hr.'g Tr. 433:12–23 (noting Five Points’ “bad reputation”).

For the last 36 years, William Lamb and his family have lived on Wheat Street, one block from Five Points and two and half blocks from Roost. R. App. \_\_ (Hr.'g Tr. 442:25–444:11 & 447:21–448:2). From 1980 until 2005, Mr. Lamb’s wife owned and operated Gibson’s, a lunch

counter and later gift shop located on Saluda Street in Five Points (the location presently occupied by Starbucks). R. App. \_\_ (Hr.'g Tr. 448:21–452:8). The Lambs closed Gibson's in 2005 because Five Points was moving away from a "shopping village" with a greater emphasis on bars and partying, which attracted a clientele inconsistent with the business. R. App. \_\_ (Hr.'g Tr. 452:9–453:15). Mr. Lamb recounted his time living on Wheat Street in the Shandon neighborhood as without concern, something that has "change[d] dramatically" in recent years and "[n]ot in a positive way." R. App. \_\_ (Hr.'g Tr. 454:7–23). Like Ms. Lucas, Mr. Lamb described living with litter, vandalism, theft, and "terrible" noise from intoxicated people "shouting and screaming" at 2:00 and 3:00 a.m., all emanating from Five Points bars starting on Thursday nights. R. App. \_\_ (Hr.'g Tr. 455:18–457:4, 458:24–459:10 & 466:5–20). These disturbances have diminished quality of life for Mr. Lamb, something he attributes to the density of bars that have "taken over our neighborhood and all the adjacent neighborhoods in [the] Five Points area[.]" R. App. \_\_ (Hr.'g Tr. 459:14–460:6).

Tom Gottshall, an University Hill resident of almost 42 years lives three and a half blocks from Ms. Lucas's home and likewise observed a diminution in community character as Five Points retail and food establishments have left or been replaced by bars and the neighborhood has come "under siege." R. App. \_\_ (Hr.'g Tr. 475:4–476:5 & 476:23–477:4). Mr. Gottshall's observations corroborated those of other residents and described how, as president of the neighborhood association, he receives calls and emails "all the time" from neighbors complaining about intoxicated individuals disturbing the peace in the middle of the night. R. App. \_\_ (Hr.'g Tr. 476:5–14). Those complaints have included vandalism, public urination, and public sex, and prompted the neighborhood association to pass a resolution seeking a reduction in the number of Five Points bars. R. App. \_\_ (Hr.'g Tr. 481:17–483:14). A coalition of Five Points neighborhoods have also

voted to oppose more bars in Five Points. R. App. \_\_\_ (Hr.'g Tr. 394:11–397:12). In Mr. Gottshall's view, the problem has become "critical" for his neighborhood *and* for the underaged students attracted to the chaos of the Five Points bar scene. R. App. \_\_\_ (Hr.'g Tr. 485:16–487:5 & 489:15–490:4).

### STANDARD OF REVIEW

This Court reviews decisions of the ALC for findings, conclusions, or decisions that prejudice the substantive rights of the petitioner and are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Be Mi, Inc. v. S.C. Dep't Rev., 408 S.C. 290, 296, 758 S.E.2d 737, 740 (Ct. App. 2014) (quoting S.C. Code Ann. § 1-23-610(B) (Supp. 2013)). That review must be confined to the record below and this Court cannot substitute its judgment for that of the ALC as to the weight of the evidence on a question of fact. Id.

Absent an allegation of fraud or a statute or court rule requiring a higher standard, the ALC weighs the preponderance of the evidence. Be Mi, 408 S.C. at 297, 758 S.E.2d at 740 (quoting Anonymous (M-156-90) v. State Bd. Med. Exam'rs, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998)). In a *de novo* contested case, the ALC is the sole finder of fact. Id. (quoting S.C. Dep't Rev. v. Sandalwood Soc. Club, 399 S.C. 267, 279, 731 S.E.2d 330, 337 (Ct. App. 2012)). When evidence conflicts on an issue, the substantial-evidence standard requires deference to the ALC unless its decision is unsupported by substantial evidence or controlled by an error of law. Id. at 297, 758 S.E.2d at 740–41 (citing Risher v. S.C. Dep't Health & Envtl. Control, 393 S.C. 198,

210, 712 S.E.2d 428, 435 (2011); quoting Original Blue Ribbon Taxi Corp. v. S.C. Dep't Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)). Substantial evidence does not foreclose the possibility of drawing another conclusion but is more than a mere scintilla and allows a reasonable mind to reach the same conclusion upon consideration of the whole record. Id. at 297–98, 758 S.E.2d at 740–41 (quoting Risher and Original Blue Ribbon Taxi, *supra*).

### ARGUMENT

The Final Order should be affirmed because the ALC's three, independent grounds to deny Roost's application are backed by substantial record evidence and controlling precedent. Specifically, the ALC held:

- (1) that Roost failed to disclose two general managers responsible for day-to-day operations and that it “intentionally misrepresented” the role of a third, Pour House owner Daniel Wells (R. App. \_\_ (Final Order, 9);
- (2) that Roost's location is not suitable because granting a permit and license would adversely impact the community welfare (R. App. \_\_ (Final Order, 9–13)); and
- (3) Roost is not a business “primarily and substantially” in the business of preparing and serving meals, as required by the state Constitution and statutory law (R. App. \_\_ (Final Order, 14–16)).

Roost claims error raising a litany of ill-formed complaints challenging the ALC's factual and legal conclusions. For Roost to prevail here, this Court must take exception to *all* of the ALC's conclusions as any one of the Final Order's three holding offers sufficient grounds to affirm. Further, to prevail on any one of these issues, Roost must show the ALC erred as a matter of law or that, on a disputed issue of material fact, the ALC's findings are unsupported by substantial evidence such that they are not entitled to deference here. For reasons that follow, that burden is insurmountable and the Final Order should be affirmed.

