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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

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

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

v.

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

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Administrative Law Court commit clear error by finding that Agua Pina knowingly permitted acts that tend to create a nuisance and lacked the reputation for peace and good order in the community, when substantial evidence showed that Agua Pina had a history of violent incidents and had become a burden on law enforcement?

- II. Did the Administrative Law Court abuse its discretion by revoking Agua Pina's beer, wine, and liquor licenses—a penalty that is within the range authorized by statute and the Department of Revenue's longstanding guidance?

STATEMENT OF THE CASE

This is an appeal of the Administrative Law Court's order revoking the On-Premises Beer and Wine Permit and Business Liquor by the Drink License held by Appellant Agua Pina, LLC d/b/a Hookah on the River. This matter came before the ALC on May 13, 2021, when Respondent South Carolina Department of Revenue filed a Motion for Emergency Suspension of Agua Pina's Alcohol Licenses. (R. pp. 056-057). The basis for the Motion was an affidavit from Captain Steven Tapler of the Richland County Sheriff's Department, who testified that the escalating violence at Agua Pina created a threat to the public's health, safety, and welfare. Tapler Affidavit ¶ 9 (R. p. 875, ¶ 9). Also on May 13, 2021, the Department issued a Department Determination to Agua Pina providing notice of the Department's intent to permanently revoke Agua Pina's Alcohol Licenses. (R. pp. 040-049). The Determination found that (1) Agua Pina's location was no longer suitable for any permit/license for the sale of beer, wine, or alcoholic liquors as defined in S.C. Code Ann. § 61-4-520 and 61-6-910; (2) Agua Pina had knowingly permitted acts that constitute a public nuisance in violation of § 61-4-580(A)(5); and (3) Agua Pina knowingly permitted acts that constitute an immediate threat to the public's health, safety and welfare, which barred Agua Pina from holding the Alcohol Licenses according to S.C. Code Ann. §§ 1-23-370, 12-60-1340, 61-6-1820(2), and 61-6-1830. *Id.* p.6 (R. pp. 040-049).

The ALC held a telephonic hearing on the Department's Motion for Emergency Suspension on May 18, 2021. At the request of the ALC, the Department supplemented its Motion by providing a second affidavit from the Sheriff's Department investigator along with a portion of Agua Pina's video surveillance that the Sheriff's Department had obtained by a search warrant. *See* Short Affidavit ¶ 5 (R. pp. 877-878); Surveillance video dated 05-08-2021, Pet'r Ex 7. (R. p. 532). The ALC granted the Motion for Emergency Suspension on May 20, 2021. *See* Order dated May 20, 2021 (R. pp. 001-006).

Although the ALC had already suspended the Alcohol Licenses, the emergency suspension was only in force until such time as the ALC decided whether to permanently revoke the Alcohol Licenses. Accordingly, the ALC conducted a contested case hearing on June 9, 2021. On June 28, 2021, the ALC entered a Final Order affirming the Department's Determination and permanently revoking Agua Pina's Alcohol Licenses on the grounds that Agua Pina did not have a reputation for peace and good order in the community and that it knowingly permitted acts that tend to create a public nuisance in violation of §61-4-580(A)(5). *See* Final Order at 18 (R. p.024).

Agua Pina filed a Motion for Reconsideration on July 7, 2021 and the Department filed its response on July 13, 2021. The ALC denied the Motion for Reconsideration on July 22, 2021. (R. pp. 026-038). Agua Pina filed its Notice of Appeal on August 17, 2021.

STATEMENT OF THE FACTS

I. Agua Pina is a hookah lounge and night club with a long record of violent incidents occurring on its premises.

Agua Pina describes itself as restaurant and lounge that rents hookahs to its patrons.¹ However, Agua Pina's business operation is more akin to that of a night club rather than a restaurant, with a dance floor, flashing lights, and a DJ playing dance music. This is further supported by the testimony of Agua Pina's witnesses who repeatedly refer to the business as a club. Agua Pina is located in a strip mall at 2700 Broad River Road, Suite B, Columbia, South Carolina (Licensed Premises). It has held an Alcohol License and Permit authorizing the sale of beer, wine, and liquor for on premises consumption since September 12, 2019.² There is a fast-food restaurant across the street and an event

¹ A hookah is defined as "a smoking pipe having a long tube passing through an urn of water that cools the smoke." American Heritage College Dictionary 653 (3rd ed., Houghton Mifflin Co. 2000).

² Jack Oliver testified that he opened Agua Pina in April of 2020, rebranded the business as Hookah on the River and reopened in October of 2020. Hr'g. Tr. p. 224 line 24 - p. 225, line 3. . (R. p. 367, l. 24 -368 l. 3).

center next door, but neither of those businesses are licensed for the sale of beer, wine, or alcoholic liquor.

During its relatively short time in business, the Licensed Premises became a routine source of problems for local law enforcement, particularly the South Carolina Law Enforcement Division (SLED) and the Sheriff's Department. Both SLED and the Sheriff's Department provided testimony and documentary evidence of numerous violent incidents at Agua Pina. For example, in just the seven months preceding the Department's Motion for Emergency Suspension, the Sheriff's Department responded to approximately fourteen complaints of violent incidents at Agua Pina. *See* Tapler Affidavit (R. p. 873); (R. p. 300 ll. 2-10). Several of those incidents have involved the discharge of a firearm. As discussed more below, two of these incidents resulted in members of the public being shot. Hr'g. Tr. p. 142, lines 1-4. (R. p. 285 ll. 1-4).

Moreover, 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 on a regular basis. Hr'g. Tr. p. 64, l. 18 - p. 65, l. 16. (R. p. 207 l. 18 - 208 l. 16). While every call for service does not result in an incident report, the repeated call for Sheriff's Department create a burden on the Sheriff's Department.³ The Sheriff's Department supervisor testified that the Sheriff's Department had received 102 calls for service, and had over 50 incident reports for Agua Pina. Hr'g Tr. p. 119, ll. 4-5. (R. p. 262, ll. 4-5). As a result of these calls for service, the Sheriff's Department asked SLED to investigate, and SLED issued two administrative citations to Agua Pina for violation of the State's alcohol beverage licensing laws. Hr'g. Tr. p. 236, l. 7-12. (R. p. 379, l. 7-12); Hr'g. Tr. p.

³ Agua Pina claims that there is inconsistent testimony regarding the burden on law enforcement. However, this argument is based upon Agua Pina incorrectly equating "call for service" with "incident reports." These are two distinct things. The ALC noted Agua Pina's interchanging of the terms in its order denying the motion for reconsideration. Order On Recons., p. 6; (R. p. 31 n. 3).

10, ll. 6-7, (R. p. 153, ll. 6-7); Hr'g. Tr. p. 11, l. 6, (R. p. 154, l. 6); Hr'g. Tr. p. 235, l. 24 –p. 235, l. 3, (R. p. 378, l. 24 –p. 379, l. 3).

Multiple officers with the Sheriff's Department testified that Agua Pina had shown an “ongoing failure and inability to control the behavior of its patrons” and that it “provides an atmosphere that is perceived as tolerant [of lawless behavior], thereby perpetuating the opportunity for criminal activities, including violence, to escalate.” *See e.g.* Tapler Affidavit, ¶ 7; (R. p. 875, ¶ 7). For these reasons, the Sheriff's Department concluded that Agua Pina was an imminent danger to the public safety and welfare. *Id.* ¶8; (R. p. 875, ¶ 8).

