THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2018-001870
Case No. 18-ALJ-17-0002-CC

Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge.....Respondent,

v.

South Carolina Department of Revenue.....Respondent,

and

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

BRIEF OF INTERVENORS, APPELLANTS

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THOMAS R. GOTTSHALL AND
APRIL C. LUCAS

February 26, 2019
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 Respondent Rooftop Bar, LLC, b/b/a Rooftop Bar and Lounge (hereafter "Rooftop") 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).[1] This first-hand account of over consumption, random violence,[2] 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 an enterprise such as Rooftop to generate hundreds of thousands of dollars in gross revenue from late-night liquor sales to an underage, student population attracted to the hospitality district by the prospect of cheap alcoholic drinks consumed to excess. 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. S.C. CONST., art. VIII-A § 1. Notwithstanding this qualitative and quantitative mandate, the Administrative Law Court (ALC) held that incidental food sales of just 12 percent were sufficient to meet constitutional muster—a conclusion irreconcilable with the Supreme Court's holding that a liquor license applicant was *not* primarily and substantially preparing and serving meals where just 10 percent

[1] Available at: http://www.thestate.com/news/local/article204038224.html.
[2] See, e.g., David Travis Bland, "One person shot overnight in Five Points," THE STATE (Oct. 6, 2018), https://www.thestate.com/news/local/crime/article219608045.html.

of the applicant's revenue was derived from food. Brunswick Capitol Lanes v. S.C. Alcoholic Beverage Control Commission, 273 S.C. 782, 260 S.E.2d 452 (1979).

The public harms that flow from illegal liquor houses like Rooftop are well documented by the ALC's Final Order and in a related case, Five Points Roost, LLC, d/b/a Five Points Roost v. S.C. Dep.'t Rev. (Roost), No. 18-ALJ-17-0005-CC, 2018 WL 1724696 (S.C. Admin. Law. Ct. Apr. 3, 2018) (Durden, J.)), that held the location of another Five Points bar run by Rooftop's owners was unsuitable for permitting and licensure. Specifically, in Roost, the ALC held that the ubiquity of underage-student drinking, the strain on local law enforcement, and the nuisance to nearby residents rendered a Five Points location at 800 Harden Street unsuitable. See Roost, 2018 WL at *4–5 & 7–9. In this case, the ALC considered much of the same testimony and (correctly) reached the same factual conclusions concerning the ongoing public harms flowing from Five Points on account of Rooftop and businesses like it. Thus, the Final Order's findings included conclusions that:

- Crowds of underaged USC students, "many armed with sham identification and intent upon drinking in Five Points bars," gather in Five Points while intoxicated, which puts their safety at risk and causes problems for law enforcement while disturbing the peace of nearby residents (see R. App. 8);

- These crowds of underage college students congregate, loiter, and use falsified identification to "enter[ ] the bars and drink[ ] to excess." (see R. App. 5);

- There is "ample evidence" and "no doubt" that the Five Points district "presents law enforcement challenges, and requires significant law enforcement attention and resources." (see R. App. 5 & 10);

- "The police chief describes Five Points as a busy area with a high concentration of young adults and students[that] attracts crowds of people requir[ing] extra attention and personnel[.]" (see R. App. 5–6);

- The University of South Carolina (USC) protested the permit and license because "it would like to decrease the number of bars in Five Points" based on its believe that "the high density of bars and the availability of alcohol

in Five Points promotes a culture of overconsumption[,]" a view informed by significant data describing the frequency of high-risk drinking behaviors by students (see R. App. 6);

- Residents are likewise concerned that the number of bars in Five Points is an "attractive nuisance" that gives rise to public intoxication, public urination, property damage and late-night disturbances (see R. App. 6); and

- There is "abundant" and "ample evidence of nuisance behavior by patrons of Five Points establishments generally," (see R. App. 5 & 11).

Notwithstanding these well-supported findings, the ALC held Rooftop's location—less than two blocks from the Roost location—*was* suitable because "there is no evidence that *this particular* location has been the source of illegal or problematic behavior" and because "no evidence was presented indicating that the issuance of a license at the proposed location will create any negative change or require increased law enforcement presence." See R. App. 5 (emphasis added). This reasoning misapplies precedent by requiring a causal connection between the applicant and public harms long held sufficient to deny permitting or licensure. There is no authority for this approach which, if left uncorrected, risks confusing distinct analytical concepts designed to ensure an administrative law court considers both the suitability of the applicant *and* the location for the sale of alcoholic beverages.

The Final Order should not stand. It recognizes an ongoing public health and safety crisis in Five Points but subordinates these traditional suitability barriers to a prophylactic regime that cannot overcome legally disqualifying facts on the ground. Further, the Final Order also credited its prophylactic regime in lieu of applying the constitutional regulation on liquor as explained by Brunswick Capitol Lanes. For the reasons that follow, the Court should reverse.

STATEMENT OF THE ISSUES

I. Whether a location is unsuitable where uncontradicted evidence and the ALC's findings indicate the area is saturated with alcohol establishments that disturb the peace and enjoyment of nearby residents, burden local law enforcement, and place university students in danger?

II. Whether a bar that sells liquor and claims only 12 percent of its gross revenues from grilled cheese sandwiches and the remainder form late-night alcohol sales to university students is "primarily and substantially" in the business of preparing and serving meals as required by the state Constitution and statutory law?

STATEMENT OF THE CASE

On September 27, 2017, Rooftop Bar, LLC, d/b/a Rooftop Bar and Lounge (Rooftop) filed an application for an on-premises beer and wine permit and restaurant liquor-by-the-drink[3] license for its location at 638 Harden Street in Columbia's Five Points business and recreation district. R. App. 662. Twelve residents[4] from neighborhoods adjacent to Five Points and the University of South Carolina (USC) filed protests with Respondent South Carolina Department of Revenue (DOR). R. App. 727–72. On January 2, 2018, DOR denied the application citing the unsuitability of the proposed location as alleged by public protests filed under South Carolina Code § 61-4-525. R. App. 778–82. On January 4, 2018, Roost requested a contested case hearing. On February 1, 2018, the ALC granted Intervenors, Appellants Thomas R. Gottshall and April C. Lucas leave to intervene.

