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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000886
Administrative Law Court Case No. 21-ALJ-17-0143-CC

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

v.

Agua Pina, LLC d/b/a Hookah on the River, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I. THE ADMINISTRATIVE LAW COURT ERRED BY REVOKING APPELLANT'S BEER AND WINE AND LIQUOR-BY-THE-DRINK LICENSES.

A. General

Rather than seeking a monetary penalty or a suspension of the Appellant's ABL Permits, the Respondent South Carolina Department of Revenue (hereinafter Respondent, Department, or DOR) sought a revocation of the Licenses and the ALC so ruled. The DOR's Department Determination was exclusively based upon two shootings at the restaurant. At trial, the Department put up extensive testimony on the burden on law enforcement (even though it was not mentioned in the Department Determination) and the ALC Order focused heavily on this.

There was one shooting in which a security guard was shot. The Sheriff's Office visited the location on many occasions.

The Shooting was done by a rap singer, and an unaffiliated Rap club next door had just closed shortly before the shooting. There was no evidence the shooter was a patron of Appellant's establishment.

There were unruly crowds but the evidence was uncontroverted they came from the next door rap club.

The Sheriff's Office was not even aware the rap club existed. It had no sign and no ABL permits (although it served alcohol).

Can a restaurant have its license revoked as a result of actions by third parties who are not patrons of the restaurant? John D. Geathers & Justin R. Werner, *The Regulation of Alcoholic Beverages* (S.C. Bar 2007) discuss enforcement in Chapter 6. They note that revocation and suspension actions typically involve either (1) maintaining the integrity of the Alcohol Beverage Industry; or (2) provisions aimed at protecting public health welfare and morals. The latter

provisions all involve violations of the sale of alcohol (e.g., sales to underage individuals, Sunday sales, sales to intoxicated persons, drinking games, games of chance). The treatise discusses "disorderly conduct" as follows:

> It is generally recognized that an alcoholic beverage licensee may have his license suspended or revoked, or an administrative fine imposed upon him, for the conduct of his *patrons* in certain instances. Alcoholic beverage licensees have an affirmative duty to maintain their licensed premises in an orderly fashion, which includes a duty to supervise the *conduct of their patrons* in and around the premises; and, where a licensee fails to meet this responsibility such that his premises become disorderly or become a nuisance to the surrounding community, his license may be subject to suspension or revocation. However, this liability will typically only be found where the offending *conduct of the patrons* has occurred continuously or routinely such that the licensee can be held accountable for tolerating the conduct, and, thus, except in extraordinary circumstances, a liquor license will not be suspended or revoked for isolated incidents of disorderly conduct committed by *patrons* on the licensed premises.

Id. at pp. 290-91 (emphasis added). This section mentions "patrons" four times. There was no testimony that any of the violence which occurred on May 2nd was from patrons.

Footnote 246 of the treatise gives several representative cases. All of these cases involve actions by patrons.

Nobody from the Department or SLED testified in support of the revocation. SLED's importance in ABL matters is explicit in South Carolina law. Section 61-4-590(A) states that "[t]he [Department of Revenue] has jurisdiction to revoke or suspend permits authorizing the sole of beer and wine." However, the Department may not order suspension or revocation until after SLED "*has conducted and completed an investigation.*" § 61-4-590(B) (emphasis added). No one from SLED testified at the hearing, much less testified that an investigation was done and it supported revocation. Significantly, not a single resident or nearby business owner/operator testified in support.

1. A Burden on Law Enforcement

The ALC Order and the Department's Brief contend Revocation is proper because (1) the burden on law enforcement; and (2) the two shootings on May 2 and May 8, 2021. The ALC Order states (R. p. 22, line 7) "I find the location is a burden on law enforcement to be an inextricable factor in determining whether Respondent's business is a public nuisance."

The Department Determination (R. p. 40) entered in this case which initiated the ALC trial does not make a single reference to placing a undue burden on law enforcement. It is completely silent in this regard. Nevertheless the DOR alleges in its Brief of Respondent (p. 10) "Since January 2021, the Sheriff's Department has received 102 calls for service at Agua Pina's business. These calls for service require multiple units, expending a significant amount of manpower and causes the Sheriff's Department to redirect resources away from the rest of Richland County." But the Department Determination is totally silent on this issue. Specifically, it makes no such allegation.

In *Department of Revenue v. Sandalwood Social Club*, 399 S.C. 267, 731 S.E.2d 330 (2012), the renewal of ABL licenses held by Spinners, a lakefront resort, were protested largely because of loud outdoor music played onsite. The parties entered into a consent order signed by the ALC, which contained twelve stipulations. Stipulation 4 required the installation of a decibel monitoring device.

Subsequently, neighbors complained and an investigator for the former ABC Commission prepared an administrative report for one violation regarding Stipulation 4. The DOR issued a Department Determination finding that Spinners had violated Stipulation 4 and imposed a $500 fine. Spinners appealed the fine to the ALC and several neighbors were allowed to intervene at the trial. After a trial the ALC found a violation of Stipulation 4 and further held "this violation

was accompanied by other conduct which constitutes ongoing knowing violations contained in the permit and license." The ALC imposed a sixty day suspension.

On appeal, the Court of Appeals held, "Spinners maintains the ALC abused its discretion and committed an error of law by penalizing Spinners for violations not cited by the DOR. We agree." 731 S.E.2d at 336.