Many of the arguments contained in Roost's brief need not be considered because they are not presented *anywhere* in the 10 issues identified in Roost's Statement of Issues on Appeal. Rule

208 of the appellate rules requires an appellant to include a “concise and direct” statement of each issue presented for review. Rule 208(b)(1)(B), SCACR “Broad general statements may be disregarded” and “[o]rdinarily, *no point will be considered which is not set forth in the statement of the issues on appeal.*” Id. (emphasis added). Here, Roost’s rambling, amorphous “issues” can be fairly read to fall in one of four categories: (1) undisclosed principal, (2) unsuitability, (3) the primarily-and-substantially requirement, and (4) due process. Due process is not addressed in the body of Roost’s brief.<sup>8</sup> Conversely, several arguments in the brief have no relationship and offer no answer to the issues presented and are therefore not properly before the Court. Specifically, the arguments offered by Roost under the following headers are *not* properly presented:

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.

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 [sic] view of the reliable, probative and substantial evidence in the record or are arbitrary or capricious.

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

VI. The Court erred in adopting expert testimony

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.

See App. Br. \_\_, \_\_ & \_\_ (App. Int. Br., 23–24, 28–37 & 44–46) (underline, italics original). These arguments are not included within Roost’s statement of the issues on appeal and should not be considered. Nevertheless, Roost’s laundry lists of purported errors are addressed *seriatim* below.

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<sup>8</sup> This issue was likely overlooked because there is no colorable due process argument. Due process requires that no person be bound by a judicial or quasi-judicial agency decision affecting a private right except with due notice and an opportunity to be heard, with a right of judicial review. S.C. Dep’t Rev. v. Meenaxi, Inc., 417 S.C. 639, 651, 790 S.E.2d 792, 798 (Ct. App. 2016). Here, there is no allegation Roost was denied notice or a hearing.

**I. The Final Order's conclusion the application was misleading in not disclosing Daniel Wells and others as principles of Roost is supported by substantial evidence and based on statutory criteria.**

Applying South Carolina Code § 61-2-100(J), the ALC found that Daniel Wells is involved in ownership and control of Roost, which “intentionally misrepresented Mr. Wells’ role in the business.” R. App. \_\_ (Final Order, 9).

A misstatement or concealment of fact on an application for a license or permit pursuant to [Title 61] is sufficient grounds for the department to deny the application and to revoke a license or permit issued based on an application containing a misstatement or concealment of fact.

S.C. Code Ann. § 61-2-100(J). The ALC denied the application based on Wells’ opaque financial connections to Roost, as well as two general managers and statutory principals (Thompson and Ellidge) who were not disclosed. R. App. \_\_ (Final Order, 9) (noting that while the omission may have been unintentional, “nevertheless the permit and license may not be issued in light of that omission.”). Roost raises four arguments.

**A. Wells and the two undisclosed general managers all meet the statutory definition of a principal that must be disclosed.**

Roost claims the ALC’s finding was “without factual support and without regard to the statutory definition of Principal.” App. Br. \_\_ (App. Int. Br., 15–17).

DOR’s application requires that all principals be disclosed. See R. App. \_\_ (DOR File 0003–05). Likewise, before an alcohol license or permit can issue, an ALC must determine whether the applicants meet all of the statutory requirements for licensure, an inquiry that requires disclosure of all principals. For instance, “[t]he department may not issue a license or permit under this title to any person unless the person and all principals are of good moral character.” S.C. Code Ann. § 61-2-100(D). South Carolina Code § 61-2-100(H)(2) defines “principal” to include:

(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.

Id. § 61-2-100(H)(2)(g)–(h). The record evidences an obscure financial arrangement that grants Daniel Wells a financial stake in Roost’s profitability, both in repaying the purported debt to his mother (if that is, in fact, true) by granting her an equity interest with no apparent consideration and receiving repayment on his \$150,000 promissory note payable from Roost’s profits. These connections are substantiated as admissions by Roost—the party with the burden of meeting statutory requirements—that Daniel Wells was actually controlling his mother’s 69 percent interest in addition to the \$150,000 note held by his company. Section 61-2-100(H)(2)(g) required denial of the application.

Moreover, the ALC questioned the very veracity of the evidence Roost offered, noting “I find neither Bland nor Ruonala to be credible witnesses, and the facts they testified to concerning the ownership and control of the business are unreliable.” R. App. \_\_ (Final Order, 4). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness’s demeanor and veracity and to evaluate the credibility of his testimony. See, e.g., Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990). Based on this record, the ALC was correct in denying the application for not satisfying its burden to show all statutory criteria (e.g., good moral character of all principals) was met. Cf. Gorecki v. Gorecki, 387 S.C. 626, 633, 693 S.E.2d 419, 422 (Ct. App. 2010) (“A ‘preponderance of the evidence’ is evidence which convinces as to its truth.” (citation omitted)).

Further, it is also undisputed Thompson and Ellidge were undisclosed general managers within the meaning of § 61-2-100(H)(2)(h). Accordingly, the ALC's conclusions are supported and correct as a matter of law.

**B. Denial based on nondisclosure does not require a willful violation.**

Citing a "longstanding practice[.]" Roost claims the ALC should not have considered its failure to disclose all principals because "case law demonstrates that generally where the ALC has denied licenses based on undisclosed principals, DOR raised the issue in its denial." App. Br. \_\_ (Int. Br. 17). Even if true, this is of no consequence. There is no requirement tying an ALC's findings of fact or conclusions of law in a contested case to matters raised by the agency. Cf. S.C. Code. Ann. §§ 1-23-320, -330 & -350. Roost cites no precedent for the proposition.