II. Agua Pina's implementation of heightened security measures failed to prevent violence incidents from occurring on the premises.

In an effort to curb the incidents occurring at its business, Agua Pina implemented a variety of security measures. Agua Pina has eight security cameras throughout the Licensed Premises. It also contracts with a third-party, SC Security Protection, to provide a number of SLED-certified armed personnel to patrol the exterior premises and control the number of patrons entering Agua Pina. The security guards are former law enforcement or military, and there are typically between two and six of these armed guards working at Agua Pina, depending on the nature of the event Hr'g. Tr. p. 241, l. 12 – p. 243 line 21. (R. p. 384, l. 12 – p. 385, l. 21).

Despite these efforts, Agua Pina continues to struggle with providing a business environment that does not threaten public safety and welfare. As the ALC correctly found from testimony of the Sheriff's Department officers, Agua Pina's security guards are often incapable of handling the “magnitude of patrons and chaos that occurs at the location.” In fact, Agua Pina's security personnel have routinely called on SLED or the Sheriff's Department for assistance, particularly at times when the crowd inside the business has become unruly. Hr'g. Tr. p. 115, ll. 8-11; (R. p. 258, ll. 8-11); Hr'g. Tr. p. 126, ll. 20-24; (R. p. 269, ll. 20-24); Hr'g. Tr. p. 314, ll. 19-23; (R. p.457, ll. 19-23). Agua Pina's own witness testified that the multiple fights and shootings create an environment he described as

“mayhem.” Hr’g. Tr. p. 313, l. 13 (R. p. 456, l. 13). The environment become so chaotic that Agua Pina locked their patrons inside the building for their own protection. Hr’g. Tr. p. 314, ll. 16-23. (R. p. 457, ll. 16-23). Additionally, Agua Pina’s security have lost their weapons while fighting with their own patrons. Final Order p.3 (R. p. 009). Moreover, although Agua Pina claims it wands or pats downs each patron at the front entrance to check for weapons, Corporal Hawkes and Sergeant Torres both testified they have observed Agua Pina’s security do a poor job of frisking patrons— or failing to do it at all— both of which can allow patrons to bring weapons into the Licensed Premises. Hr’g. Tr. p. 117, ll. 12-13 and p. 166, ll. 8-10. (R. p. 260, ll. 12-13) (R. p. 309, ll. 8-10).

III. The first major shooting at Agua Pina occurred on May 2, 2021.

The pattern of increasing violence at Agua Pina culminated in a shooting that occurred on May 2, 2021. While the Sheriff’s Department was investigating an earlier incident that had occurred across the street, officers heard gunshots coming from Agua Pina’s parking lot. Hr’g. Tr. 73, ll. 6-12. (R. p. 216, ll. 6-12.); *see also* Incident Report (Pet’r Ex. 5), (R. p. 524-526); Hr’g. Tr. p. 75, ll. 17-21 (R. p. 218, ll. 17-21). When law enforcement arrived at Agua Pina, they discovered one of Agua Pina’s armed security guards had been shot in the head. Agua Pina’s former manager, Chris Sullivan,⁴ admitted that the crowd at Agua Pina was out of control that night and there had been “multiple fights and shootings.” Richard Higgins, the owner of SC Security Protection, witnessed his employee get shot. “I was standing inside the doorframe. My partner was three feet in front of me, technically two

⁴ Jack Oliver provided inconsistent testimony regarding Chris Sullivan’s role with Agua Pina. In a previous administrative hearing, Oliver testified that he had removed Chris Sullivan as the *manager* of Agua Pina. *See South Carolina Dep’t of Revenue v. Agua Pina, LLC d/b/a Agua Pina Lounge*, 20-ALJ-17-0315-IJ (January 13, 2021). However, Oliver testified in this hearing that Chris Sullivan is now employed his *promotions manager and consultant*. Hr’g. Tr. p. 281, line 2-p. 282, l. 10; (R. p. 424, l. 2-R. p. 282, l. 10). The ALC found that “[a]lthough he is purportedly no longer a manager, he is the business’s representative who has consistently interacted with law enforcement upon their arrival at the business.” Final Order p. 2; (R. p. 008).

feet in front of me when he was shot, and I felt the aftermath. Hr'g. Tr. p. 345, ll. 6-10. (R. p. 488, ll. 6-10). Understandably, Higgins and his company quit working for Agua Pina after this incident.

IV. The second shooting at Agua Pina occurred a week later on May 8, 2021.

Six days later, the Sheriff's Department received a report of a gunshot victim from Prisma Richland Hospital. Hr'g Tr. p. 21, ll. 14-18; (R. p. 164, ll. 14-18). Investigator Short interviewed the victim, who stated he had been shot in the abdomen when a fight broke out inside the Agua Pina's business on May 8, 2021. Hr'g. Tr. p. 23, line 21-25; (R. p. 166, ll. 21-25). The victim's statement was confirmed by Agua Pina's security camera footage, which showed a mob of customers running out of the club including the shooting victim, who was holding his stomach. Agua Pina's security guards approach the entrance to the club with his pistol drawn and remains in a defensive posture until approximately eighteen minutes after the shooting. The video also shows patrons of the club hiding behind a parked car until they are escorted away by security. All of these facts indicate that the shooting occurred inside the Licensed Premises rather than some other location, as was claimed by Agua Pina. Hr'g. Tr. p. 27, l. 15 - p. 28 l. 22; (R. p. 170, l. 15 - p. 171, l. 22).

V. Agua Pina's Statement of Facts contains a number of material errors and misstatements.

Both at trial and on appeal, Agua Pina claims its Alcohol Licenses should not be revoked because it cannot be held responsible for the criminal activity of individuals who are not patrons of Agua Pina. *See e.g.*, Appellant's Br., p. 10. *See also* Final Order, p. 7 (R. p. 013). In support of this theory, Agua Pina's Statement of Facts is replete with citations to materials not in the record (and not considered by the ALC) or mischaracterizations of trial testimony. Because Agua Pina has recited

these “facts” in connection with several important issues before the Court, the Department uses this section to correct these factual errors.⁵

First, in support of its claim that nearby establishments are the source of the crime problems relied upon by the ALC in revoking the License and Permit, Agua Pina references two internet advertisements for alleged events held at the Exquisite Event Center. *See* Appellant Br. p. 4. These documents were not entered into evidence and are not part of the record on appeal. *See S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 128 S.E.2d 179 (1962) (holding that the appellate court is confined to the appellate record in reviewing a judgment for error).

Second, Agua Pina cites to Jack Oliver’s testimony about statements made by the Sheriff’s Department in reference to concerts at the Exquisite Event Center. This testimony is hearsay; it was ruled as such by the ALC, and was stricken from the record. Hr’g. Tr. p. 232, ll. 12-20; (R. p. 375, ll. 12-20). Therefore, Agua Pina cannot now rely on that testimony in its argument to this Court. *See D.A. Davis Const. Co. v. Palmetto Properties, Inc.*, 281 S.C. 415, 315 S.E.2d 370 (1984) (holding an issue not presented to the circuit judge is not properly before the appellate court).