The Court noted that the intervener "was permitted to testify as to other alleged violations" at trial. The ALC relied on "much of the evidence cited by [intervener] to find violations supplemental to the violation cited by DOR." 731 S.E.2d at 337. To the Court of Appeals, this was abuse of discretion and reversed.

In our case, the Department Determination is totally silent on the burden on law enforcement and yet the ALC cites it (at length) as a basis for revocation. As such, the ALC abused its discretion.

In any event, evidence on the burden on law enforcement was wildly contradictory, reflecting anywhere between five and 130 calls.

Five calls? Appellant subpoenaed the Sheriff's department incident reports prior to trial. The Sheriff's department produced just five incident reports, two of which were for the same incident. All of these were introduced into evidence. R. p. 511.

Upwards of Fourteen calls? This action was started when the DOR filed its Motion. The Motion attached an affidavit from Richland County Sheriff's Department Captain Stephen Tapler. R. p. 59. Paragraph 2 of the affidavit states that "I am aware that Richland County Sheriff's Deputies have responded to the location over fourteen times since [it opened on] October 23, 2020." Tr. p. 157, lines 2-8; R. p. 59, lines 11-14. Tapler, incidentally, did not testify at the Hearing.

Upwards of 26 or 28? Corporal Hawkes testified, "I would almost venture to say upwards of 26 or 28 calls for service." Tr. p. 155, lines 2-3; R. p. 298, lines 2-3.

Over 50 Calls? Sergeant Torres testified, "There's many incidents – there's over 50 incident reports that we have at your business." Tr. p. 119, lines 4-5; R. p. 262, lines 4-5.

102 Calls? The ALC Order revokes the Appellant's license in part because of 102 calls for service. The only testimony regarding 102 calls was from Sgt. Torres. Tr. p. 87, line 17-p. 88, line 9; R. p. 230, line 17-p. 231, line 9 .

130 Calls? Corporal Hawkes testified to 130 calls although he said he didn't "think they are all 911 calls..." Tr. p. 146, lines 15-19; R. p. 289, lines 15-19. He agreed he did not bring the list of calls to the ALC Hearing. Tr. p. 146, line 24-p. 147, line 2; Tr. p. 148, lines 1-3; R. p. 289, line 24-p. 290, line 2.

In summary, Sgt. Torres testified there were 50 calls for service Incident Reports, and she also testified there were 102. Only five incident reports were attached to the Department's Motion and only five introduced into evidence at the trial. Two of those incident reports detailed the same incident, which means only four incidents were independently corroborated with incident reports

Sgt. Torres testified she brought the 50 incident reports to the ALC Hearing, Tr. p. 119, lines 4-20; R. p. 262, lines 4-20, whereas, she earlier testified she had not:

> Q. I am going way out on a limb here, you didn't bring that list of 102 calls with you?
> A. No

Tr. p. 98, lines 3-6; R. p. 241, lines 3-6.

In any event, reports reflecting only four independent incidents were introduced into evidence – not 15, upwards of 26 or 28, over 50 or 102 Incident Reports. *See S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011) (hearsay evidence in the form of a

police incident report containing evidence that the testifying witness cannot independently testify to, cannot be admitted to establish probable cause in the context of an administrative hearing).

The Sheriff's Office for inexplicable reasons had been trying to close Appellant's establishment since literally the day it opened. The Sheriff's Department witnesses were well prepared and enthusiastically testified at the ALC Hearing. There were numerous references to calls for service at Appellant's location but literally no testimony as to what the calls were for. Not a single arrest was made and there were no ABL violations ever issued. Give the Sheriff Office's zeal to close the Appellant's location why didn't the DOR introduce the call log or incident reports into evidence? The obvious reason is that they did not support the DOR's case.

2. Other Incident Reports – Visits by the Sheriff's Office

Indeed, the Sheriff's Office visited the restaurant on numerous occasions when there were no incidents. Corp. Hawkes alone went there 30 times. Tr. p. 188, lines 4-6; R. p. 331, lines 4-6. He said the Sheriff's Office went many times to be "proactive." Tr. p. 108, lines 3-7; R. p. 251, lines 3-7. On November 18, 2020, Tactical Action Team with six officers visited the restaurant to check on their Business License, (even though the Sheriff's Office has no jurisdiction over county business licenses). They found it in order and wrote no violations. Tr. p. 269, lines 5-18; R. p.412, lines 5-18. In less than a four-month span between November 2020 and February 2021, the Sheriff's Office returned on November 19, December 2, December 6, December 31, January 23, February 6 and February 11. No citations were written. Tr. p. 269, line 24-p. 273, line 10; Tr. p. 295, line 10-p. 300, line 15; R. p. 412, line 24-p.416, line 10; R. p.438, line 10-p.

The Department parked a surveillance van in the parking lot in front of the restaurant with cameras all over it for a three-month period. Tr. p. 275, line 10-p. 277, line 14; R. p. 418, line 10-p. 420, line 14.

The visits started in late October or early November, 2020, about two weeks after the restaurant opened. The Department announced they were doing a compliance check. No violations were found and no tickets were written. Tr. p. 292, lines 4-18; R. p. 435, lines 4-18.