**C. Roost's scurrilous, uncorroborated claim of bias by the ALC relies on the false claims that there is no "shred" of evidence.**

Roost claims "there is not a shred of testimony or evidence in the record" to support the Final Order's conclusion Daniel Wells was still controlling the business and simply reorganized it and transferred his majority ownership interest to an LLC controlled by his mother. Compare App. Br. \_\_ (Int. Br. 18), with R. App. \_\_ (Final Order, 5). Roost impugns the ALC's impartiality contending—without support or explanation—that Judge Durden "apparently leaped to this conclusion because it supported the desired outcome not because facts supported it." App. Br. \_\_ (Int. Br. 18). But those allegedly non-existent facts are detailed in the Final Order on the very same page quoted by Roost's brief, specifically:

In addition to BG Holdings' 65% ownership interest in Five Points Roost, LLC, an LLC owned solely by Daniel Wells holds a \$150,000 promissory note from Five Points Roost, LLC. Furthermore, Bland testified that Wells owed him \$125,000 that he discounted to \$20,000 as part of the negotiations leading to the formation of Five Points Roost, LLC. The debt was related to Bland's previous employment at the Pour House. That \$20,000 was counted as Bland's part of the capital contribution to obtain his share of the business with no money exchanged, thus

absolving Wells of the disputed debt. Bland testified that he values the business at \$450,000. Assuming that value and the discounted value of the debt to Bland, Brenda and Daniel Wells received approximately \$462,500 of value in Five Points Roost, LLC. *Bland and Ruonala were unable to identify contributions made by either Brenda or Daniel Wells to justify the promissory note, debt forgiveness, and the majority share of ownership of the business.* Five Points Roost, LLC did not keep the same business name to acquire business goodwill; it did not assume the lease of the building but negotiated a new lease at roughly twice the rent amount paid by the Pour House; the Pour House had no ongoing business license, and alcohol licenses cannot be sold. The only assets Bland or Ruonala testified they acquired from the Wellses were \$45,000 for renovations, some tables, chairs, TVs, coolers, and the “first mover advantage” to move ahead with forming the business. *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;
- the admission by Bland that he never negotiated directly with Mrs. Wells but relied upon the advice of accountants and lawyers in establishing the business; and
- Bland’s testimony that the same lawyer represented both Daniel Wells and himself in drafting the documents and advising how to structure ownership of the business.

Even with the astonishing differences in Bland’s deposition and hearing testimony concerning the organization and financing of the business, *on neither occasion did he or Ruonala offer any credible explanation as to why they agreed to the financial terms reflected in the documents.*

R. App. \_\_ (Final Order, 4–5) (emphasis added). Instead of impugning the ALC’s integrity by making a serious, unsubstantiated allegation that the court came to this case with a preconceived outcome and engaged in misconduct to achieve a desired result, Roost should have tailored its argument to explaining why the detailed findings quoted above are incorrect. To the contrary, they are supported by the record.

**D. Roost misstates the record repeatedly to suggest there is no evidentiary basis for the ALC's conclusions.**

Roost claims “[t]here is no testimony in the record to support the [ALC’s] finding regarding the incident for which Wells is currently facing criminal charges.” App. Br. \_\_ (Int. Br. 18) (“*The record is bereft of any testimony or exhibit to support this finding.*” (emphasis original)). First, a court can take judicial notice of matters of public record. See Rule 201, SCRE; see also State v. Wells, Indict. No. 2017-GS-40-04420 (Rich. Co. Gen. Sess.) (3411-Assault / Assault & Battery of a High & Aggravated Nature). Second, at trial, Wells’ pending criminal charges were so well-accepted as a matter of fact that Rounala testified about them (R. App. \_\_ (Hr.’g Tr. 156:2–15) (“I make no qualms about it that I’ve known Daniel Wells for years and in terms of his business decisions and the way he handled this, I think he made a really Pour [sic] decision. ... I think he made a terrible mistake and I think it put a black eye on Five Points as a whole ....”)), and opposing counsel cross-examined Chief Holbrook about the Wells incident. R. App. \_\_ (Hr.’g Tr. 260:11–261:22). (“Q. Chief, in both cases where you have invoked this statute there’s been some public incident where someone was harmed, wasn’t it? A. Yes.”).

Roost also claims the ALC was incorrect to find that “a longstanding personal relationship 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” weighed in favor of the conclusion Wells is an undisclosed principal. Compare App. Br. \_\_ (Int. Br. 19), with R. App. \_\_ (Final Order, 5.). The only support Roost offers for this assertion is the *ipse dixit* assertion that “obviously [Ruonala] and Bland had some sort of relationship” (App. Br. \_\_ (Int. Br. 19)), but Roost neither says what that is, nor points to the record for that “obvious” answer.

Roost’s argument about some alleged incongruity between the revenue Roost generates and the consideration exchanged among the parties (see App. Br. \_\_ (Int. Br. 20–23)) is not

responsive to any issue reasonably in dispute and the Court should not rely on Roost's unfocused and inaccurate claims about the evidence in this case in lieu of the ALC's cogent findings or the record detailed above. Concerning Roost's claims the ALC "made credibility determinations based upon an error of law" because it took issue with Bland's gratuitous effort to re-write his deposition testimony using an errata sheet (see App. Br. \_\_ (Int. Br. 21)), the ALC's decision not to credit that contradictory statement is reviewed for an abuse of discretion under the sham affidavit rule. See McMaster v. Dewitt, 411 S.C. 138, 144 & n.2, 767 S.E.2d 451, 454 & n2. (Ct. App. 2014) (collecting cases, including EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 270–71 (3d Cir. 2010) (district court did not abuse discretion in applying sham affidavit rule to exclude contradictory errata sheet)). Intervenor *encourage* this Court to review Bland's deposition and errata sheet for itself (see R. App. \_\_ (Int. Ex. 1 at errata sheet)) and decide whether the ALC or Bland engaged in abuse here. Finally, Roost's claims about the evidence supporting the ALC's suitability holding will be addressed below. Compare App. Br. \_\_ (Int. Br. 22–23), with § II, infra.

