



STATE OF DELAWARE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

CARVEL STATE BUILDING, 3RD FLOOR
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

TELEPHONE: (302) 5775-ABC (222)
FAX: (302) 577-3204

Bethany Bay Brewing Co., LLC : **AMENDED**
t/a Bethany Bay Brewing : **DECISION AND ORDER**
38450 Hickman Road : Protested Application on
Ocean View, DE 19970 : Hearing held March 28, 2022

SUMMARY OF EVIDENCE

1. The above entity ("Applicant") filed an application for a microbrewery license, , a patio permit and variances to the patio permit for live entertainment and outdoor speakers.
2. A valid protest was filed against the application, requiring a public hearing on the application. 4 Del. C. § 541.
3. Twenty-two protests were received within thirty days from the filing of the application. Subsequently seventeen of the protests were withdrawn, with five protesters remaining.
4. The Commissioner held a public hearing on the protested application on March 28, 2022 at 5 p.m. via Webex, in accordance with Delaware law.
5. Exhibits 1 through 55 were noted for the Record.
6. Stephen Spence, Esq. represented Applicant and appeared on its behalf.¹

¹ A "party" is defined by the Administrative Procedures Act as "each person or agency named or admitted in any agency proceeding as a party, or properly seeking and entitled as of right to be admitted as a party to an agency proceeding." 29 Del. C. § 10102(g). A person acting as a "party" at a hearing would be evidenced by the person's actual participation as a member of a group, testifying, cross-examining witnesses, and arguing a position. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

7. Of those persons who signed or submitted a valid protest against the application, none pre-registered to testify at the hearing or appeared at the hearing.

8. On March 18, 2022, Mr. Matthew Page submitted documents for consideration by this Office as part of the protest hearing, and he pre-registered to testify during the protest hearing. As part of his pre-registration to testify, Mr. Page indicated his address was located in Wilmington, Delaware.

9. In the documents he submitted, Mr. Page indicated he is President of a homeowners' association and resident of a neighborhood "only five miles" from the proposed premises. Mr. Page's documents also alleged that there was a trademark issue concerning Applicant's business name. No one testified at the hearing regarding this evidence and the documents were not made a part of the Record.

10. After acknowledging Mr. Page's submission and his registration to testify, this Office stated it would not consider or admit Mr. Page's documents or testimony because Mr. Page did not satisfy the distance requirement of a protester pursuant to Section 541 of Title 4, and the substance of the submission was outside the scope of this Office's authority. This Office confirmed no one wished to testify and concluded there were no protesters of Record who would testify at the hearing.

11. The Office invited counsel for the Applicant to present its case for approval of a liquor license for a microbrewery.

12. Counsel for Applicant stated the Applicant contacted the protesters to address their concerns about noise and sound from the proposed patio. To alleviate those concerns, counsel for the Applicant stated the Applicant withdrew its request for variances for live entertainment and

outdoor speakers. Counsel also stated the Applicant would discontinue service to customers by 10 p.m. every day, but may wish to continue brewing operations after 10 p.m.

13. Counsel for Applicant stated the Applicant may wish to have corn hole games in the future on the licensed patio. This Office explained, however, that corn hole falls within the scope of “live entertainment” and the Applicant would need to request a variance from this Office for corn hole to be permitted, in accordance with 4 Del. Admin. Code § 704.

14. After Counsel presented the Applicant’s case, this Office confirmed once again for the Record that no one in attendance wished to testify.

FINDINGS OF FACT

This Office makes the following findings of fact based upon the evidence presented, pursuant to 29 *Del. C.* § 10128(b)(2):

1. There is no evidence in the Record that Matthew Page lives within one mile of the premises where the license is to operate. To the contrary, the Record indicates Mr. Page does not live within one mile of the premises where the license is to operate.

CONCLUSIONS OF LAW

This Office makes the following legal conclusions pursuant to 29 *Del. C.* § 10128(b)(3):

1. The Commissioner may grant, refuse or cancel licenses as required by the Delaware Liquor Control Act (“Act”). 4 *Del. C.* § 304(a)(4).²

2. A protest is a jurisdictional requirement to cause a hearing to be held for evidence to be presented on the record and is not in itself material evidence of opposition.³ In this case, twenty-two protest letters were submitted to this Office, with five remaining protesters as of the

² *Park Distributing Co. v. Delaware Liquor Comm.*, 54 A.2d 551, 557 (Del. 1947)

³ *Alfred I. Dupont Sch. Dist., v. Delaware Alcoholic Beverage Control Comm.*, 343 A.2d 600, 603 (Del. Super. 1975).

date of the hearing. A public hearing was held for this Office to consider the application and the objections of the protesters, if any.

3. The requirements for a microbrewery license are set forth generally in 4 Del. C. §§ 512 and 512C, and the requirements for a patio permit and requested variances are set forth in 4 Del. Admin. Code § 704. Title 4 states an application for a liquor license must be refused if a “substantial objection to the granting of the license has been presented by the community within which the license is to operate, or that the granting of such license is otherwise not in the public interest.” See 4 Del. C. §543(b)(11)(b).

4. In the present matter, it is undisputed that Mr. Page’s submission stated the association he represented is “only five miles” from the proposed licensee.

5. In addition, Mr. Page’s documents allege that his “objection” concerned a trademark issue. This Office’s powers are set forth in Section 304 of Title 4 of the Delaware Code and do not encompass the authority to consider or determine objections based upon trademark issues.

6. Finally, no one other than the Applicant testified at the hearing. As such, no evidence against the application was submitted into the Record during the hearing.⁴

7. Based upon the evidence presented, this Office concludes the application meets the requirements of microbrewery license with a patio permit. The Applicant withdrew its request for variances to the patio permit for live entertainment and outdoor speakers. Therefore, live entertainment and outdoor speakers are prohibited unless Applicant applies for a variance in the future and the request for variance is approved by this Office, after the request is properly noticed.

⁴ *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993)(person acting as “party” at a hearing would be evidenced by the person’s actual participation as a member of a group, testifying, cross-examining witnesses, and arguing a position).

Counsel for the Applicant stated the Applicant would close customer operations by 10 p.m. daily, but may continue brewing operations after 10 p.m. Therefore, this Office approves the license and patio permit with the condition that the business close customer service operations by 10 p.m. daily.

DECISION AND ORDER

IT IS THIS 12th day of April, 2022, the Decision and Order of this Office that the application for a microbrewery license and a patio permit are approved, with the condition that Applicant will close customer service operations by 10 p.m. even if brewing operations continue after 10 p.m. No variances are permitted. The issuance of the license and patio permit are subject to a final inspection by a representative of this Office.

IT IS SO ORDERED.



The Honorable Jacqueline Paradee Mette, Esq.
Commissioner

Right of Appeal

4 Del. C. § 304(b):

(b) The Commissioner's decision shall be final and conclusive unless, within 30 days after notice thereof has been mailed by the Commissioner's office, a party to such hearing files an appeal in the office of the Commissioner. Upon receipt of the appeal, the Commissioner shall cause the Chairperson of the Appeals Commission to be advised of the pending appeal and the Chairperson shall cause the Commission to be convened with at least 20 days' notice to all parties. The appeal shall be heard by the Appeals Commission, who shall, in accordance with the Administrative Procedures Act, Title 29 of the Delaware Code, review the matter on the record and affirm, reverse or modify the decision of the Commissioner.