The harassment of the restaurant by the Sheriff's department is best exemplified by their shutting the establishment down on New Year's Eve, 2021 – usually the busiest day of the year for a bar/restaurant. The Sheriff's Office, with a K-9 unit, arrived first and parked across the street in the Rush's parking lot. Between 5-10 minutes later two fire trucks, including the Fire Marshall and the Fire Chief arrived. By that time, there were between three and five Sheriff's vehicles in the parking lot. They arrived around 11:30 PM and stayed until 1 AM, blocking the entrance to the parking lot as the New Year rang in. No smoke detector or fire alarm had gone off and no arrests or violations were found. Tr. p. 297, line 1-p. 299, line 24; Tr. p. 270, line 20-p. 272, line 7; R. p. 440, line 1-p.442, line 24; R. p. 413, line 20-p. 415, line 7.

A very recent case where a permit renewal was denied based upon a drain on law enforcement was *Alhanik. LLC v. S.C. Department of Revenue*, 2021 WL 4238319. The Sheriff's Office in that case (unlike this case) filed a protest to the ABL Permit renewal, and the Sheriff's department (unlike this case) testified that the applicant "is a drain on law enforcement resources and harms community welfare." Six neighbors (unlike this case) testified in opposition to the permit renewal. Not a single neighbor testified in support of our revocation.

The drain on resources included "the Department arrested more than one hundred individuals but often no one from [the license holder] Obama Mart appeared to testify at the prosecution of those arrested." Not a single person was arrested at Appellant's location. The Sheriff's Office testified as to the drain on resources as follows:

> Major Harry Polis from the Richland County Sheriff's Department testified as the Respondent's witness. The Richland County Sheriff's Department

> received some seven hundred seventy (770) calls to Obama Mart over a two-year period ending the day before the hearing (through August 10, 2021). These calls were for robberies, assaults, carjacking's, resisting arrest, fights, shots fired, suspicious persons, civil disturbances (with and without reports of weapons), drunkenness, disorderly conduct, prostitution, indecent exposure, loitering, vandalism, and pointing or presenting a firearm. Although not every call resulted in arrests, law enforcement responses to Obama Mart are a severe drain on the resources of the Sheriff's Department.

Id.

B. Other Cases Support Appellant's Position that the Administrative Law Court Erred by Revoking Appellant's Beer and Wine and Liquor-by-the-Drink Licenses.

The Department asserts the following cases in support of the revocation. We have also included other Richland County Sheriff's cases in which they protested ABL permits. These cases consist of new ABL applications, renewals and revocations.

1. NEW ABL APPLICATIONS DENIED

In *J-Moe Enterprises, LLC v. Department of Revenue*, 2003 WL 24004704, eight nearby property owners and the Richland County Sheriff's Office filed protests to new ABL applications. The Department also opposed on the basis the business was not primarily involved in the serving of meals as required for liquor licenses.

During the brief period it was open (3 weeks) "its operations caused significant disturbances to surrounding businesses and created significant law enforcement problems, including two shootings." The problems were caused by the applicant's "patrons." Other "incidents included a drug arrest, noise complaints, and two shooting incidents" stemmed from a fight inside the club, and the second "involved several shots from [the applicant's] parking lot, directly in front of the entrance to the club." A security guard testified that the shooting "originated

as a fight within the club, and witnessed adult entertainment being provided at the club and illegal drugs being used by club patrons."

The ALC noted that "this tribunal is very mindful and sensitive to the racial undertones of this case" in denying the application.

By contrast in our case: (1) no neighbor testified in support of the revocation; (2) not a single arrest; (3) no adult entertainment; (4) no noise complaints; (5) no drug use and (6) conflicting testimony whether appellant's – or the rap club – patrons caused the law enforcement issues.

The second case, *Aujor, Inc. v. Department of Revenue*, 2017 WL 574315, the Department refused to issue a beer and wine permit and non-profit private club liquor permit based upon three written protests, including the Richland County Sheriff's Department, failure to pass a building inspection and the Department contended the applicant was not a bona fide non-profit. The ALC noted that the two prior bars at this location generated numerous problems including larceny and rape, and overflow parking to the point EMS could not transverse the road when responding to a shooting. A neighboring property owner testified he frequently had to "clean up the parking lot following late night drinking and partying by *patrons* of The Cave and Lipstick [the two prior bars.]" The petitioner "has no current plan to provide any security personnel and expressed the belief that providing private security was an unreasonable burden." She also "has no plan to reduce the noise generated by her *patrons*" and no plans to deal with overflow parking.

The ALC denied the application "due to a strong history of criminal activity at the location, the burden on the Sheriff's Department to maintain order, the lack of adequate parking and the proximity to churches and residences."

By contrast, appellant (1) passed building inspection; (2) there was adequate parking; (3) no arrests for larceny or rape (not a single arrest); (4) extensive security both outside and inside the bar; and (5) no specific testimony that it was the patrons of the applicant (or prior establishments) that caused the problems.

In *Barfly Enterprises, LLC v. Department of Revenue*, 2013 WL 6620406, the DOR denied the application on three grounds: (1) receipt of protests from 7 neighbors; (2) the location's proximity to a church; and (3) the businesses qualifications to serve meals. The location was formerly a strip club and the applicant testified girls in bikinis would serve patrons. The location had a stage, poles for pole dancing and "private rooms." The prior location had been the scene of "hundreds of law enforcement calls, including two murders." "At night beatings, robberies, stripping and violent crimes occurred ... with alarming regularity. Sheriff's reports indicated that the *perpetrators were coming from the location.*" "The Sheriff's Department has responded to shootings, fights, assaults, gambling, illegal alcohol sales and two murders ..." The location was less than 500 feet from a church. The ALC held that "it is abundantly clear that Club Crush was a nuisance to residents who live nearby, to the nearby church, and to the community at large."