An evidentiary hearing was held before the Honorable Deborah Brooks Durden, Administrative Law Judge, on February May 14 and 15, 2018, during which the ALC considered testimony from 12 witnesses, including Rooftop's manager Stephen Bland and front-man Adam Ruonala, the Columbia Police Department's (CPD's) chief of police, a University of South Carolina (USC) administrator, a criminology expert, and four residents (see R. App. 150–653), and admitted numerous exhibits into evidence. See, e.g., R. App. 102, 125, 189, 214, 222, 228, 273, 306, 406, 490, 576, 585 & 595.

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[3] 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(1)(b).

[4] Protests were filed by Richard Ackerman, Luther J. Battiste, III, Karen R. Belser, Jim Daniel, Michael Drennan, Kathryn Fenner, Thomas R. Gottshall, Judith Holliday, April C. Lucas, Polly F. Morrison, Kathryn S. Smith, and John J. Stucker. See R. App. 779–80. After the ALC granted Mr. Gottshall and Ms. Lucas leave to intervene, the remaining individual Protestants withdrew their petitions. R. App. 1 n.1.

On September 5, 2018, the ALC entered a Final Order (R. App. 1–17) granting Rooftop a permit and license subject to certain, enumerated conditions. On September 17, 2018, Mr. Gottshall and Ms. Lucas moved the ALC to alter or amend the Final Order (R. App. 66–96) and the motion was denied on October 3, 2018. R. App. 19.

Mr. Gottshall and Ms. Lucas noticed a timely appeal on October 19, 2018. The Court has jurisdiction pursuant to South Carolina Code § 1-23-610(A)(1).

FACTUAL BACKGROUND

There are approximately 42 establishments in Five Points that sell alcohol for on-premises consumption. R. App. 6. Rooftop's 638 Harden Street location is on a block where bars have achieved a particularly high density. The bars begin on the northeast end of the 600 block (near Devine Street) with Lucky's, followed by Pinch, Latitude 22, Rooftop (located above Latitude 22), Cotton Gin, and Bar None. See R. App. 352:14–18; 638:7–15 & 1001 (map of Five Points bars)). Thursday through Saturday night, students line the street with more than 150 waiting at times to enter Rooftop. R. App. 351:5–7; 471:8–9 & 606:14–24; see also R. App. 386:8–13 (Rooftop's line spans north to Pinch; Pinch's line runs north to Lucky's on Harden Street). Near midnight, an "incredible" number of pedestrians travel up and down the 600 block. R. App. 638:17–19; see also R. App. 476:12–14. Holidays, football games, and other special occasions turn Five Points "wild" and make the noise and confusion "unbearable" to some living in the area. See R. App. 472:10–20. As described below, this unruliness disturbs the piece and enjoyment of businesses and residences adjacent to the Five Points district.

Rooftop's primary enterprise is selling cheap liquor

Rooftop's business model requires the sale of a large number of cheap liquor drinks, typically between the hours of 10 p.m. and 2 a.m. The establishment's capacity is just 150 patrons

at any one time. See R. App. 314:8. However, in just March and April 2018—the most recent, complete sales data available to the ALC (see R. App. 214:17–23; 224:22–225:2 & 1002–1035)—Rooftop booked $54,324 and $41,668, respectively, in liquor-by-the-drink sales.[5] R. App. 1036. At a cost of $3 per drink for house (or "well") liquor (see R. App. 394:23–395:5), Rooftop would have served as many as 32,000 drinks during just these two months. Over a four-month period, the bar booked $193,135 in liquor sales, but just $28,701 in beer sales and only $16,941 in food sales (R. App. 234:25–235:17 & 1002–35), meaning liquor constituted *more than 80 percent* of Rooftop's revenue.

Food is incidental at Rooftop; more specifically, incidental to its desire to obtain a permit and license, particularly after the owners in Roost (also Rooftop's owners) lost their right to operate because it was "not a business that is bona fide engaged primarily and substantially in the preparation and serving of meals." See Roost, 2018 WL at *12 (filed April 3, 2018); see also R. App. 237:1–18 (noting Rooftop only bothered to classify its food sales data for March and April, but had been selling liquor and beer since January). Ruonala acknowledged efforts in recent months to boost food sales by creating an "image" around the sale of "grillies"—i.e., grilled cheese sandwiches. See R. App. 272:22–273:18. Since April 2018, the sandwiches are displayed in a pizza warmer that Rooftop previously used to re-sell re-heated pizza from Village Idiot, a Five Points pizza parlor. R. App. 274:14–17; 275:9; 342:1–7; 344:7–13. On Sunday, Rooftop opens for brunch from 11:30 a.m. to 2:00 p.m. R. App. 277:22–278:13 & 346:10–13. Exactly when Rooftop began serving brunch is a matter of some dispute as Bland testified Rooftop began serving in March 2018, which was contrary to an April 27 affidavit he signed indicating brunch service would start

[5] Ruonala attributed the $14,000 increase in March sales to the St. Patrick's Day holiday. R. App. 353:15–354:6.

"Sunday this week." R. App. 402:15–403:13 ("It might have been the wrong date written. I'm not sure.")).

Bland initially conceded Rooftop's food sales were "under ten percent," but sought to revise that number upward citing the enterprise's delivery business, via Uber Eats, as generating $80 to $100 in delivery sales per day. R. App. 380:3–13; 382:6–8. After relaunching its food offerings and opening for brunch, Bland claimed food sales were 15 percent of gross receipts. R. App. 417:22–419:1; 420:9–18. This testimony, purporting to establish Rooftop's newfound and upward-adjusting emphasis on food sales, was just the latest iteration of Bland attempting to modify deposition testimony (given perhaps without appreciating its legal significant, but nonetheless candid) conceding Rooftop's food sales were just five (5) percent of gross receipts. R. App. 908:6–9; see also R. App. 417:24–418:4; but see R. App. 931–34 (purporting to change testimony via an errata sheet). In Roost, the ALC rejected Bland's self-serving testimony, finding his concession that food sales made up only five (5) percent of revenue to be "more credible[.]" Roost, 2018 WL at *12. Nevertheless, here the Final Order credited Rooftop's claims that food sales averaged approximately 12 percent of gross sales. R. App. 4.