**II. 800 Harden Street is an unsuitable location for a bar based on the character of the surrounding community, the nuisance the establishment would pose to residents, the strain it would impose on law enforcement, and the harm to USC students.**

The ALC held the location was unsuitable based on evidence Roost could not operate a bar in the proposed location "in a manner that would not constitute a nuisance to the community, put additional strain on law enforcement resources, and contribute to existing problems with underage drinking in Five Points." R. App. \_\_ (Final Order, 13). In its discussion of "Underage Students and Five Points," the ALC expressed skepticism that, notwithstanding the promises of two individuals (both judged not to be credible) that Roost would take remedial steps, underage students would still find their way into Roost in light of the testimony by residents, law enforcement, and USC personnel. R. App. \_\_ (Final Order, 5–7). Roost contends the ALC "speculated" that it would "act

lawlessly in the future.” App. Br. \_\_ (Int. Br. 23–24). Similarly, Roost argues the ALC’s notion of the “location” was “overly broad” because its review of the record was not confined exclusively to activity at and harms felt at the 800 Harden during the two months it was operational under a provisional license. See App. Br. \_\_ (Int. Br. 25–27). Roost also disputes the ALC’s decision to credit the number of incidents at the location as a factor weighing against licensure because, “rather than the 623 items mentioned in the [ALC’s] finding of fact, the Chief testified that there were 23 incidents over 18 months prior to May 2017.” App. Br. \_\_ (Int. Br. 28–32). These arguments fundamentally misapprehend the nature and purpose of the ALC’s suitability analysis, which found evidence of public harms that precedent indicates are grounds to deny a license.

**A. The possibility of exacerbating underaged and student drinking and adverse activity near the location, including criminal activity, are all relevant pieces of evidence supporting the conclusion the location is unsuitable for permitting and licensure.**

An ALC can consider many suitability factors before issuing a license, including moral character of the applicant, reputation for peace and good order in the community, and the propriety of the location. See S.C. Code Ann. §§ 61-4-520, 61-6-120 & -1820. An applicant need not be found to have acted lawlessly—precedent allows a license to be denied based on the unsuitability of the location. See Schudel v. S.C. ABC Comm’n, 276 S.C. 138, 140–41, 276 S.E.2d 308, 309 (1981) (denying license based on prior disturbances, proximity to children, and objections by law enforcement, church, and residents even though “no formal complaints had been filed against his previous establishment”). Discerning whether a particular location is suitable is left to the broad discretion of the trier of fact weighing any evidence that might show adverse circumstances of location. See Fast Stops, Inc. v. Ingram, 276 S.C. 593, 281 S.E.2d 118 (1981); Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985); see also Zodiac Private Club v. S.C. Dep’t Rev., 08-ALJ-17-0054-CC, 2008 WL 2300384, at \*3 (S.C. Admin. Law Ct. 2008) (“it is proper for this

tribunal to consider any evidence that shows adverse circumstances of location.” (emphasis added) (collecting cases)). Suitability analysis requires an ALC to consider the public’s interest based on the myriad of factors that might weigh on it. See 48 C.J.S. Intoxicating Liquors § 196 (Sept. 2016 update) (license may be refused on grounds location “would adversely affect the public interest, that the nature of the neighborhood and ... premises is such that the establishment would be detrimental to the welfare ... of the inhabitants, or ... the manner of conducting the establishment would not be conducive to the general welfare of the community.”). Accordingly, geography, traffic risks, nature of the business vis-à-vis the neighborhood, community impact, and strain on law enforcement have all been cited as proper adverse considerations. See, e.g., Moore v. S.C. ABC Comm’n, 308 S.C. 160, 162, 417 S.E.2d 555, 557 (1992); Kearney, 287 S.C. at 326, 338 S.E.2d at 337; Schudel, 276 S.C. at 141–42, 276 S.E.2d at 309–10; Palmer v. S.C. ABC Comm’n, 282 S.C. 246, 249, 317 S.E.2d 476, 478 (Ct. App. 1984); Barfly Enter., LLC v. S.C. Dep’t Rev., 13-ALJ-17-0452-CC, 2013 WL 6620406 at \*5 (S.C. Admin. Law Ct. 2013); Zodiac, 2008 WL at \*3–4. Denying a license is appropriate when the location, under current *or* former applicants, is the situs of problems for law enforcement, public intoxication, or loiterers. Barfly, 2013 WL at \*5 (citing Schudel, and Palmer, *supra*).

In considering the suitability of the location, the ALC correctly considered the impact on the community—residents, law enforcement, and USC students—among many other factors. Roost’s contention that the ALC’s view of this matter was too broad is simply incorrect. Properly read, precedent stands for the proposition that, while harms flowing from the proposed location are certainly probative, they are not necessary to establish unsuitability. Instead, most suitability factors implicate an interest *external to* the applicant. See e.g., S.C. Code Ann. § 61-4-520(5)–(6) (allowing consideration location’s proximity to residences, schools, playgrounds, and churches).