By contrast, (1) not a single neighbor testified in support of the revocation of Appellant's ABL license; (2) no adult entertainment (although there was next door at the rap club); (3) no beatings, robberies, stripping, gambling, or illegal alcohol sales; (4) not in proximity to a church; and (5) while there was one admitted shooting, no evidence the shooter was a patron.

In *Bordallo v. Department of Revenue*, 2012 WL 1893275, an application was denied when the applicant had previous violations of ABL laws, the license for the previous location was revoked for "numerous police responses to the location involving shootings, drugs, assaults, theft

and vandalism." The ALC noted "The location has a reputation in the community for criminal activity and illegal drugs." The ALC noted:

> S.C. Code Ann. §61-4-580(5) (Supp. 2011) prohibits a permittee from knowingly allowing "any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this state" to occur on the licensed premises. The term "licensed premises" includes not only the interior of the licensed business but also the areas immediately adjacent to the entrance and exit, as well as the parking areas. See 23 S.C. Code Ann. Regs. 7-700 ("Licensed premises shall include those areas normally used by the permittee or licensee to conduct his business and shall include but are not limited to the following: selling areas, storage areas, food preparation areas and parking areas.") "[O]ne who holds a license to sell alcoholic beverages is responsible for supervising *the conduct of his clientele*, both within the licensed premises and in the immediate vicinity, in order to ensure that his operations do not create a nuisance for the surrounding community." Dayaram Krups, LLC v. S.C. Dep't of Revenue, 06-ALJ-17-0929-CC, 2007 WL 1219343 (S.C. Admin. Law Ct., March 19, 2007) (citing §61-4-580(5) and A.J.C. Enters., Inc. v. Pastore, 473 A.2d 269, 275 (R.I. 1984)). The court in A.J.C. enters., Inc. held that a liquor licensee "assumes an obligation to supervise the conduct of *its clientele* so as to preclude the creation of conditions within the surrounding neighborhood which would amount to a nuisance to those who reside in the area." (Emphasis added)

By contrast in our case, the Appellant (1) had no previous violations of ABL laws; (2) there were no previous incidents of drugs, assaults, theft or vandalism; (3) there was no testimony regarding reputation in the community for criminal activity or illegal drugs; and (4) the ALC Order noted that an applicant only has a duty to supervise the conduct of its "clientele."

In *Da West Bar & Brill, LLC v. Department of Revenue*, 2021 WL 2181782, the Sheriff's Department protest was a new ABL application. The location was a shopping center that housed several businesses including a DMV office, the Love Fellowship Tabernacle, a Japanese restaurant and a fitness center. Another bar located nearby had been declared a public nuisance because of high crime and closed. The applicant had repeatedly violated stipulations contained in a ABL permit for another bar she also managed, Tropical Breeze. The Sheriff's Department testified the

applicant "lacks character and reputation for peace and good order in the community given its experience with her and Tropical Breeze. There was an immense amount of violent crime at Tropical Breeze. Bright failed to observe the stipulations placed on the license at Tropical Breeze." The Department also "expressed concern about Bright's ability as the sole owner and manager, to manage both Petitioner's and a second location." The application was accordingly denied.

By contrast, Appellant violated no stipulations placed on his license and did not operate a second location. The Appellant's location was in a strip mall but it did not contain a state agency office, church or fitness center. Appellant did not have a prior record of ABL violations.

2. ABL RENEWAL DENIED

In *Thompson, Palladium, Inc. v. Department of Revenue*, 1998 WL 916501, a permit renewal was denied based upon protests by several area residents, and intervention by the City of North Charleston. The area surrounding the location was primarily residential with 3 apartment complexes, a residence located within 65 feet and a Baptist Church 325 feet from the location. The ALC order notes "While operating under its current permit and license, the location has had a history of chronic law enforcement problems including arrests on the property for possession of crack cocaine with intent to distribute, car break-ins, thefts, malicious injury to personal property, distribution of illegal narcotics, illegal possession of firearms, disorderly conduct, possession of alcohol by minors, open container violations, simple assault, assault and battery of a high and aggravated nature, assault with intent to kill, assault on a police officer, threats, drinking in public, urinating in public, civil disturbances and civil disorder."

In our revocation action (1) there were no protests or testimony from area residents; (2) the Appellant's location was not primarily residential or near a church; (3) no history of chronic law

enforcement problems - there was not a single arrest at Appellant's location, notwithstanding the numerous visits by the Sheriff's Office; and (4) not a single ABL violation.

3. ABL APPLICATIONS GRANTED

In *L&M Enterprise Solutions, LLC v. Department of Revenue*, 2005 WL 3061998, protests were filed by nearby businesses, one of which was a hotel only two feet away. The SLED background revealed "some criminal convictions for the applicant's principal owners."

The ALC granted the application based upon the following special conditions:

1. The petitioner shall hire a security guard to police the parking lot of the location. This guard shall be on duty whenever the location is open.