Rooftop's owners are 4TBs, LLC (owned by Bland), Mongo, LLC (owned by Rounala), and Schatze Capital (owned by Brenda Wells). R. App. 321:20; 322:20–323:5. Rooftop's primary investor, Brenda Wells, is the mother of Daniel Wells—former owner of the Pour House bar that operated at 800 Harden Street before surrendering its license in response to a CPD nuisance action. See also Roost, 2018 WL at *2–4.[6] Similar to the ownership arrangement in Roost, Brenda Wells

[6] CPD's nuisance action was initiated after by-stander video captured Wells choking a Pour House patron unconscious and dropping him face-first onto the public street. 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.

owns the majority interest in Rooftop (60 percent equity based on a $54,500 investment), while Bland and Rounala hold minority interests (based on $10,000 and $7,000 investments, respectively). R. App. 335:15–20; 337:8–14. Unlike Roost, however, Rooftop was not purchased from Daniel Wells, but from an individual named Rob Mara for $85,000 in a seller-financed purchase. R. App. 375:19–22; 407:5–408:9. The ALC found sufficient reason to distinguish this arrangement from Roost where it found Daniel Wells to be an undisclosed principal represented by his mother's controlling equity interest (cf. Roost, 2018 WL at *3–4) even though the Roost and Rooftop transactions were structured to allow Bland and Ruonala to "pay [Mrs. Wells] quicker [through] two revenue streams." See R. App. 335:21–337:1; see also R. App. 413:5–417:23 (discussing deposition testimony where Bland admits Daniel Wells negotiated his mother's ownership interest as a vehicle for him (Danial Wells) to satisfy a $300,000 debt from Pour House); but see R. App. 409:7–412:17; 414:5–415:7 (attempting to retract that testimony). In Roost, the ALC found Bland and Rounala "unreliable" and unable to offer a credible explanation concerning the organization and financing of the business, and that "[t]he 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." Roost, 2018 WL at *3 & 5. Here, however, the ALC was not convinced Wells was an undisclosed principal. R. App. 3. Still, according to Rounala, the business approach for Rooftop is "the same approach" taken with Roost. See R. App. 338:2–13.

The concentration of bars in Five Points interferes with the peace and enjoyment of nearby residents

Nearby residents suffer the consequences of high bar density in Five Points and a business model predicated on cheap drinks sold to underage and inexperienced drinkers. Neighborhood association president and 42-year resident of the University Hill neighborhood, Tom Gottshall,

described Five Points as an "attractive nuisance" for college students. R. App. 614:3–5; 634:3–4 & 635:1–3. Residents from neighborhoods adjacent to Five Points (including Appellants) have had enough. All of them testified to first-hand and reported incidents of public intoxication, public urination, vandalism, and more stemming from the nightlife spilling out of Five Points and into their residential communities.

For example, William Lamb, a 37-year resident of the Five Points area, described minor inconveniences of living near Five Points, including noise and littering, (R. App. 468:22–25), and more serious problems such as late-night screaming, items thrown, and trashcan dumping. R. App. 469:8–10. Lamb testified that a brick was thrown through his next-door neighbor's window and several residents have had vehicles sideswiped by cars from Five Points driving through the neighborhood at night. R. App. 469:10–12; 474:11–12. In describing the "problems that go along with the high concentration of bars and high concentration of students in one area", Lamb noted that when he walks through his neighborhood, he carries a trash bag to collect "beer cans, beer cans, and more beer cans" littering the ground. R. App. 470:13–21.

April Lucas, who lives within walking distance of the Five Points area in University Hill, fears driving through Five Points late at night because she worries inebriated students will step out in front of her vehicle. See R. App. 589:7–14. In the 30 years since Lucas moved into her home, she has observed drunk and disorderly conduct throughout the neighborhood. R. App. 594:3–7. Lucas has "personally witnessed everything from public urination to vandalism" (R. App. 600:1–12) but, echoing Lamb, noted the "disturbing" experience of waking up to a young woman's scream. R. App. 600:20–23. Describing her personal experience with Five-Points related crime, Lucas testified about being awoken in the middle of the night by an intoxicated young man banging on her door under the misapprehension that her house was someone else's (R. App 601:21–602:4),

having her car sideswiped five times and keyed, and witnessing neighbors' cars being jumped on by drunken students or their property vandalized. R. App. 603:8–604:5.

North of the 600 block, a longtime Martin Luther King neighborhood resident, Olufemi Olulenu, described similar experiences. See R. App. 426:18–427:16. Living just two blocks from Five Points, Olulenu observes intoxicated people in the neighborhood "very -- regularly." R. App. 428:6–429:1. Echoing Lucas, Olulenu explained, "After 10:00, 11:00, 12:00, step outside and see how many of these young people drunk out of their heads coming to knock on doors not knowing where they're going." R. App. 429:5–21. Olulenu also cited public urination and public nudity as acts he has personally witnessed in and near his neighborhood. R. App. 429:25–430:20; 431:19–432:5. He described the perpetrators of this disorderly conduct: "Mostly -- 99 percent of them are students." R. App. 430:22–24.

Local law enforcement has a history of problems at the location as one where young people congregate and loiter, public intoxication is common, and police have been called to respond.

Beyond the nuisance posed to residents, Five Points bar density is already taxing local law enforcement's ability to manage large, late-night crowds and predatory criminals attracted by vulnerable, intoxicated bar patrons that pose an easy mark.

Chief Skip Holbrook is responsible for allocating police resources for the City of Columbia. R. App. 447:17–21. In preparation for this testimony, Chief Holbrook reviewed police statistics in Five Points (R. App. 451:15–20) and testified about the 600 block generally and the Rooftop's location specifically, and the impact on City police forces. He was familiar with the location and the former bar at the location: The Attic. See R. App. 450:9–12. He categorized the Five Points bar clientele as predominately young adults and students. R. App. 448:7–11. Chief Holbrook expressed concern about his force in Five Points, explaining: "Any time, whether it be

Five Points or, you know, any area in the city, that has a high concentration of people at any given time requires extra attention and often times extra personnel to ensure public safety." R. App. 448:18–25. For CPD, Five Points is one of those areas. R. App. 449:1–3. Chief Holbrook described the row of bars in the 600 block as causing "more problems" than a single bar (R. App. 455:4–7) and agreed Rooftop's location is near others that have posed a consistent source for law enforcement problems stemming from large numbers of young people congregating, with a significant number in a state of public intoxication. R. App. 455:8–18. Chief Holbrook summarized:

> We have seen, since I've been here and I think historically have seen, when we have areas of high concentrations of alcohol establishments, especially with young adults that are part of that clientele, that at times, and depending on the day of the week and the events going on, that it causes us to put significant resources and attention to that specific area or wherever it may be.