Roost's insistence the ALC should have looked to the 23 particular criminal incidents CPD tied directly to Pour House during just an 18-month period *instead of* the 623 calls for service made from the 800 block offers Roost's position no assistance. Given the careful consideration the ALC gave to Chief Holbrook's testimony, there is no question Judge Durden was mindful of his testimony about these 23 incidents when she found "the proposed location has a reputation for lawless behavior under previous management and that granting the license and permit sought here would likely exacerbate and perpetuate the problems with public intoxication and the existing strain on law enforcement resources." See R. App. \_\_ (Final Order, 7); see also R. App. \_\_ (Final Order, 3) ("Following a violent incident in February 2016, for which Wells is currently facing criminal charges, Holbrook served notice declaring the Pour House a nuisance.").

Likewise, the ALC's assessment that Roost would contribute to the problem of student drinking in Five Points need not rest on particular bad acts by Roost—bad acts by an applicant weigh against other licensure criteria. The ALC's reasoning tied evidence of student-drinking harms to the fact that Roost's business model targets a population already struggling to moderate its drinking given the density of alcohol establishments near the university:

The presence of crowds of underage USC students, many armed with sham identification and intent upon drinking in Five Points bars, is an important factor indicating that the proposed location is not suitable for the type of business Petitioner intends to operate. This is especially true in light of the fact that *Petitioner's business model is a bar intended to attract and serve students and young adults*. Proximity to a place "where young people congregate and loiter" has been recognized by our Court of Appeals as a factor demonstrating that a particular location is unsuitable for the sale of beer and wine. Palmer, 282 S.C. at 250, 317 S.E.2d at 478. Here, the evidence demonstrates that crowds of young people gather in Five Points. Many of them become intoxicated, putting their own safety at risk as well as causing problems for law enforcement and disturbing the peace of the nearby residents. Granting the permit and license for such a business at this location would exacerbate this significant existing problem.

R. App. \_\_ (Final Order, 10) (emphasis added). Roost does not argue the ALC erred in relying on Palmer (it cites Palmer in its own brief Cf. App. Br. \_\_ (Int. Br. 25–26)). Thus, because the ALC’s finding is based on research data and testimony from the police chief, an expert criminologist, a USC administrator, and residents, there is a substantial evidentiary basis for the ALC’s finding, which weighed student harms as one of many factors rendering the location unsuitable. Finally, Roost’s reliance on foreign precedent is unpersuasive. See App. Br. \_\_ (Int. Br. 24). The relevant standard and precedent are set forth above.

**B. Roost’s reliance on Taylor v. Lewis is misplaced.**

Roost contends the ALC “failed to consider the evidence surrounding the Appellant’s business and location.” App. Br. \_\_ (Int. Br. 32). That is a false statement.<sup>9</sup> It also argues the ALC should have relied on Taylor v. Lewis, 261 S.C. 168, 198 S.E. 2d 801 (1973), in which the Supreme Court approved a permit because the objectors offered nothing more than “opinions and conclusions which are not supported by any facts” and the record was “devoid” of evidence the location was “any less suitable for the sale of beer now than during the prior five (5) year period.” Id. at 171–72, 198 S.E.2d at 802. The ALC distinguished Taylor from this case by explaining:

Unlike here, there was no factual evidence in the record in the Taylor case showing that the location was unsuitable. The denial of the license was based solely on the testimony of the Protestants concerning their fears. ... Moreover, the Taylor case presented a situation where the formerly licensed business had not created problems in the community and had been in virtually continuous operation selling beer and wine for off-premises consumption. In this case, the formerly licensed business was closed due to the fact that illegal, violent and nuisance behavior was taking place at the location.

R. App. \_\_ (Final Order, 13). This reasoning is entirely consistent with precedent and Roost offers no explanation how this Court should apply Taylor differently on this record aside for the false

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<sup>9</sup> Pages 32 through 34 of Roost’s brief contain a series of inaccurate, unsupported, and conclusory claims about the record that require no response in light of the record detailed above.

claim that “[a]ll of the evidence presented [in this case] was conjecture or speculation.” App. Br. \_\_ (Int. Br. 32).

**III. The ALC’s decision to qualify an expert criminologist based on decades of professional law enforcement training and academic study and rely on his testimony concerning data compiled about student alcohol use was consistent with Rule 702 and within the ALC’s discretion.**

Among the evidence the ALC relied on in concluding licensure would exacerbate alcohol-related harms to USC students, was data compiled by Prof. Wiser. Roost argues the ALC erred in qualifying Prof. Wiser as a criminology expert over its objection he “has no educational background in criminology, had 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[.]” and that Prof. Wiser’s 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 not survey control groups or known potential error rates and that its conclusions had not attracted acceptance within a relevant scientific community.” App. Br. \_\_ (Int. Br. 34–35). Roost is incorrect for three reasons.

First, the ALC was well-within its discretion to qualify Prof. Wiser as a criminology expert. “The qualification of an expert witness and the admissibility of the expert’s testimony are matters within the trial court’s discretion.” State v. Baker, 411 S.C. 583, 599–600, 769 S.E.2d 860, 869 (2015) (quoting Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). The decision to qualify an expert is reviewed for an abuse of discretion, meaning an error of law or a factual conclusion that is without evidentiary support. Id. (collecting cases). Rule 702, SCRE, allows expert testimony where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, and a witness so qualified by “knowledge, skill, experience, training, or education” to offer an opinion on the

evidence or issue. An expert is competent so long as he has acquired through study or experience knowledge and skill that renders him better qualified to render an opinion than the trier of fact. Baker, 411 S.C. 583,600, 769 S.E.2d at 869 (citing Gooding, 326 S.C. at 253, 487 S.E.2d at 598). “Defects in an expert witness’s education and experience go to the weight, rather than the admissibility, of the expert’s testimony.” Id.