2. The location shall close at 1:00AM daily.

3. No live bands shall perform at the location, either inside or outside.

4. The Petitioner shall prevent and prohibit any loitering on the premises and grounds.

By contrast, in our case (1) no testimony from nearby businesses in support of our revocation; (2) the appellant had SLED certified security guards; (3) no live bands; (4) DHEC Restaurant license; and (5) no testimony regarding loitering.

In *Da River Bar & Grill, LLC v. Department of Revenue*, 2016 WL 380243, the Department denied the application and the ALC Order noted:

> The Department received a timely protest, dated May 26, 2015, from Captain Joseph Odom of the Richland County Sheriff's Department. Odom, a resident of Richland County, testified at the hearing that he opposes approval of Petitioner's application because the club's location has a long history of significant criminal activity, including homicides and robberies. The *patrons* attracted by the former establishment at the location impacted the community with noise, and overburdened law enforcement. Odom testified that the nearby residents oppose another late-night bar that tends to attract a disorderly crowd. He asked that the court impose restrictions on the license and permit, including requiring the establishment to close by 1 a.m.; Prohibiting adult entertainment; requiring licensed security to monitor all parking areas; prohibiting illegal or dangerous

activities on the premises or parking areas; requiring security cameras; prohibiting loitering; and enforcing the dress code. (Emphasis added)

The ALC granted the Application based upon the following restrictions:

1. Jessica Bright will personally manage the business and its day-to-day affairs.

2. Licensee must contract with a security firm for a sufficient number of licensed security officers to monitor all of licensee's premises including the rear of the building, and the additional parking lots. Security officers must be present from 9 p.m. until all patrons have left the premises and additional parking lots. Rounds must be made of all monitored areas every half hour, at a minimum.

3. Licensee shall ensure that cameras are installed and maintained that afford camera operators a full view of the interior of the establishment where patrons will be buying and consuming alcoholic beverages, as well as the front parking lot and rear exterior of the building. Furthermore, proper exterior lighting of the entire property shall be maintained and in operation when the business is open at night.

4. Licensee must maintain and enforce signs preventing loitering at all times, to include additional parking lots.

5. Licensee must have and must enforce a dress code, with specific attention to the prevention of gang wear and gang activities, inside or outside the facility.

6. Licensee will not offer any adult entertainment, to include exotic dancers, on the premises, or adopt adult entertainment themes.

7. All patrons of Licensee must be at least 21 years of age.

8. Licensee shall cease serving alcoholic beverages at 2 a.m.

The Sheriff's Department witness indicated he could support the application if the special conditions were added. In our case the appellant (1) had a business manager; (2) SLED certified security guards; (3) cameras and exterior lighting; (4) appellant notified the Richland County Sheriff's Department of next-door gang activity; (5) no adult entertainment; and (6) patrons were checked for being over 21.

In *SMCR, LLC v. Department of Revenue,* 2016 WL 6921531, the Department received ten valid public protests, including from the city council member. The ALC granted the application noting that it was in "substantially commercial area where other restaurants and businesses are licensed to sell alcoholic beverages."

In our case (1) there was no testimony from the public in support of the revocation; and (2) it is also in a substantially commercial area with other restaurants and businesses licensed to sell ABL.

4. ABL RENEWAL GRANTED

In *Show Luv v. Department of Revenue*, 2007 WL 1365859, the Richland County Sheriff's Department filed a protest for the renewal of a strip club's beer & wine license. The strip club was in a substantially commercial strip mall area, although residential apartments and a church were located nearby. The witness for the Sheriff's Department indicated from 1998 until 2004 the area was a "war zone" with over 300 calls for complaints ranging from excessive noise, illegal drug activity, car thefts, fights and shootings. "The Protestant testified that it would "go along" with the application as long as the lights, cameras, and effective security staff remained in place and the music level is reduced." The ALC granted the renewal, stating:

> Thus the court finds that for the location to remain a suitable one, the Petitioner must: (1) maintain adequate lighting and security cameras in the parking lot; (2) continue to retain a licensed and bonded, effective security company; (3) continue to prevent loitering outside the club and illegal activity both inside the club and in the parking lot area; and (4) ensure that music is not discernibly audible from the nearest residence to the club when the doors and windows are closed.

In our case, the appellant had (1) adequate lighting and security cameras; (2) a licensed security company; (3) there was no testimony of any loitering or illegal activity (other than one shooting) inside or outside the restaurant; and (4) no noise complaints and doors and windows were kept closed.

5. REVOCATION GRANTED

In *Department of Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 790 S.E.2d 792 (2016) the Court of Appeals upheld the revocation of a beer and wine license where the owner had several illegal video poker machines in violation of subsection 61-4-580(5).

In *Wisecrack Comedy Entertainment, Inc. v. Department of Revenue*, 2007 WL 2071843, the Department refused to grant a renewal application and moved to revoke the beer and wine permit based upon a protest filed by the Richland County Sheriff's Department, delinquent state taxes and the failure to disclose the true owners. The permit renewal was denied and the license revoked based upon the following:

> In addition to these types of offenses, the Silver Dollar has experienced significant problems with violence and property crimes. During Smith's ownership there have been at least forty incident reports filed. Incidents that were a direct or indirect result of the operation of Silver Dollar between February 2006 and March 2007 include; aggravated assaults, shots fired, drug/narcotic violations, simple assaults, weapons, grand larceny, and vandalism. Approximately half of the incident reports involve violent crimes and approximately one-third involve drug/narcotics violations. In September 2006, one victim was shot in the arm and taken to the hospital, and in February 2007, another victim was shot in the hand and taken to the hospital. There have also been incidents of fights and shots fired due to gang-related activity. Additionally, children at the daycare next door have found empty alcohol bottles on the playground. On one occasions, a taser was discovered by a child playing on the playground. Furthermore, one shooting incident resulted in a bullet going through the front door of the daycare building and lodging in an interior wall.