R. App. 457:7–15.

Chief Holbrook took issue with the fact he was not consulted for completion of the SLED questionnaire during Rooftop's licensing review, which sought information concerning problems at the location. See R. App. 461:8–20. The form inquiry into whether law enforcement previously had problems with public intoxication at or near the proposed location would have prompted an affirmative response by CPD had the chief been consulted because CPD *has had* problems with public intoxication at or near the location. R. App. 452:6–12. Similarly, the SLED form asked whether police have been summoned to the location on prior occasions, which Holbrook would have answered "yes." R. App. 452:13–16. A third question asked if the location is near other locations that are a constant source of law enforcement problems or a location where young people congregate and loiter; again, the police chief testified Rooftop is such a location. R. App. 452:17–

21. Thus, had he been presented with these questions; Chief Holbrook would have answered affirmatively in response to each one. R. App. 453:22–454:2.

Leslie Wiser, a University of South Carolina (USC) criminology professor, former FBI special agent in charge, and former CPD deputy chief, was qualified to offer expert testimony as a criminologist with knowledge and experience based on a distinguished career assessing crime and crime statistics. R. App. 556:7–14; see also R. App. 547:12–16. As a professor and member of a USC coalition tasked with studying and improving student outcomes with alcohol, Prof. Wiser has researched the relationship between crime and alcohol density in the Five Points area. R. App. 549:16–18. In his paper, Time for a Change, Prof. Wiser draws conclusions about the effect of alcohol-establishment density in Five Points by comparison with other Columbia hospitality districts, such as the Vista. R. App. 550:11–14. Based on his research, Wiser concludes there is a positive correlation between alcohol outlet density and alcohol-related harms and crimes—e.g., hospitalization from over consumption, sexual assaults, etc. See R. App. 559:5–11; 573:10–12. Supporting his conclusion, Prof. Wiser offered examples from his work, like additional data collected from a University shuttle service. After an undergraduate was shot while waiting for a cab in Five Points, the University began a shuttle service to transport students to and from Five Points. See R. App. 649:1–5. Of 160 riders who agreed to be interviewed, 77 percent reported traveling to Five Points to drink alcohol and 69 percent admitted to being under the age of 21. R. App. 562:4–8; 563:12–18. Other scholars have reached similar conclusions, "that alcohol outlet density is associated with increased alcohol consumption and related harms, including medical harms, injuries, crime and violence." See Campbell, C., Hahn, et al., "The effectiveness of limiting

alcohol outlet density as a means of reducing excessive alcohol consumption and alcohol-related harms," Am. J. Prev. Med. 2009; 37 (6), pp. 556–69)).[7]

University opposition to Rooftop is an effort to stem a rising underage drinking epidemic

The University of South Carolina (USC), with freshman residences just a few blocks from 600 Harden Street, opposes Rooftop's permit and license on the grounds (among others) that bar density in Five Points is too high and is contributing to an alcohol problem among USC students. Associate Vice President for Student Life Anna Edwards testified that reducing the number of bars in Five Points would benefit students and diminish "high risk" behavior that have been cause for concern. See R. App. 484:1–13.

The University supported its position with evidence collected by its Substance Abuse Prevention and Education Office (R. App. 484:19–25), which requires students 23 years of age and younger to complete an online alcohol education program call AlcoholEDU. R. App. 485:7–9 (noting the survey's 98 percent response rate). First-year students are surveyed before they come to campus and again 45 days after living at USC. R. App. 494:6–24. The University receives a summary of the data along with USC-specific findings and comparisons to data gathered from university students nationally in the form of an annual "impact statement." R. App. 485:2–25; 493:5–7. As an administrator involved in collecting USC's data concerning high-risk behaviors (R. App. 483:2–4; 484:18–23), Edwards explained the University is using the data to improve "strategic planning for better education and prevention of high risk behaviors and unintended consequences." R. App. 487:9–11.

[7] Available at: http://saapa.net/research-and-resources/alcohol-outlet-density/limiting-alcohol-outlet-density-means-reducing.pdf.

For example, the USC 2016–2017 Impact Statement includes responses from 5,433 USC students—"primarily" underage students (R. App. 506:25–507:11)—who completed all three AlcoholEDU for College surveys. See R. App. 946. Thirty-nine (39) percent of students reported their most common drinking location to be in bars or nightclubs. R. App. 951. Twenty-five (25) percent of students surveyed reported drinking in "a high-risk way," most commonly pre-gaming and taking liquor shots. R. App. 946, 953. USC students engage in high-risk drinking behaviors—including, pre-gaming, shots, consumption of high-alcohol drinks, and chugging—at a higher rate than the national average. R. App. 953. USC freshman exceeded the national average in reports of performing poorly on a school assignment because of drinking. R. App. 954. The two most frequently reported drinking-related consequences were a hangover and blacking out (R. App. 954), consequences that lend themselves to far greater harm. Of students who drank during the two weeks preceding the survey, *13 percent* reported being taken advantage of sexually, while *five (5) percent* reported taking advantage of someone else. R. App. 955.

Other indicators bolster USC's cause for concern over student alcohol use. According to the latest survey data, the percentage of USC students who say they have blacked out has risen from 42 to 47 percent, while the number who passed out has risen from 23 to 28 percent. R. App. 502:24–503:8. Asked to summarize the 2017–18 data, Edwards explained the number of freshmen who reported drinking at a bar or nightclub in the prior two weeks had *increased* three percent to 42 percent. R. App. 502:20–24. The national average for students who drank at a bar or nightclub is just 11 percent—30 percentage points lower than USC. See R. App. 951, 968. Edwards published the University's official position for protesting Rooftop, explaining:

> ... Continuing to expand the number of establishments contributing to the [drinking] problem is counterproductive to these efforts [to find solutions to late night drinking]. USC invests significant financial and human resources in creating education and counseling programs directed at curbing drinking among students.

> ... Excessive drinking poses a risk, not only to the students' physical and mental health, but also significantly impedes academic performance. While these issues are not unique to USC, our students are exposed to a higher density of bars surrounding campus than other colleges and universities across the country. ... Research from the National Institutes of Health tells us that, while our education efforts are important, one of the most effective ways to curb alcohol over-consumption is to limit its availability. Too often, bars in Five Points turn a blind eye to high-risk behaviors and have helped create an environment where drinking beyond one's limit is celebrated rather than discouraged. ...