Third, Agua Pina claims that the May 2, 2021, shooter was “apparently in the Rush’s parking lot across the street, which is where the shell casing were found.” *See* Appellant Br. p. 7. This claim is based on a mischaracterization of Sergeant Torres’ testimony. When Sergeant Torres testified “the shooter was apparently in the Rush’s parking lot across the street, which is where the shell casing was found,” she was testifying about a different and unrelated shooting that had occurred earlier in the evening— not the May 2, 2021 shooting that occurred at Agua Pina. Hr’g. Tr. p. 71, ll. 16-22. (R. p. 214, ll. 16-22). Sergeant Torres’ entire testimony and the associated incident report make it clear that

⁵ This may be an unusual use of the Statement of Facts, but it is contemplated by Rule 208(E), SCACR, which allows a party to “include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, *which may include contested matters* and summarize the party’s contentions.” (emphasis added).

the May 2, 2021 shooting that formed the basis for the ALC's decision occurred at Agua Pina. Hr'g. Tr. p. 75, ll. 17-22; (R. p. 218, ll. 17-22); *See* Ptr. Ex. 5 (R. pp. 524-527).

Fourth, Agua Pina claims the May 8, 2021 shooting never occurred on the licensed premises based on selective and out-of-context quotes from the testimony of Deputy Short. *See* Appellant Br. p. 9. In fact, Deputy Short testified that the mere absence of a shell casing at Agua Pina is not dispositive of whether the shooting occurred there. Hr'g. Tr. p. 29 ll. 18-24. (R. p. 172, ll. 18-24). In fact, he testified that shell casings "routinely" are not found at the sight of a shooting like this, either because they are picked up or kicked by the "dozen people running out of the club" or because the gun involved was a revolver, which does not leave a shell casing. *Id.* (R. p. 172, ll. 18-24).

Fifth, Agua Pina incorrectly claims that no one from the Sheriff's Department interviewed its staff or security guards regarding the shooting. Appellant Br. p. 8. This is simply untrue. Chris Sullivan, Agua Pina's former manager, specifically testified that "[t]hey [Sheriff's Department] briefly interviewed me the night of the incident [May 2, 2021]. Asked me if I saw anything." Hr'g. Tr. p. 322, ll. 12-18. (R. p. 465, ll. 16-17).

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health and & Envtl. Control, 379S.C. 57, 63, 663, S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Env't Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken Cty. Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) provides the following standard:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights

of the [Appellant] have been prejudiced because the finding, conclusion, or decision is

- 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 the view of the reliable, probative, and substantial evidence on the whole record; or
- f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court should affirm the ALC's revocation of Agua Pina's Alcohol Licenses because the conclusion reached by the ALC is not in violation of any statutory provisions, contains no error of law, and was not arbitrary, capricious, or characterized by the abuse of discretion.

ARGUMENTS

- I. The Administrative Law Court did not commit clear error when it found Agua Pina knowingly permitted acts that tend to create a public nuisance and lacked the reputation for peace and good order in the community, when substantial evidence showed that Agua Pina had a history of violent incidents and had become a burden on law enforcement.**

Agua Pina claims that the ALC committed an error when the court found Agua Pina permitted activity that created a nuisance and that it no longer had the reputation for peace and good order. The question of whether Agua Pina permitted activity that created a nuisance and lacked the reputation for peace and good order is a mixed question of fact and law. As such, this question is subject to the substantial evidence standard. *See Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 646 S.E. 2d 162 (Ct. App. 2007) (finding that statutory interpretation is a question of law, but whether the facts of the case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard).

Substantial evidence is evidence, which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the administrative agency. *Southeastern Resource Recovery, Inc. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004).

"A reviewing court may reverse or modify an administrative decision if the findings of fact are not

supported by substantial evidence.” Rischer v. S.C. Dep’t of Health and Env’tl. Control, 393 S.C. 198, 210, 712 S.E.2d 428, 434 (2011). However, if the evidence presented conflicts on an issue “the court’s substantial evidence standard of review defers to the findings of the fact-finder.” Be Mi, Inc. v. S.C. Dep’t of Revenue, 408 S.C. 290, 297, 758 S.E.2d 737, 740 (Ct. App. 2014); *See also* Bailey v. S.C. Dep’t of Health, 388 S.C. 1, 5, 693 S.E.2d 426, 429 (“[W]e may not substitute our judgment for that of the [ALC] as to the weight of the evidence on questions of fact unless the [ALC’s] findings are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record.” (internal citations omitted)).

When determining whether the ALC’s decision to revoke Agua Pina’s permit/license was supported by substantial evidence the Appellate Court needs to only find that “upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached.” Engaging & Guarding Laurens Cty.’s Env’t (“EAGLE”) v. S.C. Dep’t. of Health and Env’tl. Control, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014).

As discussed below, the ALC’s decision that Agua Pina created a nuisance and that it no longer had the reputation for peace and good order was based upon the testimony and evidence submitted by both parties at the administrative hearing from which reasonable minds could reach the same conclusion. As such the finding of the Administrative Law court was not clearly erroneous.

A. The ALC’s finding that Agua Pina was knowingly permitting acts that tend to create a nuisance was based upon substantial evidence presented at the hearing.

Section 61-4-580 prohibits a person holding a beer wine permit from knowingly permitting “any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State.” S.C. Code Ann. § 61-4-580(A)(5).

While Title 61 does not define “public nuisance,” case law provides some helpful guidance. The first thing to consider is that the difference between a private nuisance and a public nuisance is not determined by the type of activity occurring. Home Sales, Inc. v. City of North Myrtle Beach, 299

S.C. 70, 382 S.E. 2d 463 (Ct. App. 1989). Rather, “[a] nuisance is public because of the danger to the public which might have been created.” *Id.* Additionally, a public nuisance is not based upon the number of people who effected by the nuisance, “but the possibility of annoyance to the public by invasion of its rights, the fact that it is in a public place and annoying to all who come within its sphere.” *Belton v. Wateree Power Co.*, 123 S.C. 291, 115 S.E. 587 (1922). Also, the Supreme Court has held that determination of whether an act constitutes a nuisance is based upon the facts of the case. *See Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 160, S.E.2d 363, 367 (1963) (no definite rule can be laid down for the determination of the question).

The ALC found that the evidence showed that Agua Pina’s business had knowingly permitted acts that tend to create a public nuisance in violation of section 61-4-580(A)(5). *See* Final Order, p. 13 (R. p.019). That finding is supported by substantial evidence in the record. The Department’s first witness, Richland County Sheriff’s Department Investigator Clay Short, testified about the May 8, 2021 shooting which occurred inside Agua Pina’s business. Investigator Short testified that he was dispatched to Prisma Richland Hospital to investigate a report of a gunshot wound. He found the victim lying in a hospital bed and asked him what had happened. Investigator Short testified that the victim said “about 3:00 o’clock or so that morning, he, with a group of friends, arrived at the Hookah Lounge... .” Hr’g. Tr. p. 22, ll. 24-23. (R. p. 165, l. 24–166, l. 1) “[H]e went inside the club with his friends and there was an altercation at which point he was shot in the stomach, and he ran outside and his friend who came with him to the club was who drove him to the hospital.” Hr’g. Tr. p. 23, l. 21. (R. p. 166, ll. 21-25). Investigator Short testified that he obtained a search warrant and seized the establishment’s front door security camera footage. Short testified that the video (Pet’r Ex. 7) (R. p. 532) shows “[p]eople running from inside the club out into the parking lot.” Hr’g. Tr. p. 27 ll. 22-23; (R. p. 170, ll. 22-23); “[a]nd as people continue to run out of the club, right there is the victim.” Hr’g. Tr. p. 27, l. 25 – p. 28, l. 1. (R. p. 170, l. 25-171, l. 1). Short was asked how he was sure the person he

identified on the video was the shooting victim “He first described to me what he was wearing, and then when he got discharged from the hospital, he came to the Sheriff’s Department and gave a formal statement and I showed him this video and he agreed that that was him running out of the club. He’s holding his stomach from being shot, and he was asked multiple times, and he was extremely certain, there’s no doubt that he was shot inside the club.” Hr’g. Tr. p. 28, ll. 3-12 (R. p. 171, ll. 3-12); Pet’r Ex. 7; (R. p. 532)