By contrast, in our case there were no (1) aggravated assaults; (2) drug/narcotic violations; (3) simple assaults; (4) grand larceny; or (5) vandalism. There was one undisputed shooting but the record showed it came from a rap singer who came from the next door rap concert.

In *Department of Revenue v. Club Rio, Inc.*, 2006 WL 2827715, the Department sought to revoke the applicant's license based upon the following stipulations:

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to ALC Rule 25(C), the parties entered the following written stipulations of fact into the Record:

1. Club Rio, Inc. d/b/a Club Rio ("Club Rio") is the holder of an on-premises beer and wine permit, and alcoholic beverage liquor by the drink license, for the location at 1734 Main Street, in the town of Columbia, South Carolina.

2. That the following Incident Reports were necessitated as a result, directly or indirectly, of the operation of Club Rio between February, 2006 and July 28, 2006:

    a. 2/5/06 – Assault & Battery on EMS/Firefighter; Resisting Officer
    b. 2/17/06 – Two Misplaced Credit Cards (Information/Non-reportable offense)
    c. 2/28/06 – Burglary/Breaking & Entering (into Club Rio)
    d. 3/24/06 – Fights and disturbances inside club (Information)
    e. 3/31/06 – Fighting/Mutual Combatants (Information)
    f. 4/7/06 – Pointing and Presenting Firearm/Simple Assault
    g. 4/15/06 – Disorderly Conduct/Resisting Arrest
    h. 5/19/06 – Lynching
    i. 6/16/06 – Assaulting Police while Resisting Arrest/Fighting/Disorderly Conduct
    j. 6/16/06 – Resisting Arrest/Disobedience to Police Officer
    k. 6/16/06 – Assault on Police Officer (x2)/Disorderly Conduct (x3)/Interfering with Policy (x3); Resisting Arrest, Disobedience to a police Officer
    l. 7/9/06 – Lynching
    m. 7/27/06 – Simple Assault
    n. 7/28/06 – Disorderly Conduct/Resisting Arrest/Interfering with Police Officer
    o. 7/28/06 – Discharging Firearm (Inside Club Rio)/Lynching
    p. 7/28/06 – Assault & Battery with Intent to Kill/Discharge of Firearm into Dwelling

3. That amongst the most serious of the foregoing incidents, two of the foregoing resulted in three (3) police officers being injured, which required medical care, while responding to calls for service at the location.

4. That further, amongst the most serious of the foregoing incidents, two of the foregoing incidents resulted in patrons being severely beaten by multiple persons.

5. That further, amongst the most serious of the foregoing incidents, one of the foregoing resulted in a firearm being discharged within Club Rio.

6. That as a further result of the operation of Club Rio, parking has presented a

problem for the city of Columbia Police Department in that on numerous occasions patrons of Club Rio have parked in the restricted parking lot for City Hall.

7. That Club Rio has no parking lot or other reserved parking spaces for the use of its patrons.

The Order noted that "all of the witnesses agree that the club's recent transition to "hip-hop" and rap music attracted patrons who engaged in the behavior that created problems for the law enforcement and community in general." The principal of the club was convicted of cocaine possession.

The ALC refused the Department's revocation request but suspended the license for sixty days.

In *Caldwell Entertainment, Inc. v. Department of Revenue*, 2008 WL 8606217, the renewal of the permit holder's ABL License was protested and after a hearing the ALC renewed the ABL Licenses but placed 12 separate restrictions on the license and permits. The DOR subsequently moved to revoke the license based upon violation of the restrictions, as well as "the inadequacy of the location, including but not limited to, its small size, limited parking spaces, and residential character of the neighborhood." The ALC revoked the ABL permits finding:

> 4. After issuance of the Order to renew Petitioner's license and permit subject to the above restrictions, the Richland County Sheriff's Department filed 26 separate "Incident Reports," documenting violations of the license and permit restrictions from July 7, 2007 through February 10, 2008.
> 5. The Incident Reports document 53 violations of the court's Order and the signed Restrictions Agreement, including 23 violations of the Hours of Operation restriction, 6 violations of the Age of Admission restriction, 2 violations of the Security restriction, 7 violations of the Noise restriction, and 15 violations of the Parting restriction.
>
> 6. The Incident Reports also document 21 other incidences taking place at Club Evolution, including 5 incidences of fighting, 10 incidences of gun possession or gun shots fired, 3 incidences of drug possession or drug use, and 3 incidences of causing property damage or leaving trash on neighborhood properties.

By contrast, Appellant (1) violated no restrictions; (2) there were no incidences of fighting, drug possession or drug use, or property damage or leaving trash on neighboring properties. There was one admitted shooting – but the shots occurred off the premises.