Prof. Wiser is a former FBI agent, CPD assistant chief, and a professor of criminology. After voir dire, the ALC found him to be “clearly quite an expert” and qualified him as an expert in criminology capable of offering opinions related to the report he co-authored. R. App. \_\_ (Hr.’g 339:15–20); see also R. App. (Hr.’g 340:15–19) (The ALC noting that expert qualification “doesn’t require a degree in the subject and this gentleman is clearly through self-study, trained as an FBI Agent and -- and his formal studies qualified as an expert in this area.”). Roost points to no evidence to suggest this was an abuse of the ALC’s discretion under Rule 702.

Second, the ALC did not admit Prof. Wiser’s report into evidence. R. App. \_\_ (Hr.’g Tr. 370:1–5 (“The Court: ... I am not going to admit this report, I’ve heard the testimony about it and I’ve heard our expert witnesses thoughts on the subject, but that’s as far as I’m willing to go.”)). Thus any concerns about its purported admission are unfounded.

Third, while Roost’s primary concern is Prof. Wiser’s conclusion that there is a correlation between crime and the density of alcohol-related establishments (see App. Br. \_\_ (Int. Br. 35)), the ALC’s reliance on Prof. Wiser’s testimony was narrow focused on the data his study compiled from student surveys and interviews:

Criminology Professor Leslie Wiser, who has studied alcohol-related student behavior, testified that the number of freshmen (typically 18 or 19 years old) who self-report drinking in bars has increased from 14% in 2012 to 39% in 2014. His study reflects that 77% of the students riding the USC shuttle bus to Five Points report that they intend to drink in bars. Of those students interviewed, 69% were too young to drink legally.

R. App. \_\_ (Final Order, 6). Roost does not dispute these findings or take issue with the methodology. Once properly admitted, it was up to the ALC as fact finder whether to credit the probity of these statistics.<sup>10</sup>

**IV. Roost is not primarily and substantially in the business of preparing and selling meals and falls short of statutory restaurant requirements.**

The Final Order also held that Roost could not receive a liquor license because it ran afoul of statutory and constitutional restaurant requirements. Specifically, after reviewing statutory and regulatory requirements under South Carolina Code § 61-6-1610(I) and South Carolina Regulations 7-401, the ALC reasoned that Roost failed to meet statutory criteria because “[t]he proposed location does not have an oven or a stove other than a microwave, and there is no evidence that menus are provided to customers.” R. App. \_\_ (Final Order, 16). More broadly, the ALC held Roost’s operation runs afoul of the state Constitution because it “is not a business that is bona fide engaged primarily and substantially in the preparation and serving of meals.” R. App. \_\_ (Final Order, 16).

The power to grant liquor-by-the-drink licenses is constrained as a matter of state constitutional law, not just statutory construction. A liquor license can only issue to a “businesses which engage primarily and substantially in the preparation and serving of meals or furnishing of lodging” for on-premises sales and consumption. S.C. CONST., art. VIII-A § 1. In Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Commission, 273 S.C. 782, 260 S.E.2d 452 (1979), the South Carolina Supreme Court held that a liquor license applicant was not primarily

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<sup>10</sup> The remaining statements on pages 35 and 36 of Roost’s brief are “generalities, conclusions, and arguments not supported by facts” (see App. Br. \_\_ (Int. Br. 35–36)) that require no further response.

and substantially in the business of preparing and serving meals where just 10 percent of the applicant's revenue was derived from food.

Beyond the constitutional requirement, the General Assembly has adopted a statutory licensure scheme that must also be met before a liquor-by-the-drink license will issue. Specifically, a license can issue if the establishment obtains a license and is “*bona fide* engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging[.]” S.C. Code Ann. § 61-6-1610(A)(1)–(2) (emphasis added).<sup>11</sup> Section 61-6-1610’s requirement is defined:

(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.

S.C. Code Ann. § 61-6-20(2) (emphasis added). A “kitchen” is an area in the establishment used “solely” for meal preparation and “must include at least twenty-one cubic feet of refrigerated space for food and *a stove*.” S.C. Code Ann. Regs. 7-401(B)(2) (emphasis added).

Properly read together, article VIII-A § 1 of the Constitution imposes certain non-negotiable limitations on licensure by requiring an applicant be (1) primarily in the business of preparing and serving meals and (2) substantially engaged in doing so. Thus, statutory and

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<sup>11</sup> Liquor by the drink is “a drink poured from a container of alcoholic liquor, without regard to the size of the container for consumption on the premises of a [licensed] business[.]” S.C. Code Ann. § 61-6-20(b).

regulatory definitions provide helpful indicia of businesses that are *primarily* in the business of preparing and serving meals (e.g., kitchen, stove, refrigeration, etc.), beyond the constitutional threshold. These statutory criteria are particularly useful in assessing new applicants without a sales history. But, simply owning restaurant equipment or meeting other statutory requirements is not, itself, enough because an applicant must also demonstrate that the preparation and service of meals is a *substantial* part of the business—i.e., a quantitative analysis.

Roost argues that ALC failed to give DOR due deference (see App. Br. \_\_ (Int. Br. 37–38)), misapplied the statutory scheme (see App. Br. \_\_ (Int. Br. 43)), and incorrectly looked to Brunswick Capitol Lanes to understand the constitutional requirement. See App. Br. \_\_ (Int. Br. 37–42). Roost’s statutory and constitutional arguments are dealt with below, while its deference claims are addressed in the following section (see § V, infra).