The ALC viewed Agua Pina’s video surveillance from May 8, 2021 and found:

Video footage from May 8, 2021, is consistent with a shooting taking place inside [Agua Pina]. The video footage shows patrons running from the entrance of Hookah on the River and the victim exiting the premises clutching his stomach. Additionally, one of [Agua Pina’s] security guards is seen facing the entrance of the entrance of the business and brandishing his weapon in response to the commotion. Approximately eighteen minutes after the shooting occurred, security is still seen holding its weapon in a defensive posture. Additionally, patrons appear to hide behind a parked car until a security officer escorts them away. It also appears that a club employee returns a bullet proof vest or safety vest to a car after the incident is over.

Order, p. 4-5. (R. pp. 010-011).

Despite Agua Pina’s questionable and uncorroborated claim that commotion occurred because a large hookah fell and broke and not because of a shooting, (Hr’g. Tr. p. 323, l. 10 - p. 324, l. 14; (R. p. 466, ll. 10-p. 467, l. 14) the ALC found “the shooting occurred within its business. However, Richland County Sheriff’s Department did not receive a call from [Agua Pina’s] premises on May 8, 2021, which suggests [Agua Pina] failed to report the incident to law enforcement.” Final Order, p. 5; (R. p. 011). Investigator Short testified that the numerous calls and reports combined with the two shooting should result in revocation of Agua Pina’s Alcohol Licenses. Hr’g. Tr. p. 38, ll. 5-6, (R. p. 181, ll. 5-6).

Richland County Sheriff’s Department Sergeant Aubree Torres testified that she would classify Agua Pina “as a nuisance and a problem for not only Sheriff’s Department, but for the community.”

Hr'g. Tr. p. 64, ll. 5-7. (R. p. 207, ll. 5-7). She went on to explain “you have problems that come with alcohol, mainly. Not only [do] we have officer safety issue, we also have shooting, people with guns, people who fight, we have car break-ins. We don't have the manpower, the resources to handle the type of crimes and issues that happen at this establishment.”

Just the— the problems that we continue to have out of this business. We— there's an officer safety standpoint, we do not have the resources to continue to handle this business. On the weekends we are constantly there, people are getting hurt, it's overcrowded, cars are getting broken into. My officers are going to get shot one day. There's already been people shot there. The community is at risk. It's just an imminent danger to the community and not only our Department. So there's no way that we can continue to handle this business.

Hr'g. Tr. p. 113, ll. 12-24. (R. p. 256, ll. 12-24).

Sergeant Torres also testified that response to the location require multiple units,

[b]ecause there's so many people that frequent this establishment and there's not many units on a squad that can handle— they have to send every single one of us there to handle what happens. Simply because at any given time, there could be 3, 400 people at the establishment as we saw when the security guard was shot in the head. But we have to pull all resources that we have, which takes away from other calls that we may have holding.

Hr'g. Tr. p. 65, ll. 1-10. (R. p. 208, ll. 1-10).

During cross examination, Sergeant Torres declared her support for the revocation of Agua Pina's Alcohol Licenses. “I support the decision because we've responded over 102 times to your business since January of this year.” Hr'g. Tr. p. 87, ll. 17-19. (R. p. 230, ll. 17-19).

Corporal John Hawkes testified “[t]he nature of the incidents that we respond to at the location are, I would say, progressing in severity. I believe since October of last year, there were 17 incidents in nine months involving firearms. Eight of those were actually where shots were fired and two of those where someone was actually shot or shot at, or somehow struck.” Hr'g. Tr. p. 124, ll. 2-9. (R. p. 267, ll. 2-9). Corporal Hawkes also testified about the need for multiple units if they are dispatched to Agua Pina,

... more than likely, it will be multiple units dispatched there only because of an officer safety issue with a venue that has that large of a crowd and it is obviously, it's a place that serves alcohol, which I stated earlier is usually a catalyst for any kind of disturbance to be inflamed due to the nature of the alcohol. It's not safe for me to send one of my units over there by himself. Sometimes two, sometimes even three units will have to go, just to make sure that, due to the size of the crowd or the nature of the incident, they had adequate backup, they were able to monitor the crowd, they were able to keep each other safe as well.

Hr'g. Tr. p. 202, ll. 4-18. (R. p. 345, ll. 4-18).

Corporal Hawkes testified that Agua Pina's staff is frequently uncooperative:

We were denied access numerous times. I believe one time I responded, the management wanted to keep us from entering the club to look for an endangered patron. That we had gotten a call that there was someone in the club who had been, I guess, struck in the head with something and he was bleeding. We arrived. Fire [Department] had been denied access. EMS had not yet arrived. They would let them go in to try to find the injured— injured person. So we went in and checked for it and I was greeted at the door by people telling us we couldn't go in there, we weren't allowed to go in there... .

Hr'g. Tr. p. 137, l. 25 – p. 138, l. 13. (R. p. 280, l. 25 – p. 281, l. 13). Corporal Hawkes expressed that the numerous incidents and escalating violence are reasons he supports the revocation of Agua Pina's Alcohol Licenses.⁶ Hr'g. Tr. p. 176, l. 6 – p. 177, l. 14. (R. p. 319, l.6 – p. 320, l. 14)

It was this substantial evidence that led the ALC to determine Agua Pina was a burden on law enforcement. “The testimony of the officers shows the nature of the calls coming from [Agua Pina] and its reputation requires a heightened law enforcement response that removes officers from other areas of the community.” Final Order, p. 16. (R. p. 022). “For example, during the incident on May 2, 2021, when [Agua Pina's] security officer was shot in the head, officers from other regions and

⁶ Agua Pina claims that the deputies' testimony regarding the ninety-five incident reports not offered into evidence is inadmissible hearsay. The testimony is proper because the deputies were testifying about their knowledge of the incidents and not about what was gleaned from the records. Moreover, the record demonstrates clearly that Agua Pina failed to object to any testimony offered by the Department's witnesses including representatives of the Sheriff. Therefore, this issue is not preserved for appeal. *See Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E. 2d 878, 880 (Ct. App.1997); *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 518, 560 S.E.2d 410, 417 (2002).

deputies from the City of Columbia were dispatched.” Id.; (R. p. 022). The ALC found that the burden on law enforcement was inextricable in determining whether Agua Pina was knowingly permitted acts that tend to create a nuisance “because, when law enforcement is burdened by a location, its presence is removed from other locations, which leaves the public in those other locations more vulnerable.” Id.; (R. p. 022). The ALC found that based upon all of this substantial evidence Agua Pina “has knowingly permitted acts that constitute a public nuisance to take place at its establishment in violation of § 61-4-580(A)(5).” Id.; (R. p. 022).