R. App. 505:14–506:22; see also R. App. 507:8–9 (explaining the University's concern is "availability" and "density").

* * *

DOR's review determined Rooftop met all statutory requirements for permitting and licensure. R. App. 127:14–128:8. The ALC issued a Final Order suggesting it harbored concerns over Rooftop's application by imposing eight conditions, the violation of which is a violation of the permit and license. As a condition of permitting and licensure, Rooftop must:

1) Scan all ID's with the same type of blacklight used by the federal Transportation Security Administration to check for forged identification;

2) Scan each ID in a scanner that verifies the ID is bona fide and flags any identification that has already been used in the same evening to prevent patrons who enter the business from sharing an ID with an underage individual waiting in line;

3) Work with law enforcement to encourage compliance walk-throughs of the business in which law enforcement checks for identification;

4) Price all alcoholic drinks at $3.00 or more and offer no alcohol promotion;

5) Exclude all promotion of alcohol from its advertising;

6) Implement all best practices requested by law enforcement;

7) Serve lunch and brunch each day the business is open beginning no later than 11:30 am; and

8) Offer menu items for sale and delivery through Uber Eats or a similar service.

R. App. 16–17.

STANDARD OF REVIEW

This Court reviews decisions of an administrative law court for findings, conclusions, or decisions that prejudice a petitioner's substantive rights 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, capricious, or an 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)). Absent an allegation of fraud or a statute or court rule requiring a higher standard, an administrative law court 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 based on the whole record. Id. at 297–98, 758 S.E.2d at 740–41 (quoting Risher and Original Blue Ribbon Taxi, supra).

ARGUMENT

The regulation of liquor in this State has long been a legitimate exercise of police power necessary to restrain ascertainable social harms. In response to an ABC Commissioner's inquiry into what meets minimum statutory requirements that a business is bona fide engaged primarily and substantially in the preparation and serving of meals, the Attorney General explained:

> The purpose and intent of legislatures in limiting the public's access to alcoholic liquor to places where meals are served has been said to be 'to prevent the return of the public saloon and barroom.' Hammond v. McDonald, 49 Cal. App. 2d 671, 89 P. 2d 407, 411 (1939). If such access is limited to places where the 'principal business was the service of food,' any dispensing of liquor must be 'a mere adjunct or side line' and 'the dispensing of sandwiches, hard boiled eggs, etc.,' as was done by the old fashion saloon, would not qualify a business as being primarily engaged in the preparation and service of meals (e.g., a restaurant). See; Covert v. State Board of Equalization, 162 P. 2d 717 (1945).

Re: No. 5, Alcoholic Liquors, Op. No. 3277, 1972 S.C. Op. Att'y Gen. 79 (1972) (discussing Section 4–29(B)(4)(a), Code of Laws of South Carolina (1962), as amended). In Hammond, the "public saloon" or "barroom" disallowed by the primary and substantial requirement was defined as any bar, counter, or other structure over which beverages of an alcoholic content in excess of four per cent by weight were sold or served by the drink to the public for consumption on the premises, but did *not* include bars or counters used to sell, serve, and consume meals. Hammond, 49 Cal. App. 2d at 676, 122 P.2d 332, disapproved of by Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 173 P.2d 545 (1946).

In this State, and others, post-Prohibition public policy has mitigated in favor of greater liberalization in the public consumption of alcohol *except* as to the public saloon. Thus, when South Carolina voters constitutionalized the regulation of liquor—amending what has become

Article VIII-A to allow the sale of mini-bottles[8] and, eventually, liquor-by-the-drink—the amendment contained the proscription that:

> 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.

S.C. CONST., art. VIII-A § 1 (emphasis added) (1972 (57) 3189; 1973 (58) 146; 1973 (58) 865; 1975 (59) 35; 2005 Act No. 19); see also S.C. CONST. art. VIII (1895) (same). In short, the public saloon has long been an illegal business enterprise in this State because it has long been understood to invite public intoxication and civil unrest no different than the social harms at issue in this case.[9]

The public health and safety crisis ravaging Columbia's Five Points district is the direct and proximate result of lax regulatory enforcement and a *laissez-faire* attitude that undermines the rule of law while ignoring the perils of unrestrained, public liquor consumption. To its credit, the ALC did *not* ignore the growing public harms documented in the record below. To the contrary, the Final Order is replete with factual findings that the high density of bars in the 600 block of Harden Street has transformed Five Points into a place where throngs of underaged and inexperienced drinkers overconsume cheap liquor late at night while burdening local law enforcement and neighbors with anti-social behavior.

Notwithstanding these troubling findings, the Final Order mistakenly concludes that because Appellants failed to tie these public harms *specifically* to Rooftop, the location was

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[8] See S.C. Code Ann. § 61-5-20(4)(a) (Supp. 1973) (authorizing on-premises mini-bottle sales and consumption by a business "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.

[9] For levity on the complex balance between prohibition and liberalization, counsel commends the comments of the former state Senator from Clarendon County, the Honorable John C. Land, III, delivered on November 26, 2012 on the floor of the South Carolina Senate. Available at: https://www.youtube.com/watch?v=xD9lkUbwWMo.

suitable for permitting and licensure. See R. App. 8. This conclusion is a departure from statute and precedent that has always treated suitability-of-location analysis as one that looks to the applicant's prospective impact on the community without concern for whether the applicant is deserving. Likewise, the ALC correctly cited the rule in Brunswick as controlling (see R. App. 15), but failed to rule on whether Rooftop's five to 12 percent in gross food sales and 80 percent in liquor sales met the primary-and-substantial requirement. It does not. Instead, the ALC fashioned conditions for Rooftop's operation and held that so long as they are met, it "is bona fide engaged primarily and substantially in the preparation and serving of meal." R. App. 16. Respectfully, this too is a departure from black letter law. Neither holding should stand and the decision below should be reversed.

I. Rooftop's location is unsuitable because it is saturated with alcohol establishments that disturb the peace and enjoyment of nearby residents, burden local law enforcement, and endanger university students.