**A. Roost did not meet basic statutory requirements that are important, legislatively mandated indicia an applicant is a bona fide restaurant.**

Roost lacks a kitchen “utilized for the cooking, preparation, and serving of meals upon customer request[.]” See S.C. Code Ann. § 61-6-1610(2)(a). The record indicates Roost has a table and a microwave. SLED’s inspection was unable to determine whether the kitchen had a working grill, stove, microwave, cold-storage unit with the necessary 21 cubic feet of storage, menus, or signs listing the meals offered for service, among other requirements. See R. App. \_\_ (DOR App. at 170). These facts undermine the claim that Roost prepares “hot meals at least once each day” in response to customer demand (see S.C. Code Ann. § 61-6-1610(2)(c)) and falls short of regulatory criteria requiring that a kitchen include a stove. Roost points to no fact in evidence sufficient to disturb the ALC’s holding on this point.<sup>12</sup> Cf. App. Br. \_\_ (Int. Br. 37–43).

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<sup>12</sup>Other aspects of Roost’s food service falls short of statutory requirements. For example, Roost does not have “various meal[ ] offer[ings]” for guests; it has *one* offering: hotdogs. Compare S.C.

**B. Roost is primarily and substantially in the business of selling liquor, not meals, which forecloses its ability to obtain a license.**

With just five (5) percent of its revenue attributable to food, Roost is not a business primarily and substantially engaged in preparing and serving meals and falls short of constitutional meal-service requirements. “Primary” means first in rank, importance, or value.<sup>13</sup> Even applying the statutory definitions Roost seems to prefer, South Carolina Code § 61-6-1610(I)(3) defines “primarily” to mean that meals are “a regular source” of business. Likewise, a “substantial” engagement is material and real, not imaginary or fictitious.<sup>14</sup> According to Bland, 65 percent of Roost’s sales are liquor, while the next largest revenue generator is beer. Applying ordinary, dictionary definitions to these constitutional terms, Roost’s primary business is the on-premises sale of liquor and meals are not a substantial part of the enterprise.

This conclusion is bolstered by the leading authority on the issue. In Brunswick Capitol Lanes, the ABC commission appealed the grant of a mini-bottle liquor license to a bowling alley with a “snack bar and lounge.” Brunswick Capitol Lanes, 273 S.C. at 783, 260 S.E.2d at 452. The bowling alley estimated 10 percent of its gross revenues were derived from food preparation and sale, while 80 percent came from bowling. Id. The Supreme Court held this fell short of the

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Code Ann. § 61-6-1610(2)(b), with R. App. \_\_ (Int. Ex. 1 at 37:3–8); see also S.C. Code Ann. Reg. 7–401.3 (defining “meal” as “an assortment of various foods...”). The significance of the mandate to offer “various” (i.e., more than one) meals is underscored by § 61-6-1610’s requirement of a “bona fide” business engaged in preparing and serving meals, meaning made in good faith, sincere, or genuine. Likewise, pizza purchased from Village Idiot does not constitute a variety of offerings because, as DOR’s regulation make clear, “[s]andwiches, boiled eggs, sausages, and other snacks prepared off the licensed premises but sold thereon, shall not constitute a meal.” S.C. Reg. 7–401.3(1). Thus, an establishment selling only hotdogs has not made a good-faith effort to meet meal requirements.

<sup>13</sup> See PRIMARY, Merriam-Webster.com, def. 2(a) (last updated Mar. 1, 2018).

<sup>14</sup> See SUBSTANTIAL, Black’s Law Dictionary (10th ed. 2014).

primarily-and-substantially requirement, *regardless* of whether the bowling alley obtained a Class

A restaurant license and met seating requirements:

This is not the determinative factor; rather, the legislature has stated the critical test is whether the business is engaged “primarily and substantially in the preparation and serving of meals.” We conclude a business which attributes only ten per cent of its gross revenues to food preparation and sale does not fulfill the “primary” and “substantial” requirement of the statute. Accordingly, respondent should not be granted a mini-bottle license.

Id. at 784, 260 S.E.2d at 453. But-for the reference to the now-defunct mini-bottle regime, the operative statutory language is *identical* to the requirement codified at South Carolina Code § 61-6-1610.<sup>15</sup> Thus, Brunswick stands for the proposition that, although an applicant may meet secondary statutory criteria (e.g., seating or DHEC license), those considerations do not displace or subsume the primarily-and-substantially requirements.

By its own admission, Roost fails this test. Even if the ALC had credited Bland’s revised, self-service hearing testimony, Roost’s food sales are *at most* eight to 10 percent (see R. App. \_\_\_ (Hr.’g Tr. 49:7–25)), making it indistinguishable from the bowling alley in Brunswick. This conclusion is consistent with the policy engendered by the constitutional meal requirement, which seeks to “prevent the return of the public saloon and barroom.” See 1972 S.C. Op. Att’y Gen. 79 at \*2 (1972) (citing Hammond v. McDonald, 49 Cal. App. 2d 671, 89 P. 2d 407, 411 (1939)). The record evidences a resurgence of precisely the sort of establishment the constitutional requirement sought to outlaw and the ALC was correct to rely on Brunswick to deny Roost a license.

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<sup>15</sup> Cf. S.C. Code Ann. § 61-5-20(4)(a) (Supp. 1973) (authorizing mini-bottle sales for on-premises consumption by business that “is bona fide engaged primarily and substantially in the preparation and serving of meals...”), repealed and re-codified by Act 415 (S.B. No. 1084), 1996 S.C. Acts 2458; see also 1972 S.C. Op. Att’y. Gen. 79, 1972 WL 20421 at \*2 (under S.C. Code § 4–29(B)(4)(a) (1962), “not only must it possess the food, material, personnel and facilities but the preparing and serving of meals ... must be essentially its main purpose and business...”).