B. The ALC’s finding that Agua Pina lacked the reputation for peace and good order in the community was based upon the substantial evidence presented at the hearing.

Section 61-6-1820(2) restricts the issuance of a liquor license to those applicants have “a reputation for peace and good order in its community.” This requirement for peace and good order is ongoing as § 61-6-1830(1) permits the Department to suspend, revoke or refuse to renew a license upon finding “the applicant no longer meets the requirements of Section 61-6-1820.”

While § 61-6-1820(2) requires a business to maintain a reputation for peace and good order, a specific definition of this term is absent from the statute. The South Carolina Supreme Court defined peace as “a state of rest or tranquility” Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236, 238 (1933) (quoting Webster’s New International Dictionary); and found that when used in connection with statutes “peace” means “the tranquility which is enjoyed by the citizens of a community, where good order reigns among its members, which is the right of all persons in political society” Id. at 238. The South Carolina Supreme Court also provided examples of activity that could disturb the peace and good order: “boisterous conduct, loud talking, and laughing, frequently accompanied with profane and obscene language.” Fincher v. City of Union, 186 S.C. 232, 196 S.E. 1, 2 (1938); *see also* State v. Peer, 320 S.C. 546, 466 S.E. 2d 375 (finding that the disturbance of public tranquility by act or conduct is considered a breach of the peace). The decisions of the Administrative Law Court are also helpful in

determining activity that indicates a business lacks the reputation for peace and good order in its community. *See* Da West Bar & Grill, LLC, d/b/a Da West Bar and Grill v. South Carolina Dep't of Revenue, Docket No. 21-ALJ-17-0099-CC (May 20, 2021) (The failure to maintain adequate and effective security to control crime at the premises placing its patrons at risk and creating a drain on law enforcement was evidence the establishment lacked the reputation for peace and good order in the community); Juan Sanchez Bordallo, d/b/a La Fe Sports Bar v. S.C. Dep't of Revenue, Docket No. 12-ALJ-17-0026-CC (May 17, 2012) (finding a business lacks the reputation for peace and good order when it was unable to provide adequate security to control the conduct of customers and prevent them from becoming a nuisance to the surrounding community and a strain to law enforcement); Isaiah N. Thompson, Palladium, Inc. d/b/a The Palladium v. S.C. Dep't of Revenue, Docket No. 98-ALJ-17-0352 (December 4, 1998) (Excessive noise, other disturbances to the surrounding residents, and law enforcement problems indicate the Palladium lacks a reputation for peace and good order in the community); Da River Bar and Grill, LLC d/b/a Tropical Breeze Bar and Grill v. S.C. Dep't of Revenue, Docket No. 21-ALJ-17-0042-CC (March 23, 2021) (in permitting a public nuisance the licensee sacrificed its reputation for peace and good order); S.C. Dep't of Revenue v. Club Rio, Inc. d/b/a Club Rio , Docket No. 06-ALJ-07-0666-CC (August 11, 2006) (Finding that a location no longer had the reputation for peace and good order when crime and violent incidents at the location prevented law enforcement from maintaining public order and safety for the members of the public and the patrons).

The extensive evidence presented at trial established that Agua Pina did not have a reputation for peace and good order in the community.

Sergeant Torres's and Corporal Hawkes's testimony revealed that [Agua Pina] is a "problem" location due to the large number of calls and crowds at its business. Again, the frequency and escalating severity of the incidents--over 100 calls for service since January--shows a pattern of criminal activity that frequently occurs at the location. Moreover, despite Oliver's effort to control the behavior of his patrons with armed security, security cameras, and pat

downs, these security measures have been ineffective and, in the case of pat downs appear to have been poorly executed. Weapons have been found in the floorboards of [Agua Pina's] establishment, and [Agua Pina] also failed to report to law enforcement that a shooting occurred inside its premises on May 8, 2021.

Final Order, p. 17; (R. p. 023).

The ALC also found that “proper management also appears to be absent at [Agua Pina], creating more opportunity for incidents to escalate rather than being dealt with appropriately.” *Id.*; (R. p.023).

[W]hen law enforcement interacts with [Agua Pina's] staff, not only is management usually absent, but both Corporal Hawkes and Sergeant Torres testified [Agua Pina's] staff and patrons are hostile towards law enforcement. A hostile attitude does not reflect a willingness to work with law enforcement to promote peace and good order in the community.

Order, p.17-18; (R. pp. 023-024).

An appellate court should only reverse the ALC's order if it is unsupported by substantial evidence in the record or contains an error of law. Directv, Inc. & Subsidiaries v. South Carolina Dep't of Revenue, 421 S.C. 59, 69, 804 S.E.2d 633, 638 (Ct. App. 2017). In determining whether the ALC's decision was supported by substantial evidence, the Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the ALC. Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9-10, 698 S.E. 2d 612, 617 (2010); Muall v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 349, 786 S.E. 2d 402 (2015); *see also* Dorchester County Assessor v. Middleton Place Equestrian Chr'g. Tr., LLC, 414 S.C. 453, 778 S.E.2d, 919 (2015). Furthermore, [t]he mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.” Jones v. S.C. Dep't of Health & Envtl. Control, 384 S.C. 295, 304, 682 S.E.2d 282, 287 (Ct. App. 2009) (quoting DuRant v. S.C. Dep't Health & Envtl. Control, 36 S.C. 416, 420, 604 S.E.2d 704, 707) (Ct. App. 2004)).

Agua Pina cannot establish that the ALC's decision to revoke the Alcohol Licenses was unsupported by substantial evidence. Furthermore, the lack of evidence offered by Agua Pina prevented the ALC from ruling in their favor. As such, the ALC did not abuse its discretion in finding

Agua Pina knowingly permitted acts that tend to create a nuisance and that it lacks the reputation for peace and good order in the community.

- C. The Department met its burden of proof to demonstrate, by a preponderance of the evidence, that Agua Pina's Alcohol Licenses should be revoked.

The functions, duties, and powers that relate to alcohol and alcoholic beverages are vested in the Department and SLED. The Department is charged with the responsibility of regulating and administering laws governing the sale of beer and wine in South Carolina, while SLED is charged with the enforcement of the provisions of Title 61. S.C. Code Ann. §§ 61-2-20 and 61-2-80 (2009). “[T]he issuance or granting of a license to sell beer or alcoholic beverages rests in the sound discretion of the body or official to whom the duty of issuing it is committed[.]” Palmer v. S.C. Alcoholic Beverage Control Comm'n, 282 S.C. 246, 248, 317 S.E.2d 476, 577 (Ct. App. 1984) (citing Wall v. S.C. Alcoholic Beverage Control Comm'n, 269 S.C. 13, 235 S.E.2d 806 (1977)). Similarly, the Department may suspend or revoke permits authorizing the sale of beer and wine for violations of section 61-4-580. *See* S.C. Code Ann. § 61-4-590(A).

In its Determination, the Department sought to revoke Agua Pina's Alcohol Licenses because it determined Agua Pina had violated South Carolina's alcoholic beverage laws by knowingly permitting acts that constituted a public nuisance or an immediate threat to the public's health, safety and welfare. *See* Department Determination; (R. pp. 040-049). As such, the Department also determined the licensed location was no longer suitable for licensure. *Id.* (R. pp. 040-049).