The ALC's reasoning confuses two distinct analytical concepts by concluding Rooftop's location was suitable unless Appellants could point to otherwise disqualifying alcohol-related harms tied to Rooftop's enterprise. Here, all of the ALC's findings concerning the location mitigate *against* permitting and licensure of yet another bar in Five Points. The ALC found that crowds of underaged USC students, many armed with fake identification, drink to excess inside Five Points bars and congregate and loiter on the public street while intoxicated, which jeopardizes their safety, burdens local law enforcement, and disturbs the peace and enjoyment of nearby residents. See R. App. 5 & 8. Indeed, the ALC saw "ample evidence" and harbored "no doubt" that the high concentration of young adults and students congregating in Five Points "requires significant law enforcement attention and resources" in the form of extra attention and CPD personnel. R. App. 5–6 & 10. Finding "abundant" evidence, the Final Order draws a causal connection between Five

Points bar patrons and the public intoxication, public urination, property damage, and late-night disturbances suffered by neighbors. See R. App. 5–6 & 11. The ALC also credited the University's view that the high density of bars in Five Points has promoted a culture of overconsumption and high-risk drinking behavior that is growing (see R. App. 6) and will continue to do so if left unchecked.

Nevertheless, the ALC failed to give these facts any weight when considering the location's suitability because "there is no evidence that *this particular* location has been the source of illegal or problematic behavior" and because "no evidence was presented indicating that the issuance of a license at the proposed location will create any negative change or require increased law enforcement presence." See R. App. 5 (emphasis added). This reasoning incorrectly requires evidence of a causal connection between Rooftop and documented public harms that are themselves reason to deny Rooftop's application. This Court should credit the ALC's factual findings and then hold that Rooftop's location is unsuitable for any applicant to obtain a beer-and-wine permit or on-premises liquor-by-the-drink license.

A. A proper suitability-of-location analysis weighs the proposed use against prospective community harms.

Suitability of location turns on the propriety of the location for the proposed use, not a causal connection between existing harms and the applicant. Generally, an ALC can consider many suitability factors before issuing a license, including the applicant's moral character, 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. Section 61-4-520, imposing criteria for the issuance of a beer and wine permit, expressly requires that a proposed location is proper and suitable (see S.C. Code Ann. § 61-4-520(5)–(6)); while the location-based restrictions for a liquor license, imposed by South

Carolina Code §§ 61-6-120 and -1820 have been construed to allow denial if the proposed location is not suitable. See Schudel v. S.C. ABC Comm'n., 276 S.C. 138, 276 S.E.2d 308 (1981). Thus, an applicant need not be found to have acted lawlessly or immorally; a license can be denied based solely on unsuitability of the location. See, e.g., Schudel, 276 S.C. at 140–41, 276 S.E.2d at 309 (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"); Terry v. Pratt, 258 S.C. 177, 185, 187 S.E.2d 884, 888 (1972) (inadequate police protection rendered location unsuitable).

Unlike criteria focused on the applicant, a suitability-of-location 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 local 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); Byers v. S.C. ABC Comm'n, 305 S.C. 243, 246, 407 S.E.2d 653, 655 (1991); Kearney v. Allen, 287 S.C. 324, 326, 338 S.E.2d 335, 337 (1985); 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 Private Club v. S.C. Dep't Rev., 08-ALJ-17-0054-CC, 2008 WL 2300384, at *3–4 (S.C. Admin. Law Ct. 2008).

There is no disagreement between the ALC and Appellants concerning the relevant legal standard that should have applied below. For example, the Final Order correctly reasoned an applicant can be denied when the location (1) will strain police resources, (2) when "the public areas surrounding the proposed location have been the source of constant law enforcement problems or significant problems with public intoxication[,]" or (3) when "the location is near other locations that have either been a constant source of law enforcement problems or are locations where young people congregate and loiter." R. App. 9 (citing Moore, 308 S.C. at 162, 417 S.E.2d at 557; Palmer, 282 S.C. at 250, 317 S.E.2d at 478; Roche v. S.C. ABC Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975)). Thus, the Final Order impliedly recognizes that suitability-of-location analysis looks beyond the location to countervailing community interests. The ALC's reasoning was exactly right, but with each of the countervailing interests cited above—residents, law enforcement, and USC students—it ignored record evidence and instead required Appellants to prove Rooftop was responsible for the ongoing harms. While harms flowing from the proposed location are certainly probative, they are not necessary to establish unsuitability and the Final Order misunderstands this critical distinction.

B. Reversal is warranted to ensure suitability-of-location analysis is not subsumed within other statutory criteria.

The Final Order's novel approach to suitability should be corrected because it confuses criteria designed to protect community interests with other statutory criteria designed to ferret out bad applicants. The goal of statutory construction is to harmonize conflicts when possible to prevent an absurd result. Hodges v. Rainey, 341 S.C. 79, 91, 533 S.E.2d 578, 584 (2000). This means construing statutes of the same subject matter together if possible as *in pari materia*. Beaufort Cty. v. S.C. State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

Perhaps unwittingly, the ALC's approach to suitability—requiring a causal connection between the applicant and the social harm—frustrates these cannons in three ways.

First, the ALC's approach renders suitability considerations irrelevant when reviewing a first-time applicant (as is the case here). If public harms must be tied directly to the applicant's conduct, an applicant with a limited track record or no track record can never be disqualified based on location suitability grounds. There is no authority for such a proposition. To the contrary, denying a license is appropriate when the location, under *any* occupant, has been the situs of problems for law enforcement, public intoxication, or loiterers. Barfly, 2013 WL at *5 (citing Schudel, and Palmer, supra).

Second, suitability as a licensure consideration requires a court to weigh the public's interest against the interest of the applicant. See, e.g., Moore, 308 S.C. at 161–63, 417 S.E.2d at 556–57 ("... and that the public interest would be best served..."); 48 C.J.S. Intoxicating Liquors § 196 (license may be refused when "location of the establishment would adversely affect the public interest, ..."). The concerns motivating the ALC's decision—i.e., Rooftop's conduct—largely fall under South Carolina Code § 61-4-580, which authorizes suspension or revocation for enumerated violations or acquiescence to certain prohibited conduct. Suitability of location is something different. Inherent in that balancing analysis is the possibility or, even, the mandate that an otherwise meritorious applicant should be denied a license because conditions surrounding the proposed location render permitting or licensure contrary to the public interest. The quintessential example of this proposition is South Carolina Code § 61-6-120's prohibition against liquor licensure in proximity to a church, school, or playground. The applicant's good moral character is irrelevant because the location is categorically unsuitable. Similarly, South Carolina Code § 61-4-520(1) expressly prohibits permitting if an applicant or its employees lack good moral character,

while subsections (5) and (6) require inquiry into whether *the location* is proper or any other factors indicative of an unsuitable location or proximity to residences, schools, playgrounds, and churches. See S.C. Code Ann. § 61-4-520(1), (5)–(6). The ALC's rule short-circuits the statutory scheme by only considering facts touching on or flowing from the applicant as evidence of unsuitability rather than considering whether the location was proper in light of present circumstances.