**C. A constitutional limitation on liquor licensure cannot be superseded by statute.**

Roost contends the primarily-and-substantially requirement “leaves [the] determination [of precisely what that means] to the Legislature.” App. Br. \_\_ (Int. Br. 39–40). In Roosts view, the constitutional rule in Brunswick has been superseded by subsequent acts of the General Assembly. See App. Br. \_\_ (Int. Br. 40–43). This argument misapprehends the hierarchy of authority in a constitutional system. “The provisions of the state constitution are not a grant *but a limitation* of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution.” Segars-Andrews v. Judicial Merit Selection Comm’n, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (emphasis added) (citing Moseley v. Welch, 209 S.C. 19, 39 S.E.2d 133 (1946)). While the General Assembly has an “especially broad” power to regulate alcohol (see Retail Servs. & Sys., Inc. v. S.C. Dep’t Rev., 419 S.C. 469, 473, 799 S.E.2d 665, 667 (2017)), article VIII-A § 1 is an express limitation on that power and Brunswick is the final word on how that limitation must be applied.

**V. Roost fails to identify a favorable agency determination on an ambiguous statute or regulation that changes the outcome below.**

Finally, Roost argues the ALC “overrul[ed]” DOR’s construction of statutory definitions. See App. Br. \_\_ (Int. Br. 44). But Roost is missing critical ingredient to any deference argument—an ambiguous statute or regulation and an agency ruling on that interpretation.

“The construction of a regulation is a question of law to be determined by the court.” S.C. Dep’t Rev. Blue Moon of Newberry, Inc., 397 S.C. 256, 260, 725 S.E.2d 480, 483 (2012) (quoting 2 Am. Jur. 2d Administrative Law § 245). While this Court reviews an ALC’s construction *de novo*, it will give an agency’s interpretation of its own regulation deference so long as it is not contrary to the regulation’s plain language. Id. at 260–61, 725 S.E.2d at 483. Interpreting statutes

and regulations administered by an agency is a two-step process. First, the court determines whether the language of a statute or regulation directly speaks to the issue and, if so, it uses the plain meaning of the statute or regulation. Kiawah Dev. Partners, II v. S.C. Dep’t Health & Env’tl. Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014) (citing Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003); Brown v. S.C. Dep’t Health & Env’tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002)). Only if the statute or regulation is silent or ambiguous with respect to the specific issue does the court give deference to the agency’s interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Id. (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Brown, 354 S.C. at 440, 581 S.E.2d at 838). The doctrine requires deference “unless there is a compelling reason to differ.” Kiawah Dev. Partners, 411 S.C. at 33–35, 766 S.E.2d at 717–18 (collecting cases).

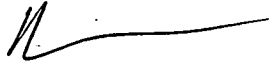
Here, Roost has not identified an ambiguous statute or regulation, nor has it identified the favorable DOR interpretation it seeks to reinstate. See App. Br. \_\_ (Int. Br. 44–46). At most, it quarrels with the ALC’s view of the facts, which is not an agency-deference argument. For instance, Roost argues “DOR found that Petitioner met [statutory restaurant] requirements” (App. Br. \_\_ (Int. Br. 38); see also App. Br. \_\_ (Int. Br. 44)), but a disputed factual finding is not an agency interpretation entitled to deference. Nor is this claim accurate: one of three grounds DOR cited to deny the application was “failure to meet the restaurant requirements set forth in S.C. Code Ann. § 61-6-20(2) and S.C. Ann. Regs. 7-401.3 (Supp. 2017).” R. App. \_\_ (Final Order, 1–2). Likewise, Roost takes issue with the ALC’s finding that its kitchen did not include a “stove,” by arguing the ALC used a definition that “differs markedly from that utilized and applied by the Agency charged with administering the Act[.]” but nowhere does Roost offer any authority to

corroborate this assertion. See App. Br. \_\_\_ (Int. Br. 39). Accordingly, the Court should conclude there is no colorable agency deference argument.

### CONCLUSION

For the reasons set forth here, the Final Order should be affirmed.

Respectfully submitted by,



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APRIL C. LUCAS

October 8, 2018  
Columbia, South Carolina.

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

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2018-001064  
Case No. 18-ALJ-17-0005-CC

**RECEIVED**  
OCT 08 2018  
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.

**CERTIFICATE OF SERVICE**

I, Holli Miller, paralegal to the attorney for Intervenors/Respondents, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 8, 2018, served by placing in the U.S. Mail, first-class postage affixed thereto, the following documents to the below mentioned persons:

Document:

1. Initial Brief of Intervenors/Respondents Gottshall and Lucas;
2. Intervenors/Respondents Gottshall and Lucas's Designation of Matter; and,
3. Return in Opposition to Motion to Dismiss Appeal and (Alternatively) Motion for Fees and Costs for Frivolous Appeal.

Served:

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October 8, 2018  
**VIA HAND DELIVERY**

The Hon. Jenny Abbott Kitchings  
Clerk of Court  
The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

In re: Five Points Roost v. SCDOR  
Appellate Case No. 2018-001064

**RECEIVED**  
OCT 08 2018  
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and four copies of the following:

1. Initial Brief of Intervenor/Respondents Gottshall and Lucas;
2. Intervenor/Respondents Gottshall and Lucas's Designation of Matter; and,
3. Return in Opposition to Motion to Dismiss Appeal and (Alternatively) Motion for Fees and Costs for Frivolous Appeal.

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

With warmest personal regards, I am

Sincerely,

Richard A. Harpoottlian

RAH:hm

Enclosures

cc: Mike Montgomery, Esq.  
Elizabeth Shields, Esq.