Because the Department was seeking to revoke Agua Pina's Alcohol Licenses, the Department bore the burden of proof at the contested case hearing. *See* RANDOLPH R. LOWELL, The Contested Case Before the ALC, SOUTH CAROLINA ADMINISTRATIVE PRACTICE & PROCEDURE 192 (Randolph R. Lowell ed., 2013) (“The agency bears the burden of proof in cases in which it initiates enforcement, alleging that a party has violated a statute or regulations.”); *see also* S.C. Dep't of Revenue v. Spartanburg

Wings, LLC, d/b/a Wild Wing Cafe, No. 08-ALJ-17-0440-CC (Jan. 16, 2009); SCALC Rule 29(B) (“In matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.”).⁷

Thus, the Department bore the burden both to establish, demonstrate, and confirm certain facts and to “convince the trier of fact of its position” that Agua Pina’s Alcohol Licenses should be revoked. *LOWELL*, *supra*, at 191 (“Burden of proof describes two distinct but related concepts: the burden of production and the burden of persuasion.”). The standard of proof (i.e. burden of persuasion) in a contested case (unless otherwise provided by statute) is by a preponderance of the evidence. S.C. Code Ann. § 1-23-600; *Anonymous v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1988).⁸

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. The Department may call any witness it chooses to meet the required burden of proof. “The rules of evidence are directed to the proof of the issue by competent testimony. They do not require that all witnesses who may be present when the offence was committed, or who may be supposed to possess

⁷ This is an exception to the general rule, in which the party opposing the agency’s decision generally bears the burden of proof. *LOWELL*, *supra*, at 191; *see also* *DIRECTV, Inc. & Subsidiaries v. S.C. Dep’t of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017) (“In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof.”); *Leventis v. S.C. Dep’t of Health & Envtl. Control*, 340 S.C. 118, 132–33, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing 73A C.J.S. Public Administrative Law and Procedure § 128 at 35 (1983)).

⁸ “When we say that a party must prove a proposition by the greater weight or preponderance of the evidence, we mean that the evidence on that proposition must be more convincing on that party’s side than on the other side.” RALPH K. ANDERSON, JR., S.C. REQUESTS TO CHARGE – CIVIL § 1-3 General Instructions - Burden of Proof.

information respecting it, should be produced.” State v. Clark, 35 S.C.L. 311, 315, 4 Strob. 311 (Ct. App. 1850); State v. Watts 249 S.C. 80, 152 S.E. 2d 684 (“A litigant, which includes the State of South Carolina... is not required to produce as a witness every person who may give evidence in its favor; and his failure to do so does not necessarily imply a design on his part to suppress the truth.”). There was no dispute that the Department was seeking the revocation of Agua Pina’s permit and license; furthermore, any testimony from the ABL division or SLED would have been cumulative.

Agua Pina also claims that evidence regarding the burden on law enforcement was contradictory. However, this claim is based upon Agua Pina’s failure to understand the difference between a call for service and an incident report and its erroneous assumption that every 911 call results in the generation of an incident report. Agua Pina’s failure to understand the difference between call for service and incident reports is evident by its incorrect claim that Sergeant Torres testified that she brought 50 incident reports, where she earlier testified she did not. *See* Appellant’s Br., p.13. Sergeant Torres testified that she had brought the 50 incident reports to the hearing and offered them to Agua Pina’s counsel. Order On Recons., p.7; (R. p. 032). However, when questioned about the records for the 102 calls for service she testified she did not have those records. Hr’g Tr. p. 98, ll. 3-6; (R. p. 241, ll. 3-6). These are two completely separate documents.

The affidavit of Captain Tapler indicated that he was aware that Sheriff Deputies had responded *over* 14 times since October 23, 2020. *See* Tapler Aff. (R. p.059). Corporal Hawkes testified that he was unsure of the number of responses to Agua Pina. “I would almost venture to say upwards of 26 or 28. I would have to count them back up.” Hr’g Tr. p. 155, ll. 2-3; (R. p. 298, ll. 2-3). Corporal Hawkes testified that he believed that Sheriff’s Department had received “roughly 130” calls in regards to Agua Pina. Hr’g Tr. p. 146, ll. 12-13; (R. p. 289, ll. 12-13).

The ALC, as the fact-finder, is free to make factual findings based upon the creditability and weight of the evidence. MRI at Belfair, LLC v. S.C. Dep't of Health & Env't Control, 392 S.C. 314, 324, 709 S.E.2d 626, 631 (2011). *See* S.C. Dep't of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 279 731 S.E.2d 330, 337 (Ct. App. 2012) (“in reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding.”). As the sole fact finder, the ALC found that there had been over 100 calls for service to the licensed premises.

As discussed above, the record is replete with evidence that demonstrates Agua Pina had become a nuisance and no longer had the reputation for peace and good order (four witnesses from the Sheriff's Department provided firsthand testimony regarding their investigations and interactions with Agua Pina; police incident reports; affidavits; security footage; etc.). *See* LOWELL, *supra*, at 191 (noting it is a party's “duty to demonstrate the truth of the assertion by the appropriate standard of evidence”); Pike v. S.C. Dep't of Transp., 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (citing 2 MCCORMICK ON EVIDENCE § 336 (5th ed.1999)). The Department presented all of this evidence in support of its conclusion—as expressed in its Determination—that Agua Pina's license should be revoked. Despite Agua Pina's contention that the Department did not meet the required burden of proof required in administrative hearings the ALC found that “based upon the Court's review of this testimony and the testimony from the two witnesses presented by [Agua Pina], the Court determined the Department showed by a preponderance of the evidence that [Agua Pina's] Alcohol Licenses should be revoked.” Order On Recons., 3; (R. p. 028). In the view of reliable, probative, and substantial evidence, the Department met its burden of proof in this case. The ALC's decision was not erroneous and should not be overturned.

II. The ALC did not abuse its discretion by determining that revocation was the appropriate penalty for a business that was knowingly permitting acts that constituted a public nuisance and lacked the reputation for peace and good order in the community.

Agua Pina argues that the ALC abused its discretion when it determined that revocation was the appropriate penalty for violation of § 61-4-580(A)(5) and § 61-6-1820. To the contrary, the penalty imposed by the ALC is authorized by statute and supported by the Department's longstanding practice and published guidance. The Department "is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, [and] is authorized to establish conditions or restrictions which the department considers necessary before issuing or renewing a license or permit, and occupies the entire field of beer, wine, and liquor..." S.C. Code Ann. § 61-2-80. This authority permits "the department [to] revoke the permit of a person failing to comply with any requirements hereof." S.C. Code Ann. § 61-4-70. Likewise, the department may suspend, revoke or refuse to renew an alcoholic liquor license upon finding "the applicant has violated since the issuance of the license any provision of the ABC act..." S.C. Code Ann. § 61-6-1830(3). The Department also "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." S.C. Dep't of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 278-79, 731 S.E.2d 330, 336 (Ct. App. 2012). "As an administrative agency, [the ALC] is the fact-finder and it is [the ALC's] prerogative... to impose an appropriate penalty based on the facts presented." Id. at 279-80, 731 S.E.2d at 337 (quoting Walker v. S.C. Alcoholic Beverage Control Comm'n, 305 S.C. 209, 210, 407 S.E. 2d 633, 634 (1991)).