II. THE ADMINISTRATIVE LAW COURT ERRED BY FINDING THE DEPARTMENT MET ITS BURDEN OF PROOF.

The Final Order should be reversed because, simply put, the Department failed to prove its case. Paragraph 10 of the Final Order states that the Department is the moving party and bears the burden of proof. R. p. 17, lines 4-9.

The Order should be reversed for the simple reason the Department failed to put up a single witness from the Department or SLED to prove its case.

The Department argues (Brief of Respondent at p. 26) "Agua Pina devotes a significant portion of its brief arguing that failed to meet its burden of proof because none of the witnesses at the hearing were from SLED or the Alcohol Beverage Licensing (ABL) division of the Department. This argument misses the mark because there is no statute or law that requires the Department to call a witness from the ABL division or SLED." Is this accurate?

In *Department of Revenue v. Sandalwood Social Club*, *supra*, 731 S.E.2d at 336, the Court of Appeals stated:

> DOR is charged with the responsibility of administering and enforcing the laws and regulations governing the manufacture and sale of alcoholic beverages, including beer, wine, and alcoholic liquors.
>
> S.C. Code Ann. § 61-2-20 (2009) ("The functions, duties, and powers set forth in this title are vested in the department and the division. The department must administer the provisions of this title, and the division must enforce the provisions of this title.")

"Department" refers to the DOR and "Division" refers to SLED. Significantly, Section 61-4-590 (B) states:

> (B) In addition to the notice requirements contained in the Administrative Procedures Act, the department may not suspend or revoke a licensee's permit authorizing the sale of beer or wine until the division has conducted and completed an investigation, and the department has made a departmental determination, as defined in Section 12-60-30, that the licensee's permit should be revoked or suspended. (Emphasis added)

The DOR has the authority to issue financial penalties, suspend or revoke ABL permits. Obviously, revocation is the most serious penalty. While section 61-4-590 (B) may be unnecessary in minor penalty actions, clearly in license revocation actions the statute should be strictly complied with. In our case, there was no evidence of a SLED investigation and no one from the SLED Alcohol Beverage Enforcement Division testified in favor of the revocation. Indeed, they were conspicuously absent.

Could the ALC affirm the Department of Insurance's granting a large rate request where the only testimony was from 3 insureds who complained about the large hike – and not a single witness from the DOI testified in favor of the rate hike?

Could the ALC affirm the DOI's denial of an insurance company's request for a rate hike where not a single witness from the Department testified at the ALC hearing in opposition to it?

Could the ALC affirm DHEC's revocation of an environmental permit if the only testimony was from environmental groups who wanted the permit revoked and not a single witness from DHEC testified in favor of the revocation?

Could the ALC affirm a county assessor's huge increase in property valuation if no one from the assessor's office testified in support of it?

Could the ALC affirm a DOR Department Determination that a convenience store owed $100,000 in sales taxes without a single witness from the DOR testifying in support of the Determination?

III. THE ADMINISTRATIVE LAW COURT ERRED BY NOT FOLLOWING THE PRESUMPTION THAT WHEN A PARTY FAILS TO PRODUCE EVIDENCE WITHIN ITS SOLE CONTROL THERE IS A PRESUMPTION IT IS HARMFUL TO ITS CASE.

The ALC Order was largely based upon the Appellant's burden on law enforcement. The ALC Order repeatedly noted that the Appellant's burden on law enforcement was demonstrated in part because "Since January, 2021, Richland County Sheriff's Department has responded to over 100 calls at Appellant's location." Final Order at 13. See also *Id.* at 3, 8 and 17; R. p. 19, line 18-19; R. p. 9, line 20; R. p. 14, line 5; R. p. 23, line 11-12.

When the Sheriff's department receives calls they fill out an incident report. The Department entered some 5 incident reports into evidence – just five and two of the 5 were for the same incident (May 2nd shooting off Appellant's premises).

The Department failed to introduce into evidence the other 95 incident reports. Sgt. Torres testified she had the incident reports at the Courthouse. Tr. p. 119, lines 4-20; R. p. 262, lines 4-20. Yet neither she nor the other witnesses produced the incident reports nor testified from them. The witnesses were well prepared and obviously another over 95 incident reports would have been helpful to their case. Yet they were not introduced into the record. Why?

The law in South Carolina is clear that the failure of a party to introduce evidence creates a presumption that the evidence would be harmful. As the Supreme Court stated in *Davis v. Sparks,* 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959):

> In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, it not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him.

One obvious reason is that the incident reports had nothing to do with Appellant's restaurant. The incident reports may have all related to the rap venue. They may have related to

simple traffic accidents in the busy roads near Appellant's location. They may have related to nearby bars and restaurants with numerous serious incidents.

Given the presumption that the failure or refusal to produce evidence particularly within the control of one party [Sheriff's department] warrants the inference that it would be unfavorable to the Sheriff's department, the ALC erred in relying on "Richland County Sheriff's Department has responded to over 100 calls at [Appellant's] location." The inference is that the Sheriff's department responded to five calls and the other 95 had nothing to do with Appellant's location.

IV. THE ALC ABUSED ITS DISCRETION AND COMMITTED AN EROR OF LAW BY DETERMINING THAT REVOCATION (RATHER THAN SUSPENSION OR A MONETARY FIX) WAS THE PROPER PENALTY.

The ALC abused its discretion by not imposing a monetary penalty or suspension, especially given that Appellant had not violated any alcohol sales statutes.