Third, requiring Appellants to produce evidence that alcohol-related harms flowed directly from Rooftop is contrary to the well-established evidentiary standard requiring an administrative law court to consider "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, 287 S.C. at 326, 338 S.E.2d at 337; see also Zodiac, 2008 WL at *3 ("it is proper for this tribunal to consider any evidence that shows adverse circumstances of location." (collecting cases)). The ALC spent considerable time detailing the evidence but failed to credit any of it when fashioning its own standard for weighing suitability. Decisions predicated on irrelevant considerations are typically grounds for reversal. See SGM-Moonglo, Inc. v. S.C. Department of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) (reversing unsuitability determination based on a restrictive covenant because covenant was "not a legitimate concern ... in determining whether the location is suitable." (applying S.C. Code Ann. § 61-4-520)). Thus, while it was certainly within the ALC's authority to decide what weight to give evidence of alcohol-related harms in Five Points (no contrary evidence was offered), it was a departure from the any-evidence standard and an error of law to decide that evidence was not relevant or should not control the outcome here.

* * *

Appellants agree with the ALC that Five Points is saturated with alcohol establishments that attract large crowds of underage students engaged in illegal and unhealthy overconsumption

that residents and CPD are burdened to bear and that these harms flow specifically from the 600 Harden block where Rooftop is located. These considerations render Rooftop's location unsuitable. In Roost, the ALC reasoned the location was unsuitable (in part) by tying evidence of student-drinking harms to the applicant's business model seeking to exploit this vulnerable population (no different than Rooftop):

> 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.

Roost, 2018 WL at *8 (emphasis added). This nexus—a link between the public harm and the prospective enterprise—is the only nexus necessary to substantiate an unsuitability claim. The location is not unsuitable on account of something Rooftop has done—it is unsuitable because Rooftop would contribute to existing harms. The Final Order required something more, which has no basis in statute or precedent and risks rendering the suitability doctrine a dead letter. That error should be corrected.

II. Rooftop is primarily and substantially in the business of selling liquor.

The Final Order is silent as to a critical legal issue that should categorically bar Rooftop from obtaining a liquor-by-the-drink license. Based on testimony from Rooftop's accountant, 80 percent of Rooftop's revenue is derived from the sale of liquor. The ALC found that during the months of March and April 2018, Rooftop's food sales "averaged approximately twelve percent

of gross sales." R. App. 4. Based on this evidence and certain judicially imposed conditions, the Court concluded Rooftop "is bona fide engaged primarily and substantially in the preparation and serving of meals." R. App. 15–16. Although Appellants raised and re-raised the constitutional requirement (see R. App. 66–68), the ALC declined to reach it. This Court should hold that Rooftop is not eligible for liquor licensure because even assuming 12 percent of its gross sales are derived from food, that is an immaterial distinction from Brunswick Capitol Lanes and Rooftop falls short of the constitutional standard.

A. Rooftop is indistinguishable from Brunswick Capitol Lanes, which held that 10 percent gross sales from food fell short of the primary-and-substantial requirement.

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 a bowling alley was not primarily and substantially in the business of preparing and serving meals where just 10 percent of its revenue was derived from food. At issue was then-South Carolina Code § 61-5-20(4), which limited licensure to a business "[b]ona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging[.]" Brunswick Capitol Lanes, 273 S.C. at 783, 260 S.E.2d at 452. The Court rejected the bowling alley's argument that its Class A restaurant license and seating capacity for 52 people deemed it a restaurant. Id. at 783–84, 260 S.E.2d at 453. Instead, the Court explained that "primarily" means "of first importance" or "principally" and concluded a business that attributes only 10 percent gross revenues to food preparation and sale falls short of the primary-and-substantial requirement. Id. (citing Malat v. Riddell, 383 U.S. 569, 572 (1966); Webster's Third New International Dictionary 1800 (1965); 33A Words and Phrases, 209–15). Notably, while the Final Order favorably discusses and cites Brunswick Capitol Lanes (see R. App. 15), it fails to apply it here by considering whether, like the bowling alley, a mere 12 percent

of gross revenue from food falls short of the constitutional requirement in article VIII-A § 1. Instead, the ALC cited steps taken by Rooftop (steps taken since one owner testified food sales are actually just five (5) percent) as evidence the bar was attempting "to increase the food service component of its business" and reasoned that so long as Rooftop operates consistent with representations made by Bland and Runoala at the Final Hearing, it is bona fide engaged primarily and substantially in the preparation and serving of meals. See R. App. 15–16. Respectfully, this is error.

B. The Constitution's regulation on liquor imposes a qualitative and quantitative standard Rooftop cannot meet.

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. "Primary" means first in rank, importance, or value. See PRIMARY, Merriam-Webster.com, def. 2(a) (last updated Mar. 1, 2018); cf. Brunswick Capitol Lanes, 273 S.C. at 783, 260 S.E.2d at 453 (applying ordinary, dictionary meaning). Likewise, a "substantial" engagement is material and real, not imaginary or fictitious. See SUBSTANTIAL, Black's Law Dictionary (10th ed. 2014).

In Roost, the ALC cited Brunswick Capitol Lanes for the proposition that where only 10 percent of a business' gross revenue was attributable to food sales, the business was not primarily and substantially engaged in the preparation and service of meals. See Roost, 2018 WL at *12. The Roost decision also rejected the petitioner's argument that the statutory definitions of primarily and substantially supplanted Brunswick's analysis, explaining:

> While it is true that the language and code section number of the definition has changed since Brunswick was decided, a specific definition of "bona fide engaged primarily and substantially in the preparation and serving of meals" was codified in statute and considered by the Brunswick court. The court held that despite a specific definition of "bona fide engaged primarily and substantially in the

> preparation and serving of meals" (found in Code Section 61-6-20(2) at that time) a business must not only meet the technical requirements outlined in the statute, *but must also actually be "primarily" engaged in the preparation and serving of meals.* Id.