Although the ALC's factual findings regarding Agua Pina are reviewed under the clear error standard, the ALC's decision to revoke Agua Pina's license and permit is reviewed for an abuse of discretion. S.C. Dep't of Revenue v. Meenaxi, Inc., 417 S.C. 639, 663, 790 S.E.2d 792, 804 (Ct. App. 2016) (reviewing ALC's decision to revoke beer and wine permit under the abuse of discretion

standard); *see also* Sandalwood, 399 S.C. at 277; Midlands Utility, Inc. v. South Carolina Dep’t of Health & Envtl. Control, 313 S.C. 210, 437 S.E.2d 120 (Ct. App. 1993) (penalties reviewed for an abuse of discretion.). The term abuse of discretion “[h]as no opprobrious implication and means nothing more or less than that the ruling of the trial court was without reasonable factual support, result[ing] in prejudice to the rights of the appellant, and therefore, in the circumstances, amounted to error of law.” Bridges v. Wyandotte Worsted Co. 239 S.C. 37, 39, 121 S.E.2d 300, 302, (1961). The record on appeal contains numerous facts that support the finding that Agua Pina violated § 61-4-580(A)(5).

Since January 2021, Richland County Sheriff’s Department has responded to over 100 calls at [Agua Pina’s] location for increasingly violent incidents to include assaults, weapon law violations, and shootings. Two of these incidents resulted in persons being shot: on May 2, 2021, law enforcement discovered a security guard from [Agua Pina] had been shot in the head, and on May 8, 2021, a patron was shot in the stomach inside [Agua Pina]. The incidents taking place at [Agua Pina] are violent, frequent, and incontrovertibly dangerous to the public because, although [Agua Pina] is privately owned, it is located in a shopping center, which is a place where the public is likely to gather and does gather.

* * *

[Agua Pina] is clearly aware, or ‘knows’ of the criminal activity occurring at its premises because it has discussed the issue with law enforcement and even admitted the crowd was chaotic during certain incidents.

* * *

Based on all the above, I find [Agua Pina] has knowingly permitted acts that constitute a public nuisance to take place at its establishment in violation of § 61-4-580(A)(5).

Final Order p. 13-16; (R. pp. 019-022).

Likewise, the record on appeal supports the finding that Agua Pina violated § 61-6-1820(2).

The evidence established that [Agua Pina] does not have a reputation for peace and good order in the community. Sergeant Torres’s and Corporal Hawkes’s testimony revealed [Agua Pina] business is a ‘problem’ location due to the large number of calls and crowds at its business. Again, the frequency and escalating severity of the incidents—over 100 calls for service since January— shows a pattern of criminal activity that frequently occur at the location.

* * *

[D]espite Oliver’s efforts to control the behavior of his patrons with armed security, security cameras, and pat downs, these security measures have been

ineffective and, in the case of pat downs, appear to have been poorly executed. Weapons have been found in the floorboards of ... establishment, [Agua Pina] also failed to report to law enforcement that a shooting occurred inside it premises on May 8, 2021.

Proper management also appears to be absent ... creating more opportunity for incidents to escalate rather than being dealt with appropriately. Often, the manager was not present during the incidents reported by law enforcement. This kind of management is particularly concerning considering the frequency and type of criminal incidents that have taken place at the location. And, when law enforcement interacts with [Agua Pina] staff, not only is management usually absent, but ... [Agua Pina's] staff and patrons are hostile to law enforcement.

* * *

Based upon the above reasons, and because I find [Agua Pina] is knowingly permitting a public nuisance (and a nuisance, by its very definition, is not compatible with peace and good order), I conclude [Agua Pina] does not have "a reputation for peace and good order in the community" in violation of § 61-6-1820(2).

Final Order p. 17-18; (R. pp. 023-024).

Additionally, the Court of Appeals has previously held that revocation of a permit or license is *not* an abuse of discretion if revocation is "within the range of penalties authorized by section 61-4-580 and was the penalty prescribed by the Department in Revenue Procedure 13-2." Meenaxi at 804–805, 790 S.E.2d at 663–664 ("[It] is the ALC's prerogative to impose the appropriate penalty based upon the facts presented."). The Mennaxi Court also held that the ALC declining to reduce a revocation to a suspension or fine was not abuse of discretion, so long as there was evidence to justify the decision. *Id.*

In this case, it was completely within the ALC's prerogative to impose revocation based upon the substantial evidence presented at trial, as revocation falls within the range of penalties set out by statute and department procedure. *See* § 61-4-580(B); 61-6-1830; South Carolina Revenue Procedure # 13-2. Furthermore, the ALC justified its decision to impose revocation specifically because of "[t]he numerous calls for law enforcement combined with escalating violence as reflected, in part, by two

shootings...” Order On Recons., p.13; (R. p. 038). Therefore, the ALC’s decision to revoke Agua Pina’s permit and license is not an abuse of discretion.

III. The ALC did not err when it declined to make an adverse inference against the Department simply because it chose not to enter cumulative evidence at trial.

Agua Pina argues the Department “failed to introduce into evidence” at trial, specifically incident reports (authored by the Sheriff’s Department) concerning criminal activity in and around Agua Pina. *See* Appellant’s Br. at 27. Because those incident reports were not admitted into evidence,⁹ Agua Pina contends the ALC should have made an adverse inference that those reports were harmful to the Department’s case, and that the ALC’s failure to do so was error. *Id.*

This argument fails from the start because there were no missing incident reports. Agua Pina’s brief incorrectly claims that 95 incident reports were not entered as evidence. The ALC noted that “[Agua Pina] incorrectly interchanges the phrase ‘calls for service’ for ‘incident reports’.” Order On Recons., 6 n. 3; (R. p. 031 f. 3) The witness from the Sheriff’s Department testified that “I know that 102 times we’ve responded to your business for calls for service.” Hr’g. Tr. p. 88, l. 6; (R. p. 231, l. 6). The Sheriff Department records of the calls for service were not entered into evidence, despite being available to Agua Pina.

The Court should reject Agua Pina’s argument for at least two reasons. First, Agua Pina has failed to demonstrate the elements necessary to create an adverse inference under South Carolina law.¹⁰ Second, even if the ALC erred in failing to draw an adverse inference, such error was harmless

⁹ Witnesses from the Sheriff’s Department testified to the content of those reports without objection. Order On Recons., p.8 n. 4 (R. p. 033, f. 4).

¹⁰ Agua Pina’s “argument” on this issue consists primarily of wondering aloud about what might have been contained in the unintroduced incident reports. The brief makes no effort to demonstrate that the elements of *Davis* are met; instead, Agua Pina simply proclaims: “The documents were not introduced. Why? Because they must be bad!” This sort of speculative rumination is nothing more than a regurgitation of the same unfounded doubt-casting contained in Agua Pina’s Motion for Reconsideration, which the ALC correctly characterized as incredible “suppositions and unsupported hypotheticals.” *See* Order on Recons., 8 (R. p. 033).

and does warrant reversal because Agua Pina could have introduced those records itself— and chose not to— and the record contains substantial evidence supporting the ALC’s decision.

A. Agua Pina failed to establish the elements necessary for the ALC to make an adverse inference based on unadmitted evidence.

“Generally, in the absence of explanation, the failure to produce evidence may create an adverse inference.” *See* TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 14:10 (5th ed.) (citing Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959)). As Agua Pina correctly notes in its brief, the seminal South Carolina case dealing with the adverse inference doctrine is Davis. *See* Appellant Br. at 27. In Davis, the Supreme Court identified the elements necessary to establish an adverse inference: (1) the absence of an explanation, (2) the failure or refusal of a party to produce evidence, (3) the evidence is within the party’s knowledge and power to produce, (4) the evidence is not equally accessible to his opponent, (5) the evidence is such as he would naturally produce if it were favorable to him, and (6) under all the circumstances of the case, failure to produce the evidence creates a suspicion of a willful attempt to withhold competent testimony. Id. at 326, 111 S.E.2d at 545. None of these elements are met in this case.