The ALC permanently revoked Appellant's beer and wine and liquor licenses, versus suspending them or issuing a monetary penalty. This is the most serious ABL penalty with consequences for both the present and future for the permit holder. When a license is suspended, the permit holder cannot sell alcohol during the suspension period, and the permit holder is ineligible to receive a new license for that location for a period of one year after suspension. The holder is ineligible to receive a license at a different location only during the suspension period. By contrast, when a license is revoked, the Department is prohibited from issuing the holder a new beer and wine license for two years, and for liquor five years from the date of revocation. *See S.C. Dep't of Revenue v. Club Rio,* 392 S.C. 636, 709 S.E.2d 690 (2011).

The ALC in this case had the alternative of (1) imposing a monetary fine; (2) suspension of the licenses, or (3) revocation. The ALC imposed the most drastic penalty of revocation.

In *Department of Revenue v. Sandalwood, supra*, the Court of Appeals noted:

> DOR has the authority to determine an appropriate administrative penalty, within the statutory limits established by the legislature, after the parties have had an opportunity for a hearing on the issues. *See Walker v. S.C. Alcoholic Beverage Control Comm'n.* 305 S.C. 209, 210-11, 407 S.E.2d 633, 634-35 (1991). Further in assessing a penalty, DOR "should give effect to the major purpose of a civil penalty," which is "deterrence." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 313 S.C. 210, 212, 437 S.E.2d 120, 122 (Ct.App.1993).
>
> ****
>
> Revenue Procedure 04-4 the advisory opinion cited in DOR's final determination, states "[t]he Department recognizes that insuring compliance with the law, not punishment, is the reason for administrative penalties.

S.C. Rev. Proc. #13-2 provides penalty guidelines for ABL violations. The Guidelines note that: "The Department recognizes that insuring compliance with the law, not punishment, is the reason for administrative penalties."

There are separate guidelines for Beer and Wine as well as for Liquor by the drink. For beer and wine violations, monetary penalties are assessed for first ($500) and second offenses ($1,000) with a 45 day suspension for third offenses, and revocation for the fourth offense. The Beer and Wine guideline does impose revocation for "Permitting any act that tends to create a public nuisance." Liquor by the drink guidelines impose revocation for three kinds of offenses all relating to the sale of alcohol but public nuisance is not included.

Given the wildly contradictory evidence regarding the incident reports and the fact there was no evidence linking the May 2nd shooting to patrons of Appellants, the ALC should have issued a monetary penalty.

CONCLUSION

Regrettably, there has been one undisputed shooting, and one disputed shooting in 2021. Clearly crowds from rap concerts have caused problems for both Appellant and law enforcement.

The ALC Order revoking Appellant's licenses is based upon the shootings and the burden on law enforcement. The ALC Order repeatedly notes 102 calls/visits to the establishment. But the incident reports were not introduced into the record and there was no testimony regarding what happened or caused the other 98 or so incident reports. Not a single witness testified to the other 98.

Appellant testified to numerous visits by the Sheriff's department but no tickets were written or violations found. Indeed, there was not a single arrest for any violation, and no ABL violations by Appellant.

Revocation of licenses is the most serious ABL penalty. The ALC Order sets a precedent whereby a bar with SLED-certified security guards policing the exterior, frisking and using metal detector wands, bouncers on the inside, and numerous surveillance cameras is subject to revocation – for the simple reason it was situated next to a rap club. Very few bars and restaurants employ that level of security.

There was *no* testimony that the first shooter ever set foot in the Appellant's establishment.

Revocation when no witness from the Department of Revenue or the South Carolina Law Enforcement Division requested revocation or testified in support of it and the Sheriff's Office did not request it appears unprecedented.

The evidence that was not introduced – 102 incident reports, the Appellant's videos and the Sheriff's Office videos from its surveillance van – outweigh the evidence that was introduced, and the Sheriff's deputy that signed the original affidavit in support of the motion for emergency suspension never testified.

Finally, revocation where the SLED investigation required by § 61-4-590(B) was not done is unprecedented and sets a dangerous precedent.

Lastly, in *all* the other ALC cases in which a new permit was not issued, a renewal not granted, or a permit revoked, there was some combination of (1) neighbors protesting; (2) noise complaints; (3) larceny; (4) rape; (5) illegal liquor sales or aggravated assaults; (6) theft; (7) vandalism; (8) gambling; (9) adult entertainment; (10) grand larceny; (11) assaults on police officers or firemen; (12) lack of adequate parking; (13) urinating in public; (14) car break ins; and (15) open container violations.

Other than one single shooting by a rap singer from the unaffiliated venue next door to Appellant's premises (who was not Appellant's patron) and the one disputed shooting, there was absolutely no testimony regarding any of the above. There was not a single arrest or ABL violation at Appellant's location – not one!

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000886
Administrative Law Court Case No. 21-ALJ-17-0143-CC

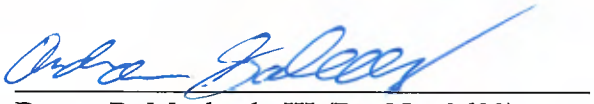
South Carolina Department of Revenue,.....Respondent,

v.

Agua Pina, LLC d/b/a Hookah on the River, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Reply Brief of Appellant** complies with Rule 211(b), SCACR.



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