Roost, 2018 WL at *12 (emphasis added); see also R. App. 15 (same). Put differently, Brunswick is best read to explain that the primary-and-substantial requirement is a qualitative and quantitative one. The Attorney General agrees, having reasoned:

> Therefore, it is the opinion of this Office that for a business to satisfy the definition of Section 4–29(B)(4)(a), not only must it possess the food, material, personnel and facilities for providing meals, but the preparing and serving of meals, when and as ordered by customers, must be essentially its main purpose and business and the providing of accommodations for the possession and consumption of alcoholic liquors a secondary and incidental feature.

1972 S.C. Op. Att'y Gen. 79. Thus, a liquor by the drink establishment must be primarily in the business of preparing and serving meals and substantially engaged in doing so.

Rooftop is not such an enterprise. Eighty (80) percent of its sales are from liquor; 12 percent are from beer. R. App. 234:25–235:17. Even considering the two months Rooftop was focused on increasing food sales, it averaged just 12 percent (see R. App. 347:21–25) notwithstanding the concerted effort to raise them above the five (5) percent to which Bland previously testified. See R. App. 15–16. Even with 12 percent food sales, the overwhelming bulk of the enterprise is dedicated to the sale of alcohol, specifically liquor by the drink, not meals. Rooftop does not have a stove and Rounala expressed apprehension about the cost of installing a stove and hood system given the uncertainty over the status of Rooftop's *liquor* license. See R. App. 280:16–22. A restaurant would not likely share this apprehension if dedicated to the preparation and sale of meals. Instead, Rooftop's emphasis on checking certain statutory boxes, while laudable, reflects an overly formalistic approach and fundamental misunderstanding of the primary-and-substantial requirement that ignores evidence touching on whether it is *actually* a restaurant with liquor incidental to that pursuit.

C. Statutory criteria are helpful indicia of a restaurant but are not dispositive of whether the constitutional standard is met.

Assuming, for the sake of argument, that Rooftop met all statutory requirements to obtain a license (as DOR purportedly found), compliance with statutory requirements does not automatically satisfy the constitutional standard. Put differently, statutory and regulatory definitions provide helpful indicia of businesses that are primarily in the business of preparing and serving meals (e.g., kitchen, stove, refrigeration, etc.), but they do not foreclose the possibility that the enterprise is not, in fact, a restaurateur for two reasons.

First, a statutory scheme adopted by the General Assembly cannot overrule or abrogate a constitutionalized restraint on liquor enterprises. "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)), and has exercised that power by adding conditions for licensure. Article VIII-A § 1 is an express limitation on that power that must be given effect separate and independent of any law passed by the legislature.

Second, in applying article VIII-A § 1, the codified licensure regime is still relevant and, indeed, helpful when identifying characteristics of a true restaurant. Specifically, the scheme authorizes a license to issue only if the establishment 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). The South Carolina Code defines "primarily" to mean:

> 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.

S.C. Code Ann. § 61-6-1610(I)(3). A "meal" is defined as "prepared foods available to guests...during the normal mealtimes that occur when the licensed business establishment is open to the public. Sandwiches, boiled eggs, sausages, and other snacks prepared off the licensed premises but sold there are not a meal." S.C. Code Ann. § 61-6-1610(I)(2). Section 61-6-1610 provides further:

> (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). 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).

These criteria (and others) may prove particularly useful when assessing new applicants without a sales history. But, simply owning restaurant equipment or meeting other statutory requirements is not, itself, enough. See Brunswick Capitol Lanes, 273 S.C. at 783–84, 260 S.E.2d at 453 (rejecting possession of a restaurant license as dispositive). Criteria that evidences restaurant activity does not foreclose a finding that the enterprise is not, in fact, in the business of preparing

and selling meals, particularly where owning restaurant equipment, printing menus (see S.C. Code Ann. Regs. 7-401.3), and providing sufficient seating is treated as a necessary obstacle to overcome to obtain a lucrative liquor license. Cf. Covert, 29 Cal. 2d at 134–35, 173 P.2d at 550 ("It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor."). But it is a perfunctory, check-list approach liquor regulation in Five Points that has led to the proliferation of illegal alcohol enterprises like Rooftop and heightens the importance of the constitutional standard imposing a qualitative and quantitative limit on licensure. Like the rule in Brunswick Capitol Lanes, South Carolina's sister states have looked to gross revenue as a persuasive indicator of a business's actual focus. See, e.g., N.C. Gen. Stat. Ann. § 18B-1000(6) (defining a "restaurant" as an establishment "substantially engaged in the business of preparing and serving meals" with "gross receipts from food and nonalcoholic beverages [ ] not less than thirty percent (30%) of the total gross receipts[.]"); Ga. Code Ann. § 3-1-2(3) (West) ("the term 'eating establishment' means an establishment which is licensed to sell distilled spirits, malt beverages, or wines and which derives at least 50 percent of its total annual gross food and beverage sales from the sale of prepared meals or food"). The ALC (and DOR before it) should have subjected Rooftop to a more exacting standard by requiring it demonstrate that the preparation and service of meals is a primary *and* substantial part of the business. It is not.

* * *

This Court should reach the constitutional issue the ALC declined to and hold that where Rooftop's food sales are just 12 percent of gross sales receipts it is indistinguishable from the bowling alley in Brunswick and falls short of Article VIII-A § 1's mandate. Further, the record

indicates the primary enterprise pursued at Rooftop is the sale of alcohol, which also falls short of the constitutional requirement.

CONCLUSION

The public saloon may be, in the minds of many South Carolinians, an antiquated term from days past. In fact, they are alive and well in Five Points. While these businesses no longer cater to dangerous elements typically associated with the "saloon" (i.e., frontiersman, cowboys, and outlaws), the dangers posed by overconsumption and raucous behavior have been magnified by the hundreds, sometimes thousands, of USC students that descend on Five Points to frequent Rooftop and establishments like it. For these reasons, the balance struck by this State's law limits the sale of liquor to restaurants, hotels, and motels—something Rooftop is not—and requires an inquiry into the conditions on the ground before granting a permit and license.

Five Points is an ongoing public health and safety threat. Rooftop is an illegal enterprise that burdens and already beleaguered location. For the reasons set forth here, the Final Order should be reversed.

Respectfully submitted by,

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