First, the explanation for why the calls for service were not entered into evidence is quite simple. The Department believed the events that resulted in the generation of incident reports was sufficient to establish that Agua Pina was knowingly creating a nuisance and no longer had the reputation for peace and good order. The Department had no intention of discussing the 102 calls for service as it felt this testimony would have been cumulative. The testimony regarding the 102 calls for service was elicited during Agua Pina’s cross-exam of a witness.

Second, the Department did not fail or refuse to produce the evidence. The Department simply made a strategic decision not to introduce cumulative evidence where law enforcement had already testified about the incidents. *See* Davis, 235 S.C. at 334, 111 S.E.2d at 549 (noting a litigant need not produce as a witness every person who may give evidence in his favor.).

Third, the records concerning the calls for service were authored by the Sheriff's Department, not the Department, and were not within the Department's exclusive knowledge and power to produce. The South Carolina Supreme Court requires the missing witness to be an agent or employee, or be subject to the control of the party.

[T]he rule is applied when the uncalled witness is an agent, employee, relation or associate of the party failing to call him or within some degree of control of said party. 'It is a general rule that a party is not to be prejudiced by his failure to call a witness who is equally available to the other party.'

Id. at 333 (internal citations omitted).

Here, the call for service in dispute were authored by and remained in the sole custody of the Sheriff's Department, not the Department. Therefore, it would be an error of law to impose a negative inference against the Department.

Fourth, as the ALC found, the documents that were not presented were equally accessible to Agua Pina.

The incident records were available to be subpoenaed, and it appears that they were subpoenaed by [Agua Pina]. At the hearing, [Agua Pina] indicated that they did not receive the reports for the [Agua Pina's] business testified to by Sergeant Torres, but when Sergeant Torres offered them to the [Agua Pina] during the hearing, [Agua Pina's] counsel stated they 'certainly would' want them but then continued to question Sergeant Torres and never followed up on the reports. Interestingly, [Agua Pina] admits... that these other reports were present and available in the courtroom, but [Agua Pina] did not elicit testimony about these reports although they were available.

Order Denying Mot for Recons., p.7 (R. p. 032).

Agua Pina's counsel did not serve discovery requests on the Department and did not subpoena the incident reports from the Sheriff's Department; rather, Agua Pina's subpoena to the Sheriff's Department only requested records regarding crimes that occurred at *other* alcohol establishments.

Fifth, the Department was confident that the evidence presented by the Department was sufficient to establish that Agua Pina was knowingly permitting acts that tend to create a public

nuisance and that it lacked the reputation for peace and good order. Introducing that evidence would have been cumulative in light of the witness testimony.

Sixth, Agua Pina can point to no evidence in the record that there was a willful attempt to withhold competent testimony, which is required before the court can impose a negative inference.

Inference from the unexplained failure of a party to call an available witness that the testimony of such witness would have been unfavorable may be drawn only where, under all the circumstances of the case, the failure to produce such witness creates a suspicion of a willful attempt to withhold competent testimony.

Id. at 334, 111 S.E.2d at 549.

The ALC also found “no credible evidence to make this Court suspicious of the Department’s failure to introduce the evidence of the other ninety-five calls for service.” Order On Recons., p. 7; (R. p. 032).¹¹

None of the authority cited by Agua Pina supports its argument that the ALC’s failure to impose an adverse inference was an error of law.

The substantial evidence found in the record on appeal indicates the incident reports were not under the exclusive control of the Department, the incident reports were available to Agua Pina, and there was no evidence that the Department was attempting to suppress the truth. Therefore, the ALC’s decision to not impose a negative inference against the Department was not an error of law.

- B. Even if the ALC should have made an adverse inference concerning the incident reports, its failure to do so was harmless error.

¹¹ Agua Pina also cites three other cases as support for this argument. Willcox, Ives & Co. v. Jeffcoat, 135 S.C. 149, 133 S.E. 463 (1926); Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co., 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993); and, Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990). However, the holding in Gathers and Kershaw County are inapposite to this case because they hold that a negative inference is only proper when there is proof the evidence requested was lost or destroyed; a fact not present here. Furthermore, Willcox was explicitly overruled in 1973 by Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 200 S.E.2d 681, which held the fact the unfavorable inference may be drawn does not require that the jury to draw it.

Rule 61 of South Carolina Rule of Civil Procedure describes harmless error and requires the court “at every stage of the proceeding” “to disregard any error of defect which does not affect the substantial rights of the parties.” *See also Wells v. Halyard*, 341 S.C. 234, 533 S.E. 2d 341 (Ct. App. 2000) (An alleged error is harmless if the alleged error did not contribute to the verdict).

Even if the ALC erred by not insisting on an adverse inference against the Department, that error was harmless. The imposition of an adverse inference for failing to introduce every incident report could never refute the first-hand accounts and video evidence demonstrating violent and criminal activity was routinely occurring at Agua Pina. Therefore, the error, if one in fact occurred, was harmless and did not contribute to the finding that Agua Pina’s permit and license should be revoked.

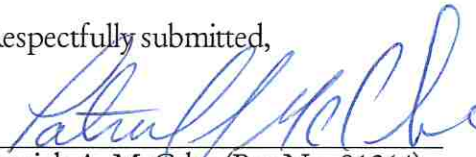
CONCLUSION

The ALC recognized that the sale of beer, wine, and alcoholic liquor at Agua Pina was contributing to an environment that put the public’s health, safety, and welfare at risk. In revoking the Alcohol Licenses the ALC held Agua Pina’s *privilege* to alcoholic should not eclipse the public’s necessity for peace and good order. “The law of this State authorizes the sale of beer and wine by persons duly licensed. But the law does not and the Legislature never authorized such persons to make sales in a way and under such circumstances as will create a public nuisance.” *State v. Turner*, 198 S.C. 499, 18 S.E. 2d 376, 379 (1942). *See also Wall v. S.C. Alcoholic Beverage Commission*, 269 S.C. 15, 235 S.E. 2d 807 (1977) (holding that liquor licenses are neither contracts nor rights of property). All relevant authority is clear. The ALC did not commit a clear error because its decision to revoke Agua Pina’s permit and license is based upon the wealth of evidence found in the record. The ALC did not commit a clear error because the penalty imposed on Agua Pina is within the range of penalties permitted by statute and the evidence in the record supports its decision. The record on appeal is inundated with evidence that led the ALC to correctly determine (1) that Agua Pina knowingly

permitted actions in the Licensed Premises that created public nuisance and (2) that Agua Pina lacked the reputation for peace and good order. The ALC properly revoked Agua Pina's beer and wine permit and its liquor license.

Therefore, the Department respectfully requests this Court continue to protect the public's health, safety, and welfare and affirm the ALC's revocation of Agua Pina's On-Premise Beer and Wine Permit and Business Liquor by the Drink License.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Patrick A. McCabe", written over a horizontal line.

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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

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

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 the South Carolina Department of Revenue’s Final Brief of the Respondent complies with Rule 211(b), SCACR.



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